STATE CAPTURE IN AFRICA

—

OLD THREATS, NEW PACKAGING?

EDITED BY
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Foreword by

Justice Albie Sachs
Former judge of the South African Constitutional Court

EISA is a non-partisan organisation which seeks to promote democratic principles, free and fair elections, a strong civil society and good governance at all levels of African society.

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ABBREVIATIONS AND ACRONYMS

ANC	African National Congress
AU	African Union
CAR	Central African Republic
ICC	International Criminal Court
ICP	Italian Communist Party
ICT	information and communication technology
IEBC	Independent Elections and Boundaries Commission
IEC	Independent Electoral Commission
IFFs	illicit financial flows
KBC	Kenya Broadcasting Corporation
KTN	Kenya Television Network
MAPAR	Miaraka Amin'i Presida Andry Rajoelina
MDC-T	Movement for Democratic Change-Tsvangirai
NCIC	National Cohesion and Integration Commission
NDP	National Development Plan
NGO	non-governmental organisation
NMG	Nation Media Group
PEMMO	Principles for Election Management, Monitoring and Observation
PSCU	Presidential Strategic Communications Unit
RFI	Radio France International
RMG	Royal Media Group
SABC	South African Broadcasting Corporation
SADC	Southern African Development Community
SARS	South African Revenue Service
SDA	Special Defence Account
TIM	Tiako i Madagasikara
WMC	white monopoly capital
ZANU-PF	Zimbabwe African National Union-Patriotic Front
ZEC	Zimbabwe Election Commission
ZLHR	Zimbabwe Lawyers for Human Rights

FOREWORD

Justice Albie Sachs, former judge of the South African Constitutional Court

In 1988, while I was in exile in Mozambique, an attempt was made on my life. I was blown up by South African security agents and lost my arm and sight in one eye, but I survived. I felt liberated and overjoyed by my survival and was totally convinced that, as I recovered, so South Africa, too, would get better. The vengeance I sought for this attack, and those against countless others, was what I called 'soft vengeance'. This eventually came in the form of democracy, an equal vote and self-determination for all South Africans.

The vote was of vital importance as it gave more than just power to the people, it gave dignity and recognition to each and every person. It became a symbol of a new, shared South African nationhood, of equal citizenship in a united country. It declared, quite literally, that each person counted as much as any other. Universal adult suffrage on a common voters' roll was enshrined as a foundational principle of our new Constitution. The right to vote and to stand for political office was expressly included in the Bill of Rights.

These factors are inherently linked to the mandate of EISA as a leading institution and an influential player in election monitoring and democracy. EISA has played a pivotal role in observing the emergence of democracy through the vote, first in South Africa and, over the decades, across the continent. EISA has also expanded its mandate beyond observing elections to supporting the entrenchment of democratic institutions. Entrenching democracy was at the heart of EISA's 2017 symposium as it considered whether state capture is an obstacle to democratic consolidation in Africa.

Looking back on our South African experience we recall that exile was often very harsh. But one positive side effect was that we were able to live in or travel to countries on all continents. We saw at first hand both societies that were transforming themselves in very positive ways and societies in which formerly brave freedom fighters had gone on to amass power and riches for themselves, their families and their friends.

For that reason we built into the Constitution special protections for upholding the rights of citizens and for maintaining the integrity of public institutions such as the Electoral Commission, the Judicial Service Commission and the Public Protector, to protect our democracy from state capture.

But having a beautiful Constitution alone will not make us a 'beautiful people'. We have to use the numerous institutions created by the Constitution

to challenge abuses of power and corruption. The South African Constitution not only aimed for perfection, it required us to guard against corruption. We needed to guard against ourselves. We had to acknowledge that people are capable of doing wrong in the name of doing right. Therefore, in constructing the Constitution great attention was paid to creating protections against slippage, personal ambition and the abuse of authority. The whole structure of the Constitution emphasised the importance of public life being governed by an organic body of humane norms and values. We also established a strong Constitutional Court, with robust review powers, to ensure that this value system would permeate all exercises of public power.

In recent years South Africa has learnt about serious attempts to hollow out our democracy by capturing important state institutions. Fortunately we have been able to witness the value of having strong and independent constitutionally-created institutions. In particular, the complementary relationship among the Office of the Public Protector, the Judicial Service Commission and the Independent Electoral Commission, vindicated by the Constitutional Court, has played a major role in the push back against 'state capture'.

Attacks on the institutions of democracy are by no means unique to South Africa. As pointed out above, other African states have also experienced such abuses of power. The diversion of power away from citizens to private interests in a situation of state capture is especially worrying for African states that fought so hard for liberation and self-determination for the people.

This book is an important contribution to deepening our understanding of and provoking discourse about the idea of state capture. The contributing authors give examples of abuses of power, manipulation of the rules and regulations of state institutions and attacks on civic spaces.

There is a need to protect our hard won democratic mechanisms but this requires a deep appreciation of the evolving threats they face. These mechanisms give the public confidence in the Constitution and the integrity of our democracy. Thank you, EISA, for bringing us together to share views on how to spot the dangers and develop the necessary remedies.

INTRODUCTION

Melanie Meirotti

The final decade of the twentieth century marked the beginning of a period of political transition for a large number of states in Central and Eastern Europe that had previously formed part of the now collapsed Soviet bloc. In the decade that followed, these states began the transition from communism to democracy and a liberal market economy.

In the course of this transition states adopted a variety of strategies and timelines that resulted in different political and economic trajectories. During this period the emergence of rampant corruption prompted a World Bank study by researchers Joel Hellman, Geraint Jones and Daniel Kaufman, who identified particular trends of corruption that came to be known as 'state capture'.

Now, two decades on, a 'state capture' (as opposed to corruption) narrative has emerged and gained momentum in South Africa. Following the release in 2016 of a report by the Public Protector, entitled *State of Capture*, an escalating number of political scandals and the leak of thousands of incriminating emails between members of the immigrant Gupta family and prominent political representatives, there has been an increasing interest in analysing the consequences of 'state capture' for the South African state.

A report published in 2017 by a group of academics and members of civil society suggested that South Africa had experienced a silent coup that had removed the ruling party from its place as the primary force for transformation in society (State Capacity Research Project 2017). The state capture that has played out in South Africa, in conjunction with the transitional status of many African countries, raises the question of whether these countries, too, are experiencing some form of state capture and what lessons can be learned to safeguard transitional democracies in the region?

TRANSITIONAL DEMOCRACIES IN AFRICA

The goal of African liberation movements in the latter part of the twentieth century was 'political independence in a sovereign state under government representing the majority of the previously colonized people' (Melber 2002).

The goal of political parties, some of which emerged from these post-liberation movements, has been to transform the inherited colonial state.

As in the post-Soviet states, this involved a transition from one political and economic system to another. After liberation many African states experimented with socialism before changing in the 1990s to multiparty democracy and liberal market economies. While political and economic transition was common in many African countries, this volume explores whether it facilitated experiences of state capture and the impact on African states in which it has taken place.

A significant number of countries in the African region will be holding their sixth or seventh multiparty election in the coming years (2017-2020). Among them are Botswana, Mozambique, Namibia, South Africa, Rwanda, Algeria and Zimbabwe, all of which are governed by parties that emerged from liberation movements and have been in power since independence.

Tanzania has continuously re-elected the incumbent liberation party, Chama Cha Mapinduzi, in every election since the introduction of multiparty elections in 1995. In Uganda there have been three attempts at a multiparty experiment – the first in the early 1960s, the second in the early 1980s and the current attempt, which began in 2005. In 2016 Yoweri Museveni's National Resistance Movement won the third multiparty election and Museveni maintained his 30-year hold on power. In many of these countries, however, opposition parties have been gaining support, though, for various reasons, their efforts have been insufficient to unseat the incumbent parties (Lekalake 2017).

The economic growth and democratic progress experienced since the 1990s (much of which occurred under these dominant post-liberation parties) has started to flag in recent years and, with it, trust in elected leaders (Lekalake 2017).

Describing the development of the South African Constitution, Justice Albie Sachs (2018) stressed the importance of preparing 'ourselves to guard against ourselves', as people are capable of doing wrong in the name of doing right. The pushback against state capture in South Africa has demonstrated the value of an independent judiciary with the power to protect the freedom of civil society and media and expose and organise against the abuse of state power.

Not all transitional states have, however, developed independent institutions protected by a strong constitution and given the capacity to 'guard against' excesses of power and, as a result, multiparty elections and open-market systems have not always resulted in the consolidation of democracy. Countries experiencing democratic transition are particularly vulnerable to

the manipulation of illicit political finance aimed at weakening the democratic pillars of society and capturing politicians and parties, journalists and the media and the police as well as key state institutions such as the legislature, the executive, the judiciary and regulatory agencies (Kupferschmidt 2009).

IMPLICATIONS FOR DEMOCRACY

The substantial theory developed in Eastern Europe and Latin America, as well as recent revelations and developments in South Africa, show that state capture has profound implications for the consolidation of democracy, systematically eroding democratic processes by undermining the election of public representatives, the institutionalisation and normalisation of democracy and the socioeconomic transformation processes.

The contributors to this volume explore the concept of state capture and its contribution to democratic discourse in Africa. The first section sets out the definition of state capture and corruption. The second analyses cases of corruption and capture in African states and the third and final section draws on experiences beyond the continent to make the point that all democracies – developed or otherwise – are vulnerable to corruption and state capture. Crucially, these chapters highlight the role of independent institutions, together with an active citizenry, in fighting abuses of state power.

If, indeed, there have been incidences of capture in African states it is necessary to understand how they have come about, in order to protect democracies in transition from suffering a similar fate.

CONCEPTUALISING STATE CAPTURE

The object of this volume is to determine whether the concept of state capture adds value to discussions about democracy and governance issues in Africa. The first section lays the foundation for the arguments advanced in other chapters by setting out the common understanding of the concept and suggesting ways in which such an understanding might add value to the analysis of governance in Africa. It also warns that caution should be exercised in doing so.

The point of departure in Lodge's and Southall's chapters is the 1990s World Bank study conducted by Hellman, Jones and Kaufman of the specific patterns of corruption that took place in the former Soviet-bloc states after their transition from authoritarian socialist systems to democratic market economies.

These cases attracted the interest of researchers at the time because, as Lodge notes, state capture is not the 'normal' exercise of political influence by powerful groups, it is a form of meta-corruption, specifically by corporate

concerns intent on shaping the regulatory framework of a state. In this situation, control or power passes from state officials (and the citizens they are mandated to represent) to non-state corporate interests. Interest in this concept has re-emerged because the current definition of corruption seems, in some cases, to fall short of describing the means and motives of misappropriation of state resources in African states.

But what, exactly, is new? asks Southall. The abuse or misuse of state power and resources is not a new phenomenon (in any context) and can be conducted in many different ways. Southall describes the case of South Africa, where political commentary on the phenomenon of state capture has escalated and expanded to include a number of issues which may not necessarily be classified as 'state capture'. He contends that it is vital to be clear about the definition being applied. To this end he investigates the history of state capture, including corruption, power elites and seizure of state power, to determine whether there is anything new about it. Lodge also examines original research into the characteristics of the phenomenon to highlight groups that might be engaged in state-capture undertakings. He also identifies some of the features of political settings that are especially vulnerable to capture.

The concept, as developed by Hellman, Jones and Kaufmann, can be broken down into three components: timing (transitional states), context (centralised economies combined with strong political elites and relatively weak institutions of accountability) and actors (captors – normally business interests) and the captured (state institutions).

If the concept of state capture is to be applied effectively beyond the original case studies it is essential to understand the distinction between it and other abuses of power. Southall distinguishes state capture from other abuses of state power – which are common in developing states – including kleptocracy (organised from the top of the state and involving maximum wealth extraction) and Mafia states (organised crime groups that use threats of violence).

These abuses are distinguished from the equally questionable and opaque behaviour described by Van Nieuwkerk in his chapter on the 'deep state'. 'Deep state', he writes, 'refers to a political situation where an internal organ or organs, such as the armed forces and civilian authorities … do not respond to the civilian political leadership but rather steer the affairs of state in the (perceived) interests of the nation.' While both state-capture and deep-state activities constitute deviations from democratic norms, the motivations of actors in a deep state are not necessarily as mercenary as those involved in state capture.

A glance at the definition of state capture might lead to the conclusion that every modern state is either captured or vulnerable to capture in some way. A key point that emerges from this section, however, is that the devil appears to be in the detail. Both Lodge and Southall point out that if the term loses its precise connotations or is de-linked too far from its original application it risks becoming indistinguishable from other theories. If most, if not all the characteristics outlined in the definition of state capture are not taken into consideration, there is a risk that the definition will become devoid of any meaningful explanatory value for the continent.

CAPTURING DEMOCRACY: THE HOLLOWING OUT OF STATE INSTITUTIONS

The increase in the number of regular and relatively peaceful elections in Africa in the past three decades is encouraging. Democratic consolidation, however, is rarely a certain outcome of regular and periodic elections alone. The achievement and consolidation of 'substantive' democracy – including socio-economic transformation and social justice – continues to evade even the strongest democracies on the continent such as those in South Africa and Botswana. This is particularly true of political systems that have been dominated by one party for a long time, where lines between party and state begin to blur. As state capture is entrenched, political competition is limited and undermined and elections and other institutions become mere façades, intended to provide legitimacy to governments.

The chapters that make up the second section of the book explore the characteristics and nature of corruption – the combination of timing, the political and economic context and the actors – and consider in some detail whether the theory of state capture is relevant in the broader African context.

Timing: Transitional states
As noted above, states are particularly vulnerable to capture while undergoing wholesale political and economic reform in an environment in which there is limited oversight. Lodge suggests that neo-liberalisation within African economies shares similarities with the hasty privatisation coupled with dominant politicians that characterised the post-Soviet-bloc states.

South Africa's shift from apartheid to multiparty democracy in 1994, accompanied by the opening of markets following years of sanctions, is a particularly good African example of wholesale reform. It is perhaps unsurprising, then, that the 'state capture' narrative emerged there first.

As Mkhabela explains, South Africa's Constitution was intended to be transformative. However, using the example of the *National Development Plan: Vision 2030*, advanced by the Zuma administration, Mkhabela highlights how

a captured executive can create a façade of transformation and development through the legitimate state while simultaneously undermining its 'key goals of building a capable state, promoting accountability and fighting corruption' by means of a parallel shadow state.

While elections are not ordinarily associated with the same 'wholesale' reform described in Lodge's chapter, Akinduro and Masterson argue that the electoral process gives state captors a means of exerting their influence because it provides regular access to the organs of state power. The authors explore the interaction between state capture networks and electoral processes to identify how the process of encoding the rules of the electoral game offers an opportunity for state capture. They note that, particularly in countries ruled by dominant political parties, where the state-party lines start to blur, the rules of the electoral game can determine whether elite networks are further entrenched or democratic institutions are consolidated.

Mkhabela's observation that the 'agents of capture' can appropriate the language of transformation to legitimate their exploitative actions, as is the case in South Africa, does not apply solely to that country. Such 'smokescreen' language is often used during election periods. In Chapter 10, for example, Stremlau details Donald Trump's appeals to white ethnic nationalism during his election campaign in the United States.

Context: Concentrated political and economic power, limited accountability

Southall emphasises that 'institutional legacies' matter. Transitional states with a legacy of developed state institutions and a civil society strong enough to promote change and demand accountability have been more successful in containing the worst excesses of corruption than those that lack these elements. The legacy of many Soviet, colonial, apartheid (and many post-colonial) states has, however, resulted in transitional states characterised by strong or dominant political elites combined with weak mechanisms of accountability and an underdeveloped civil society.

While there has been an increase in the number of democracies on the continent, in countries with a history of centralised power – where privilege and patronage are tied to political office – the institutionalisation of the separation of powers is a battle.

Citing a particularly severe case of state-party conflation, Matyszak details how the Zimbabwe African National Union-Patriotic Front manufactured its victory in the election battle for a parliamentary seat in the Mount Pleasant constituency in Zimbabwe's 2013 elections. In order to capture the seat, a disproportionately powerful executive was able to manipulate three institutions

of the state machinery – the security sector, the election management body and the judiciary, all of which should, ideally, be independent.

Akinduro and Masterson explain that 'the institutionalisation of the framework for guaranteeing civil rights and freedoms remains at a developmental stage across many African countries'. Since an active civil society and independent media play a crucial role in exposing corruption and fraudulent practices, it is not surprising that two of the most common methods employed to influence political outcomes directly have been through the illicit financing of political parties and the purchase and control of media and journalists in order to propagate biased information (Karklins 2002: 28).

Nanjala Nyabola's chapter highlights the contemporary history of the media in Kenya and examines the problematic relationship between them and the political class. Nyabola describes how the agendas of political elites during the 2017 Kenyan national elections (and, indeed, under various preceding regimes) influenced the narrative in the mainstream media. Oppressive conditions for civil society – including financial pressure, but also harassment and, in extreme cases, assassinations, have a deleterious impact on accountability.

The concentration of political power is often coupled with centralised economic power. In fact, political and economic power are mutually reinforcing. Akinduro and Masterson argue that voting behaviour in Africa is largely driven by ethno-religious considerations and, over time, socio-economic developments have further stratified divisions along class lines. They explain that this political context in Africa (and rent seeking in particular) creates an environment conducive to the capture of the electoral process.

This situation has been commonplace in oil-dependent Nigeria, they explain, where 'cabals' in the petroleum sector become involved in the political space to ensure the election of a government that favours their interests. In the case of Madagascar, Rakotomalala explains how political elites were able to sustain their activities after the withdrawal of international aid (as a consequence of the 2009 political coup) by relying on the country's supplies of highly-prized rosewood.

She describes how cycles of demand (by a predominantly Chinese market) for and exploitation of the valuable wood can be directly linked to developments in the political sphere. The 2013 Madagascan electoral process in particular was marked by scandals linked to the use of funds generated by the illicit exploitation of rosewood by major political candidates to finance their parties and campaigns.

In countries with an entrenched political elite, Lodge notes, political-party-owned investment companies are major undertakings. He names, as

examples in Southern Africa, Mozambique, Zimbabwe, South Africa, Namibia and Angola, where companies that were initially intended to fund political activity have eventually become ends in themselves.

Captors and targets
The original theory of state capture (see Lodge, Southall and Stoyanov) suggests that the principal agents are corporations external to the state. Lodge suggests, however, that there is another kind of 'captor' that develops in dominant-party systems: political party business interests. As captors are concerned with the formulation or interpretation of laws, rules or regulations, the legislature, the executive, the judiciary and regulatory institutions are commonly targeted. Within the executive arm of government, critical ministries such as finance, public enterprises and natural resources are particularly appealing to illicit private interests, but they are not the only targets.

For instance, in Madagascar, Rakotomalala notes, rosewood 'barons' have set their sights on the Ministry of the Environment in order to skew in their favour the regulations relating to the supply of the precious wood. Under pressure from domestic and international civil society the Malagasy government issued decrees clamping down on production, but, shortly after it did so, the Minister of the Environment issued a decree authorising the distribution of new export permits at his discretion.

Mkhabela explains that the sheer scale of the resources directed through South Africa's substantial welfare state make the executive a particularly attractive 'investment' for would-be captors. The president, as head of the executive, has a hand in more than 30 appointments to positions in various state organs, the judiciary and independent public bodies. The 'moral capital' of the person heading the executive is therefore significant. These powers of appointment, Mkhabela suggests, contribute to the development of a 'shadow state' where capture is conducted through a network of controllers and brokers in key positions in Cabinet, the ruling party and the security agencies.

CONSEQUENCES OF CAPTURE AND LESSONS LEARNED

All forms of corruption damage democracy, attacking the institutions of state with direct consequences for democratic consolidation and economic transformation. In their chapter Nkomo and Felton explore the more subtle consequences of state capture, those that affect the relationship between citizens and the state. Their chapter, which is based on Afrobarometer survey data between 1999 and 2015, questions whether awareness of corruption influences the way in which democratic institutions are perceived and, eventually, if and how, as a result, people participate in a democratic society.

The withdrawal of citizens from democratic processes essentially delegitimises the democratic project.

Nkomo and Felton's analysis suggests that, in environments perceived to be captured, citizens tend to place higher levels of trust in independent institutions (religious groups, independent media, and so on). It should, however, be acknowledged that as captors erode the independence of the state the civil space also begins to close – as is the case with Kenya's media. Respondents to the Afrobarometer surveys appear to be cognisant of this trend, remaining sceptical about the capacity of even independent institutions to tackle corruption.

While democracy in the United States is older and more advanced than that in many African countries, its institutions are no less vulnerable to attacks from external interests. In his chapter Stremlau describes some worrying behaviour by President Donald Trump in his first year in office, including attacks on independent media and independent state institutions, and cautions that the US state may indeed be susceptible to capture.

Stremlau traces the state's current vulnerability back to the profound influence of the country's racial-economic history on the division of power among the states and the role this played in the development of the country's Constitution.

He details how Trump panders to the (significant) populist prejudice in American society and, indeed, uses it to deflect attention from the economic exploitation that underlies America's democracy. The appeals to white ethnic nationalism displayed in Trump's electoral campaign mirror the modus operandi of captured political elites on the African continent, he writes. Van Nieuwkerk makes a similar link when he examines the nature of the apartheid deep state.

Kenya offers another example of an elite continuing to use ethnicity for political gain and, ultimately, economic enrichment, while, in Burkino Faso, Akinduro and Masterson point out, a form of nationalism is used to exclude certain candidates from standing in elections.

Where Nkomo and Felton's research seems to suggest that as perceptions of corruption increase citizens withdraw from democratic processes, examples from South Africa and the US suggest that in states with a history of an engaged citizenry and an active civil society, 'democracy fights back'. There have been strong reactions by civil society to the perceived capture by interests aligned to the Zuma administration. Stremlau also describes how citizens and civil society in the US continue to practise their right 'to peaceably assemble and to petition the government for a redress of grievances', as was evident in

the overwhelming participation in the Women's March on Washington the day after Trump was inaugurated.

Almost two decades after the transition to democracy and liberal market economies in the Eastern bloc, Stoyanov takes stock of the objective prerequisites for effective anti-corruption initiatives, specifically the role of civil society and non-governmental organisation-driven initiatives to combat corruption.

While giving examples of anti-corruption initiatives that have proved useful and successful at national and regional levels, he does, however, note that progress in this area has not been uniform. The structure of economies (and, importantly, their relationship with the state) is profoundly different in states such as Poland, which initiated economic and political reform measures early in the transitional period, and others, such as Russia, which delayed reforms, resulting in higher levels of executive involvement and, consequently, higher corruption levels.

The role of civil society and independent institutions in combating state capture is a theme that runs through this volume. Stoyanov explains how civil society, unable to operate under authoritarian Soviet rule, remains relatively underdeveloped in Central and Eastern Europe today. Anti-corruption initiatives in the region – ranging from advocacy-style mechanisms of uniting anti-corruption stakeholders to think tanks working on policy measures – have had varying (but ultimately fairly limited) levels of success.

Stoyanov goes into some detail about the Bulgarian Coalition 2000 and its current regional extension, the Southeast Europe Leadership for Development and Integrity. Many African states also have emerging civil-society sectors and Stoyanov's insights into the successes and challenges faced by civil society in Eastern Europe in implementing anti-corruption initiatives are beneficial.

In order to consolidate democracy, there should be established 'rules of the game'. State capture undermines these rules by eroding processes of democracy such as elections and state institutions. Degeneration in these areas retards and even reverses the transformation of the state. This leads to a system in which power is systematically diverted away from the people, unravelling socioeconomic transformation and undermining efforts to consolidate democracy.

SECTION 1

CONCEPTUALISING
STATE CAPTURE

STATE CAPTURE
CONCEPTUAL CONSIDERATIONS

Tom Lodge

ABSTRACT

Modern usage of the terminology of state capture is quite specific. It is about efforts by very particular private concerns, individuals even – not business in general or broad sectoral groups – to shape the regulatory domain that affects their commercial operations. These interests seek to shape or reshape financial rules or public policy in both legal and illegal ways. The term also has a broader usage, though. This chapter discusses a range of different groups that may be engaged in state capture undertakings and identifies the features of political settings that are especially vulnerable to state capture. It draws on case studies from Central Europe and from across the African continent. State capture is not the normal exercise of political influence by powerful groups and its effects weaken states, reducing their autonomy and hence their capacity for effective political action. Successful action against state capture may require high levels of civic mobilisation, easier to achieve in relatively equal and culturally homogenous societies.

INTRODUCTION

The chapter opens with a definitional discussion of the term 'state capture'. As a concept it has been loosely used in political science for a long time, but, since 2000, it has been employed in a more precise fashion to distinguish a particular form of political corruption.

The term has been applied in various ways in recent analytical work. The first section of the chapter reviews the different meanings attributed to the concept. From these definitional complexities a set of questions arises. The next part of the chapter explores the identity of the agents engaged in state capture. Who is doing the capturing and what is being captured? Which parts of the state or which kinds of state functions are these agents seeking to control? When is it obvious that a state has been captured, or is in the process of undergoing captivity? Are there key identifying attributes of state capture? If state capture is a partial process can it be measured? And what makes certain states especially susceptible or vulnerable to capture?

When it is helpful, the discussion in this chapter refers to African experience. This is not always straightforward, for, in its recent usage, the

concept of state capture evolved in efforts to understand the behaviour of post-communist states in Eastern Europe and Central Asia.

The concluding pages review the remedies that are often proposed to correct state capture as well as the insights that can be derived from the experiences of those states that have regained their autonomy or freedom.

WHAT IS STATE CAPTURE?

'State capture' is not always spoken about in a judgemental or disapproving way, its usage as a concept depends, rather, upon the assumptions people may make about the interests that states normally support or serve. Not long ago Marxist revolutionaries were quite frank about seeking to capture the state so as to establish proletarian dictatorships. But even in more sedate circles not all political scientists assume that the state's default predisposition is neutral.

In addition, there are national variations among different political systems, even within the broad family of liberal democracy, in what is considered the appropriate use of patronage by politicians. What might be considered excessive interference in branches of the state that are supposed to be independent of political influence in certain national settings might be viewed as a normal and, indeed, the proper exercise of power by elected leaders in another country.

In its colloquial usage state capture simply refers to a situation in which an identifiable group of interests – leaders of a political party or members of a particular social group – secure control over the government and the public administration in such a way that their predominance is secure and unlikely to be challenged in the foreseeable future (see, for example, Edwards 2017).

Used more pejoratively, and closer to the contemporary way in which the term is often employed, state capture implies that the state has lost its social autonomy and is unable to function in such a way as to serve broad social interests or to make decisions that might achieve long-term developmental goals. It is unable to do these things because it has become harnessed to a very particular and especially narrow set of private interests.

From 2000 a group of researchers at the World Bank began using the terminology of state capture to refer to efforts by business groups – firms or corporations – to determine or shape the 'basic rules of the game', that is, laws and regulations that might have an impact on their operations – investment codes, for example. In other words, essentially, in this view, state capture is regulatory capture. Aspirant state captors might try to achieve such a goal by bribing parliamentarians, or by inducing political parties, through donations, to develop policies aligned with their needs.

The courts and central bank decision-making bodies might be another target of their efforts to determine the 'institutional environment' (Hellman, Jones and Kaufmann 2003; Hellman, Jones, Kaufmann and Schankermen 2000). The World Bank's use of the term has been quite specific: it is about efforts by very particular private concerns – not business in general or broad sectoral groups – to shape the regulatory domain that affects their operations.

Used in this way, the term state capture is not merely the subversion of public interest by persuading officials not to apply the rules that govern business operations – though certain uses of the terminology of state capture do simply mean this – but rather, 'the point is that state capture involves formulating rather than breaking rules' (Begovic 2005: 3). This suggests a much greater and more stable degree of influence over political decision-making than the occasional inducement to officials to implement regulations unevenly. If, however, such inducement is exercised to a sufficient extent that a company or an entrepreneur benefits from a protected domain in which its operations are exempted over a long term from the rules that govern the undertakings of its competitors, that, too, might fall within the kind of understanding implied in the World Bank's usage (see Rijkers, Freund and Nucifora 2014).

From this perspective, the capturing is being done by entrepreneurs, that is, interests outside the state, not by officials or politicians; it is the businessmen or women who take the initiative. In this understanding of the term, state capture need not necessarily imply activity that is illegal; in contrast to other kinds of high-level or grand political corruption, here the agent is engaged in an effort to alter the legal framework and may do this through activities which are not, themselves, proscribed, such as donations to political parties, in settings in which these are unregulated, or elaborate kinds of lobbying (Begovic 2005: 3).

Most analysts, though, focus on inducements to officials that are illegal, such as bribes to parliamentarians (Bennich-Bjorkman 2002: 346). In a captured state businesses have *undue* influence over the decisions of public officials; state capture allows large economic interests to *distort* the legal framework and policy-making process [my emphasis]' (Chetwynd, Chetwynd and Spector 2003: 9).

Note that the World Bank's usage is about companies that seek to influence law making illicitly. But there are broader understandings that may be more helpful in thinking about the African experience. In certain post-communist settings political parties are funded and controlled by 'oligarchs', that is, the owners of former state-owned enterprises, themselves often former communist officials. These parties undertake the role of 'brokerage firms'. Having secured elected office they engage in asset-stripping of the remaining

public domain while protecting themselves from any parliamentary oversight procedures (Innes 2014).

Oligarch-controlled political parties have been conspicuous in Serbia, for example, and were powerful in Latvia in the 1990s. In many respects, Andrej Babis's ANO2011 party in the Czech Republic conforms to the model, with Prime Minister Babis himself having a typical oligarch profile. He built his fertiliser company in the early 1990s with the help of networks and insider knowledge derived from his earlier career as a Communist Party international trade functionary.

In one analysis of Serbia, the oligarch parties function in coalitions in which each party is allocated a set of ministries or government departments that they run as party-led fiefdoms, exercising complete control over civil service appointments, procurement and the activities of any remaining state enterprises associated with their departments' line functions (Pesic 2007). Note that this is a much broader undertaking than the regulatory capture that is at the heart of the World Bank's use of the term. In any case, regulatory capture may be superfluous in environments in which regulations or laws are under developed. In such cases captors might focus on a single state department to secure decisive influence over its procurements (Fazekas and Toth 2014: 5).

There is also the question of scale and degree. Central European usage of state capture suggest a coordinated set of activities by a relatively small number of entrepreneurial networks that seek to control procurement or the allocative activities of the major centres of bureaucratic power in a modern state. But, as might be expected, as the term has entered the lexicon of everyday politics it is being employed to describe a much wider range of activities in which groups outside the state seek to influence public institutions.

In Derek Matyszak's case study of Zimbabwe (Chapter 6) the concept of state capture is used to refer to a situation in which electoral arrangements are manipulated or even intentionally conceived to ensure the predominance of a particular party.

Once the term loses its precise connotations, though, it becomes indistinguishable from more general ways in which interest groups seek to influence policy. So, for example, in South Africa, *City Press* reported on 4 June 2017 that the public protector had received a letter signed by a group of pro-Zuma members of Parliament asking her to investigate state capture in the Treasury and Reserve Bank 'under their former bosses'. The Treasury during Pravin Gordhan's term as Minister of Finance had been a major agency in opposing public sector contracting to businesses connected to President Zuma's allies.

Zuma's supporters, including the corporate groups who benefit from contracting in present-day South Africa, argued that they are engaged in a

project to reduce the influence over the state of established older firms that enjoyed predominance during apartheid. So in this narrative 'state capture' is a defensive smokescreen created by previously politically-connected and well-established business interests – 'white monopoly capital' – to keep new and 'transformative' players out of the game (see, for example, Niehaus 2017).

Or, to cite another instance of this kind of understanding, in the view of Economic Freedom Fighters head Julius Malema, African National Congress (ANC) delegates attending their party's conference in December would have a choice between two different sorts of state capture. Those supporting Cyril Ramaphosa's candidature for the presidency would be taking the country back to its traditional 'sophisticated capturers', in other words, the old-money likes of Anglo American and similar entities. Alternatively, the delegates voting for Nkosazana Dlamini-Zuma would be maintaining her former husband's 'legacy of mediocre capturers', the parasitic nouveau-riche Guptas (Umraw 2017).

Essentially, this argument runs, state capture is nothing new in South Africa, and present-day beneficiaries of venal public tendering are simply replacing an earlier group of powerful white-owned businesses that enjoyed the same kind of relationship with politicians and officials. The validity of this contention is examined below.

Most contemporary discussions of state capture are about groups that operate more or less openly and which seek to alter the rules that constrain their activities. More exceptionally, though, there are instances of illegal groups that succeed in securing control over state departments and using them as bases for outright criminal activity. In 'Mafia states' criminal groups succeed in colonising key departments such as customs agencies or police entities or magistrate's offices – or whole organisms of local governments (Karklins 2005: 30). Examples include the control of anti-drug-smuggling agencies by people involved in narcotic trafficking, as in Mexico or Venezuela (Naim 2012). In Montenegro, cigarette smuggling became a major state enterprise in the 1990s, controlled by the country's leading politicians. Guinea-Bissau is a similar example of a state governed by a group of people engaged in criminal activity, in this case, cocaine smuggling.

WHO IS DOING THE CAPTURING AND WHAT IS BEING CAPTURED?

The World Bank's usage suggests that the captors are firms or company directors or particular business groups. What they seek to 'capture' is decisive influence over the regulatory framework that governs the way they operate in general, or the nature of their interaction with state departments, with respect

to procurement in particular or with regard to entry into particular fields of business that may be restricted by an investment code.

Other understandings of state capture envisage much more direct kinds of administrative control through, for example, the corporate sponsorship of political parties that themselves secure command positions within departments of state (as with Central European oligarch parties). Here a much broader range of government activity might be shaped by these corporate interests, including civil service recruitment. Business groups might have very particular policy concerns – over choices in public investment in energy, for example, and for this purpose they may target particular groups of parliamentarians or officials in particular ministries.

The captors might be particular groups of firms, local or foreign. In the 1960s, taking their cue from Latin American dependency theorists, studies of multinational companies began arguing that transnational firms could effectively restrict state power within particular national operational domains, emerging as rival sources of sovereignty (Said and Simmons 1975). The original meaning of 'banana republic', before the term became a clothing brand, was a small unstable Third-World state whose main single export was controlled by a foreign company: Honduras was the first prototype (Peckenham and Street 1985).

State captors might be other sectional interests, though, not just commercial actors; an ethnic elite, for example (see Edwards 2017: 9). Studies of state 'militarisation' that were fashionable in the 1970s and 1980s were, in effect, focusing on the capture of state power by a particular subset of state functionaries; as one analyst has noted, 'public officials themselves can capture the state' (Pradham 2000). In this volume Roger Southall (Chapter 2) considers notions of state capture antecedent to the World Bank usage including power elite literature and militarisation studies. As we have noted, in extreme cases, criminal associations may secure control over state agencies or local governments.

In the modern concept of state capture, as discussed in many of the studies to which I have referred, the principal agents are corporations that are external to the state – they might be foreign investors or local companies or political parties that serve as their proxies – the Central European oligarch-headed parties, for example. But there is also the kind of state capture that can happen when an incumbent political party, often in a one-party-dominant political system, as exists in many Southern African countries, itself develops business interests which may initially be acquired to pay for the party's electoral expenses.

These businesses are then promoted through the party's ability to control and direct state resources or the state's authority – especially in instances in

which its dominance over the political system has enabled it to deploy its own loyalists in key civil service positions. The party businesses then become ends in themselves rather than entities established to fund political activity.

For example, in Mozambique, when the cellphone multinational Vodacom/Vodaphone established a local subsidiary, Mozambican investment law required it to partner with local companies. At the relevant ministry Vodacom Mozambique was introduced to representatives of Emotel, the business arm of the ruling party, Frelimo, to which Vodacom lent US$1 million so that Emotel could buy the requisite 3% shareholding in Vodacom Mozambique.

Vodacom would subsequently partner with two further local companies, Intelec and Whatana, investment operations directed respectively by former president Armando Guebeza and former first lady Graça Machel (Turner, Mathieson and Doward 2017). Here was an instance of the ruling party as well as ruling party notables deriving commercial benefits through control of or influence over telecommunications licensing and foreign investment entry regulations.

Of course, it might be argued that Frelimo's commercial concerns are merely auxiliary, facilitating the party's achievement of broader goals and projects that have public interest at their centre. However, once political parties begin to operate their own business interests there is always a high possibility that official agencies might be harnessed to serve narrow sectional goals. In such situations, given ruling party access to state power, state capture in the sense that the World Bank uses the term – that is, particular business groups shaping the rules of the game – becomes a high risk. Political-party-owned investment companies are major undertakings in Mozambique, Zimbabwe, South Africa, Namibia and Angola.

WHERE DOES IT HAPPEN?

State capture can happen in different institutions: captors may target the legislature, the executive, the judiciary or regulatory institutions, or different ministries – the ministry of finance or the treasury may be an especial focus of would-be captor effort, as would be the Central Bank.

Because state capture is often about shaping the regulatory framework (or its application) it tends to be focused on those institutions that are most concerned with formulating or interpreting the laws, rules or regulations that govern corporate concerns and which determine their role in public investment or their relationship with public entities. Recent reviews of state capture have tended to focus on transition polities, that is, countries undergoing systemic change, particularly within the ex-communist bloc.

Capturing the state is a more attractive project if the state itself is reasonably well developed and fairly efficient. Some of the most severe cases of

state capture have been in countries in which the incidence of petty corruption (low-level everyday venality) is comparatively limited and in which most officials do their jobs honestly. Examples are Latvia and the Czech Republic.

The combination of high levels of grand corruption (over-procurement, for example) and low incidences of petty corruption by junior officials is a frequent feature of captured states. After all, there is not too much point in attempting to 'capture' or shape a country's investment code or procurement procedures in a fashion that suits a particular set of interests if the political ruling group habitually disregards its own procedures, or if the actual implementation of the 'rules of the game' is arbitrary or unpredictable, or the state is ineffectual in other ways. So, for example, efforts by private corporations to seek illicit accommodations with the Kabila administration in the Congo have been frustrated by official propensities to sell the same licences or rights to successive bidders (Garrett 2016).

Certain states are too internally disorganised to be easily susceptible to capture by groups that are committed to securing long-term investments. Exactly those sorts of states, though, those which are particularly poorly institutionalised are likely to be targeted for capture by criminal groups, especially those involved in international smuggling operations where the basic protections offered by independent sovereignty are sufficient for their needs.

WHAT MAKES CERTAIN STATES SUSCEPTIBLE TO CAPTURE?

So, where is state capture most likely to happen? What kinds of situations are likely to increase the risk?

Post-communist countries have been the main focus of World Bank-sponsored research into state capture. The justification for this attention is that their experience of wholesale and simultaneous political and economic reform, in which, at the same time as laws and regulations were being re-written, huge amounts of industrial, commercial and service activity were being privatised, created major opportunities for the exercise of illicit sectional business influence over public policy-making (Pradhan 2000).

This was the case especially in settings in which public oversight institutions and civil society agencies were undeveloped. The especially severe cases of post-communist state capture tended to be in those settings in which transition was very sudden and did not allow for the development of an assertive, structured and mass-based civil society; the Czech Republic for example, as opposed to Poland; Latvia, rather than Estonia. As Innes (2014) notes:

the flaw of the Czech, Slovak, Latvian and Bulgarian systems compared to those of Poland, Hungary, Estonia, Slovenia and Lithuania was that they came into their transitions semi-formed in terms of political competition. In contrast to the higher performing cases their legacies of relatively weak dissident oppositions and hence hard-line communist parties had prevented the emergence of reformed ex-communist social democratic parties to play the disciplining role of strong opponents.

Large-scale and very hasty privatisation of public corporations in environments in which locally-dominant politicians were often the only people able to forge the necessary connections with foreign investors to enable them to acquire personal stakes in former parastatal companies were also a feature of the 'neo-liberalisation' of African economies that sometimes *preceded* their democratisation, as, for example, in Mozambique (Harrison 1999: 543-544).

In Africa, oligarchs in top-down political transitions in which former single parties remained in office often did not need to form political parties to undertake state capture projects. Even in cases in which the ruling group changed there are several African parallels to Latvia's democratisation, in which the new governing groups were 'relatively non-ideological coalitions of old regime and exiles and local business groups' that emerged by default because of the local non-availability of organised popular democratic forces (Bennich-Bjorkman 2002: 357-360).

Even outside these poorly institutionalised settings certain features of political life can facilitate the kinds of political behaviour that increase the risk of state capture. In general, unregulated or weakly regulated and secretive political-party financing can make party elites susceptible to forming symbiotic connections with particular sectional interests (Pesic 2007). National list proportional representation, in which individual parliamentarians are reluctant to exercise oversight because they might lose their seats, has played a major role in shielding such connections from public exposure (Pesic 2007). In a different vein, the use of public procurement to achieve social equity, as in South Africa's 'Preferential Procurement Framework Act Regulations' of 2011, can open up prospects for politically biased and developmentally inefficient tendering. This would be the case especially in contexts in which the supposed beneficiaries of such tendering – the aspirant businessmen and women from historically disadvantaged communities – belong to the same social circles as ruling-party politicians. In South Africa as well, as Anthoni van Nieuwkerk notes in Chapter 3, the subversion of public institutions by their own officials dates at least as far back as the 1975-1990 'deep state'.

EFFECTS OF STATE CAPTURE

What harm results from state capture of the kind described in World Bank-sponsored research? Obviously it is beneficial to those firms that are engaged as captors, at least in the initial phases of their operations. More generally, though, the creation of a politically privileged stratum of business is disadvantageous to business in general, especially for those firms that cannot afford the higher transaction costs required for bribes and political sponsorships – smaller enterprises, for example (Hellman, Jones and Kaufman 2000).

World Bank research that compares the performance over time of countries that have either high levels or low degrees of state capture suggests that in the long term there will be lower rates of growth and investment and employment in states with high levels of state capture than in those with only minor incidences (Hellman, Jones and Kaufmann 2000).

In the situation in which oligarch-sponsored parties participate in coalition governments that allocate to each partner a set of ministries it is likely that large numbers of inefficient and unqualified public servants will be appointed through 'captured' procedures (Pesic 2007). Degrees of incidences of state capture in post-communist Europe tend to correlate with high levels of income inequality in countries that, under communist rule, were very egalitarian. In other words, it is likely that state capture helps to promote social inequality (Chetwynd, Chetwynd and Spector 2003: 9).

The most systematic efforts to measure degrees of state capture focus on tendering and procurement and calculate the proportions of state procurement that are not subject to a competitive tendering procedure. One reason why research into state capture tends to be focused on Central Europe is that in the countries concerned this information is accessible. For example, researchers at Charles University in Prague maintain a data base that traces the procedures followed for every contract announced by a government department: the conclusion arising from research on this data was that between 2006 and 2010, 80% of contracts were awarded to single bidders without competition (Innes 2014).

On the basis of similar kinds of information, Hungarian researchers tracking bureaucratic concentrations of non-competitive procurement concluded that between 2009 and 2012, 60% of government organisations were affected by state capture in the sense that the majority of their procurements were non-competitive, with single bidders (Fazekas and Toth 2014: 26). Alexander Stoyanov (Chapter 11) presents a Bulgarian-based assessment and measurement methodology for tracking state capture.

So, very high levels of state contracting occurring through non-traceable, 'private' or non-competitive channels are one fairly obvious indicator that

there may be a process of state capture in operation. A word of caution is in order here, though. Uncompetitive tendering in itself may not represent state capture. Officials controlling procurement may be awarding contracts to a range of companies offering inducements at different times, with no single firm exercising the kind of influence that would leave a durable imprint on public policy.

State capture is not simply grand corruption, it is a situation in which control or power passes from officials to non-state corporate interests, or officials themselves (including elected politicians) become corporate, primarily individually entrepreneurially-oriented, actors.

A political environment that facilitates state capture will often feature political parties in which inner life is factionalised around patron-led groups that jostle with each other to build support, often through vote-buying or the promise of jobs and favours. Societies in which political and business elites are 'mutually dependent' in the sense of each supplying to the other indispensable resources or opportunities are also likely incubators for state capture. For example, a business group highly dependent on state contracting that, in return, supplies the main source of electioneering finance (or indeed the funds that patrons need to recruit party followers) might be well poised to undertake state capture.

South Africa's new tender-created business elite, which clusters around municipal governments, might be a case in point, supplying the vital finance that local political patrons or 'gatekeepers' require to maintain their electoral predominance in local settings in which the ANC can no longer rely upon a mobilised mass following (Olver 2017: 46-47).

Evidence of a fully captured state might be the existence of a system of regulation that makes it very difficult for would-be investors, both foreign and domestic, to enter a wide range of fields (Rijkers, Freund and Nucifora 2014). Restrictive investment codes can create protected enclaves for politically connected businesses, even if their original purpose may be equitable.

AFRICAN EXAMPLES AND EXPERIENCE

During the presidency of Zine El Abidine Ben Ali, Tunisia was a highly regulated environment for investors. When Ben Ali fell during the Jasmine Revolution it was possible for researchers to explore the effects of political protection on his own business empire. Ali and members of his family owned 662 companies, a sizeable share of the total of Tunisian corporate life. Many of these undertakings were joint ventures in partnership with foreign investors, the French telecom, Orange, for example.

Systematic study of the process of these firms during the Ben Ali presidency confirms again and again that they derived benefit from

political manipulation of the investment code's entry regulations – with the promulgation of new regulations most frequent in those fields in which Ben Ali firms were present (Rijkers, Freund and Nucifora 2014: 21-22). It is as close an example of regulatory African state capture as one could wish for. Note too that it occurred in one of Africa's relatively more effective states; a confirmation of a general pattern in which severe capture of the regulatory domain tends to be in political settings which feature relative administrative efficiency. It seems likely, moreover, that the Ben Ali clan's involvement in the economy led to both large inefficacies and great inequities (Rijkers, Freund and Nucifora 2014: 25). Tunisia's high unemployment may partly be the consequence of a regulatory environment that may have restricted employment-generating local enterprises in favour of presidential partnerships with foreign companies. Here the captor is a state functionary rather than an external corporate interest. Ben Ali, originally a soldier, acquired his business interests *after* his ascent to ministerial office.

Angola supplies another good example of top-level politicians creating a regulatory system that facilitates their private accumulation. Angolan state secrecy legislation enacted in 2002, which criminalises disclosure of economic information about such matters as the government's use of oil revenues, is an especially crude example of protecting corporate interests linked to key politicians by changing basic rules. Between 1996 and 2002, $4.2 billion in oil revenues were not accounted for in reported government expenditure channelled through the Treasury, roughly the same amount as the country's expenditure on social welfare (Ganesan 2004).

As suggested above, though, not all African states are susceptible to state capture and, indeed, their institutional life may be too weakly developed to offer powerful incentives for external groups to try and shape procedures and rules. In Kenya, for instance, 'most types of corruption are directed at influencing the implementation of existing laws and regulations' and despite efforts by foreign organised crime to suborn parliamentarians, the evidence simply does not add up to 'calling Kenya … a captured state' (Gastrow 2011: 9-10). In fairness to the Kenyans, though, as Albie Sachs noted in his opening address to the EISA symposium, the reorganisation of the Kenyan judiciary between 2008 and 2010 has helped to toughen up at least one key institutional domain.

South Africa may supply a range of opportunities for would-be state captors of a different order from most African settings. This is partly because of the relative extent to which a bureaucratic order is institutionalised compared to many other African countries but also, crucially, because of the political elites' commitment to altering racial shares of property ownership through using the business regulation and procurement.

Research into South African state capture suggests a calculated and intricate effort since 2012 by business interests linked to the presidential family and its associates, the Guptas, to 'repurpose' state institutions so as to massively increase flows of illegal rents. The processes include the replacement of independent politicians in key Cabinet positions, the redirection of state enterprises' procurement following the restructuring of their boards and the re-staffing of law enforcement and security agencies so as to provide 'high-level political protection' for illegal rent seeking.

Evidence of this activity includes the 'offers' of Cabinet positions to politicians by members of the Gupta family, as well as South Africa's choice of an energy policy favouring an expensive and in other ways irrational nuclear power option that would have benefited members of the presidential circle as well as the Russian interests that helped to bankroll ANC electoral campaigning (Swilling, Chipkin et al 2017). Essentially, the research concludes, state capture in South Africa is undertaken through the construction of an informal 'shadow state' articulated by placing 'controllers' and 'brokers' in key positions, that is, in Cabinet, within the ANC's own hierarchy, in parastatal companies and in security and law enforcement bodies.

Political cover for much of this activity is supplied by references to a project of radical economic transformation. So, for example, officials in the Department of Mineral Resources and in the power utility, Eskom, invoked clauses in the Mining Charter, drafted to facilitate the entry of black businesses into the sector, to compel Glencor to sell three important coal mines to Tegeta Exploration and Resources, a company owned jointly by members of the Gupta and Zuma families (Jeffrey 2017).

As noted above, in South Africa apologists for these kinds of undertakings suggest that they simply represent a shift in the social identity of the beneficiary group and that certain businesses in in the country have always been able to induce the state to address their interests. Most serious research into the historic relationship between the South African state and dominant capitalist groups suggests a more qualified picture, however.

For example, much, though not all of the 'revisionist' Marxist scholarship of the 1970s and 1980s tended to suggest that though the state secured the long-term needs of capital or big business *in general* it did so in such a way that it could also support other concerns, such as protecting white workers, for example, or investing in a public iron and steel industry. It could do this partly because big business influenced government mainly through the political system rather than by direct access or cronyism. In this respect it was well resourced, not least through mass media whose ownership was heavily concentrated in the main business houses.

'Monopoly capital' did not need to create a shadow state of brokers and controllers. Nor were the biggest business groups dependent upon public contracting. Indeed, historically, under apartheid, social relations between leading politicians and the biggest business groups were distant, not close.

Such analysis often took its cues from Nicos Poulantzas (1973), who noted that the spatial separation of the decision making in the political arena from the calculations of the market provided the state with a degree of 'relative autonomy'. This allowed leaders of governments to give 'to the economic interests of certain dominated classes guarantees which may be contrary to the short-term economic interests of the dominant classes but which are compatible with their political interests and hegemonic domination' (Poulantzas 1973: 190-191; for South African versions of this argument see: Clarke 1978: 47-48; Posel 1983: 50-66; Yudelman 1983; Iheduru 2008: 333-360).

Arguably, in the proximity and intimacy of Jacob Zuma's relationships with a particular cluster of businessmen there is no room for the promotion of general interests of capital, or, indeed, the balancing out of the needs of different constituencies. And what makes the South African case unusual among the examples of state capture cited in this chapter is that the would-be captors are emerging rather than dominant economic interests. Hence, as the Guptas' supporters have noted, the strength of opposition to their activities (Phasha 2017). In South Africa, state capture is still very much a work in progress.

HOW CAN STATE CAPTURE BE ENDED?

Not easily. Russia does supply an example of state recapture, though the abuses that characterised the earlier phase of oligarch control have not ended. Under Putin the presidency succeeded in recapturing state authority from the oligarchs between 2004 and 2007. This was achieved through the politically directed use of taxation laws, the abolition of elected governorships and electoral system reform – removing individual MP mandates through the adoption of a party list system. This achievement was at the cost of making the system more centralised, authoritarian and, arguably, more vulnerable to future state capture (Kusznir 2017).

More encouragingly, Tunisia has experienced major constitutional reform in the wake of the 2011 revolution and this does indicate a considerable effort to retrieve the state from incumbent capture. For example, the 2014 Constitution stipulates that the parliamentary finance committee should always be led by an opposition party (Zisenswine 2014). Dictator Ben Ali's companies were confiscated by the state and are in the process of being put up for sale. But in this instance 'recapturing' or rescuing the state required a full-scale regime change.

Recent reforms in Latvia have been headed by a Corruption Prevention and Combating Bureau, a body established initially as one of the cosmetic measures instituted to win European Union accession. When it proved unexpectedly effective, the president tried to close it down, but was prevented from doing so by massive demonstrations.

Among other achievements, the bureau's investigation of party funding prompted the closure of 20 political parties. Latvian citizen action in its defence was stimulated by the 2008 financial crisis, which caused, in a single year, a quadrupling of unemployment and a 26% contraction of the economy (Kuris 2012). Both the Tunisian and Latvian cases underline the importance of a mobilised assertive citizenry undertaking collective action on a very large scale. The conditions that prompt such actions are quite rare, though, and usually involve 'broad national coalitions' (Mungiu-Pippidi 2011: 82) that are probably easier to achieve in relatively equal and culturally homogenous societies. In Chapter 11 of this book Alexander Stoyanov offers rich experience of relatively successful civil society action to check state capture in Central Europe.

Much of the prescriptive advocacy of remedial measures to tackle state capture are merely shopping lists of good governance measures coupled with observations about the importance of a fully mobilised civil society exercising oversight functions. But democracy or democratisation in itself is not necessarily going to alleviate state capture.

Ghanaian research suggests that under a system of 'competitive clientelism' increasingly competitive party politics and alternations of parties in government correlate with stagnation or even a decline in administrative quality in the civil service. After Ghanaian elections one of the first acts of any incoming government is to replace the boards of all state-controlled enterprises with its own placemen (and women). In Ghana, parties in power also employ a 'post-incumbency' strategy of fighting corruption, in which only members of rival parties are prosecuted (Appiah and Abdulai 2017: 19).

So, in certain kinds of political settings, rival interest blocs prevail over the state, milking its resources and determining its decisions for periods set by the electoral calendar. The policy effects of this are most nakedly evident in the foreign affairs of certain microstates, in which alternate groups in power successively sell diplomatic recognition to one or other of the two rival Chinese governments: São Tomé would be a case in point.

In Africa some of the most effective bureaucratic reforms have taken place in the early phases of dominant party leadership, as in Uganda in the 1990s (Muhumuza and Bukenya 2017). This underlines a more general truism. Many of the features of good governance regimes – independent

judiciaries or professionalised civil services – were instituted before, not after, democratisation. Undertaking profound political reforms in the arenas of competitive politics is much more difficult.

WHAT'S NEW ABOUT 'STATE CAPTURE'?

Roger Southall

ABSTRACT

The concept of state capture has assumed much prominence in South Africa, with the state under President Jacob Zuma being said to have been 'captured' by corrupt networks constructed by the Gupta family. This chapter explores how the concept was initially developed in research for the World Bank in relation to the growth and extent of corruption in the former Soviet Union and the states of the post-Soviet bloc. Prior to that, however, many of the ideas inherent in the concept were developed in antecedent literatures relating to corrupt power elites and Bolshevik theories of seizure of state power, the last mentioned subsequently borrowed by post-colonial military and political elites. It is argued here that too casual use of the term 'state capture', de-linked from its moorings in the World Bank research, threatens to deprive it of its value.

INTRODUCTION

'State capture' has become a highly familiar concept to South Africans, having been employed extensively in the media during Jacob Zuma's second term as president. As a result, South Africans have a fairly clear understanding that it has involved collusion between Zuma (and those around him) and a recently naturalised Indian family, the Guptas, to direct public resources into private hands, notably via the corrupt allocation of contracts by parastatals (state-owned entities) and public ministries to Gupta-related companies.

This narrative has become deeply entrenched through the remarkable work of South Africa's outstanding coterie of investigative journalists (eg, Pauw 2017), further analysis by academics (PARI 2017) and, most notably, a celebrated exploratory report by former Public Protector Thuli Madonsela (Public Protector 2016).

All this was capped by President Zuma's subsequent attempts to frustrate Madonsela's recommendation regarding the appointment of a full commission of inquiry into 'state capture' headed by a judge to be selected by the Chief Justice, Mogoeng Mogoeng. Suffice it to say, without going into further detail, the use of the term 'state capture' has now become pervasive; there is widespread concern that the South African state under the presidency of

Jacob Zuma was 'captured'; that this was subversive of democracy and deeply damaging to the economy and, accordingly, it was an insidious process that must necessarily be reversed.

There is an assumption embedded in much of the discussion of state capture that it is a distinctly post-apartheid phenomenon, somehow or other a product of African National Congress (ANC) politics. This is often associated with a further assumption that corruption has ballooned since 1994 and that, rather than a vehicle for improving the lives of the South Africa people, the ANC has become the instrument of a corrupt few. Indeed, this was a widely held interpretation of the recent struggle between Cyril Ramaphosa (now South Africa's president) and Nkosazana Dlamini-Zuma for the leadership of the ANC. The former was regularly cited as a 'constitutionalist' and reformer intent upon driving the 'self-correction' of the party, while the latter was equally regularly cited as the candidate of a corrupt faction centred on President Zuma.

It is therefore unsurprising that, while no-one was openly prepared to defend the idea of 'state capture', its reality was denied by some of those viewed as close to Zuma, who, in turn, came up with a counter-narrative. This had two closely related lines of argument. The first was that the narrative of 'state capture' provided cover for the interests of 'white monopoly capital' (WMC), which was seeking to rebuff attempts by the ANC and its business allies to 'transform' the patterns of ownership and wealth in South Africa's brutally unequal society. The second was that 'state capture' in South Africa was nothing new, the argument being that the economy had long been captive to WMC, a variant of this being that 'Afrikaner capital' had launched a largely successful bid to capture the state through its close association with the country's political leaders since the 1920s (see, eg, Matuba 2017).

It follows from the above that it is important to be clear about what is meant by the term 'state capture' and how and why it has come to assume such prominence in debate. This, in turn, requires us to refer to antecedent literatures. Only then will we be in a position to assess the extent to which 'state capture' is 'new'. First, however, it is necessary to explain how the term entered the political lexicon internationally prior to it being borrowed for use in South Africa.

THE GLOBAL ENTRY OF 'STATE CAPTURE'

There is nothing new in the notion that certain groups or elites within a society overtly or covertly gain control of a state and its machinery in order to further their own material interests. Yet the concept of 'state capture', at least in the way it is currently deployed, is relatively new, having been introduced (or

popularised) by a study conducted for the World Bank by three researchers (Joel Hellman, Geraint Jones and Daniel Kaufman) to outline and understand new patterns of corruption occurring in Soviet Union and former Soviet-bloc states after their transition to market economies.

Explaining their mission, they proclaimed:

> The fusion of the state and the economy that characterized the communist system has been replaced in most countries by a new order, but one in which the separation of private and public interests has not been adequately defined.
>
> Hellman, Jones and Kaufman 2000

Arguing that corruption in Russia and countries of the former Soviet Union 'is developing new dimensions, reaching new heights and posing new challenges', with media reports revealing how powerful firms and individual 'oligarchs' are buying off politicians and bureaucrats to shape legal, policy and regulatory environments 'in their own interests', they define state capture as follows:

> State capture refers to the action of individuals, groups or firms both in the public and private sectors *to influence the formation of* laws, regulations, decrees and other government policies to their own advantage as a result of the illicit and non-transparent provision of private benefits to public officials. There are many different forms of the problem. Distinctions can be drawn between the types of institutions subject to capture – the legislature, the executive, the judiciary, or regulatory agencies and the types of actors engaged in the capturing – private firms, political leaders, or narrow interest groups. Yet all forms of state capture are directed towards extracting rents from the state for a narrow range of individuals, firms or sectors through distorting the basic legal and regulatory framework with potentially enormous losses for the society at large. They thrive where economic power is highly concentrated, countervailing social interests are weak, and the formal channels of political influence and interest intermediation are underdeveloped [emphasis in the original].
>
> Hellman, Jones and Kaufman 2000 xv

They go on to argue that because state capture is 'by definition' a function of the concentration of economic power, 'differences in the structure of the economy across countries should have an impact upon the potential for capture'. Hence, in countries where wealth is highly concentrated in a few key productive assets there are significant risks that powerful interests will seek

to gain control over them and invest some portion of their gains in seeking to capture state institutions in an effort to strengthen their positions.

Accordingly, they cite countries richly endowed with natural resources, for instance, Azerbaijan, Russia, Kazakhstan and Turkmenistan, as particularly vulnerable to and illustrative of state capture (Hellman, Jones and Kaufman 2000: xx). In turn, state capture has been facilitated by the institutional legacies of the past. Thus, former Soviet-bloc countries such as Hungary, Poland and the Baltic states, with previous experience of sovereignty and 'closer links to European standards of civil service and judicial administration' (as opposed to the state machinery having been completely subordinated to the will of the communist party concerned), were likely to be less susceptible to state capture.

In other words, 'institutional legacies' matter and, in former communist countries possessed with a state with strong capacities and a civil society strong enough to promote change and demand accountability, there has been a 'level and pace of political and economic reforms that have contained the worst excesses of corruption relative to other transition countries'.

State capture has been limited by stronger political competition and a civil society better able to constrain the power of concentrated economic interests. Administrative corruption has been limited by the high level of accountability as well as by the more developed public institutions associated with a more advantageous historical legacy (Hellman, Jones and Kaufman 2000: xxi).

In contrast, countries that started the transition away from communism with greater continuity between the old and new systems, less-developed public administrations and weaker civil societies, tended to adopt a path of partial political and economic reforms that intensified a wide range of rent-generating economic distortions and placed only minimal mechanisms for accountability on public officials. This has proved to be fertile ground for the growth of administrative corruption (Hellman, Jones and Kaufman 2000: xxi).

Since publication of the World Bank's study the term 'state capture' has been appropriated to describe corruption in a much wider range of countries than those of the former Soviet bloc. For instance, a report by Transparency International (2014) cites state capture as having taken place in Singapore, South Korea, the United States and other European countries, the central theme of the analysis being how powerful multinational corporations have colluded with political actors to shape policy and regulatory environments in their favour.

Against this background it is valuable to consider the broader literature in which the notion of 'state capture' would appear to have been composed, for it is only if it adds value to analysis that the term is usefully employed.

ANTECEDENT LITERATURES

The notion of 'state capture' draws upon a wide range of political ideas used to explore what might loosely be termed the subversion of good government in the interests of powerful minorities. However, three sets of literature would seem to predominate. These relate first to corruption, secondly to elites and thirdly to the seizure of state power. When elements of these are brought together they may result in the toxic combination now regularly presented as 'state capture'.

Corruption

A concern with corruption is fundamental to much political analysis, its central thrust being how individuals or groups use their influence over public officials in a manner which detracts from the public interest.

Central to the notion of corruption is some sense of morality; of the high standards expected or required of public officials being defiled. Hence, one valuable overview of definitions of corruption divides its categories as follows:

- Those centring on 'public-office', these revolving around deviations from norms binding upon incumbents;
- Those centring on the 'marketisation' of public office, whereby incumbents use them as businesses from which they seek to maximise income; and
- Those centring on 'public-interest', which focus upon violations of the public interest for special advantage, the suggestion here being that even actors in private institutions such as companies may be constrained by law or social norms to act in (or at least not to disregard) the public interest.

<div align="right">Heidenheimer 1970: 4-6</div>

The literature recognises that notions of morality are central to definitions of corruption, that is, that corruption involves the doing of wrong. Yet the problem is that notions of morality have varied wildly over time and space. What was considered acceptable under the Hohenzollern monarchy in Prussia in the 18th century is very probably not regarded as acceptable in contemporary Germany, the key historical process having been the disappearance of the concept of public office as private property and its replacement with the concept of the office-holder as bound by the norms and rules of the bureaucratic system.

In other words, in the contemporary world, corruption is widely taken to be the perversion of the modern state, as famously defined by Max Weber

(1947: 156). That is, the modern state possesses an administrative and legal order subject to change by legislation, to which the organised corporate activity of the administrative staff is oriented. This system of order claims binding authority, not only over the state's citizens but also, to a very large extent, over all action taking place in the areas of its jurisdiction.

Yet for all that the Weberian state has come to be widely regarded as the ideal, the fundamental problem remains that of moral relativity: under what circumstances, by what standards, and according to whose norms and social values, are actions termed 'corrupt'?

This issue is particularly pressing in cases of countries undergoing transition from one set of values, constitutional rules or forms of authority to another: for instance, from what Weber termed 'traditional' towards 'rational-bureaucratic authority' (as represented by the modern state'); from communist to 'post-communist'; from authoritarianism to democracy and perhaps even from apartheid to 'post-apartheid'.

As indicated by Colin Leys (1965) in a famous paper asking the question 'What is the Problem about Corruption?', this means that if we seek to analyse alleged cases of corruption we have to ask: 'What is being called corruption? Who regards the purpose which is being perverted as the proper or 'official' purpose'? Who regards the allegedly corrupt action as perverting the official purpose?' and 'What are the short-term and long-term consequences of the behaviour in question, both of each particular case and of such behaviour generally?'

The answers to such questions can be variable, according to the prevalent values of a society, rendering analyses of corruption highly complex and deeply contested. It is very common, for instance, for alleged perpetrators of corruption in transitional countries to complain that their accusers are basing their allegations upon 'Western' or 'imperialist' values.

Ultimately, however, whatever the historical or theoretical basis of such complaints, this is likely to take us back to the notion of the Weberian state because, in the contemporary world, all but a handful of states (even if they enjoy only juridical as opposed to de facto authority) have written constitutions and laws, deliberate rent-seeking deviations from which can be defined legally as corruption. Increasingly, too, corruption is likely to be defined as breaching international laws and practices, especially concerning international financial and trading transactions.

However, as Leys also pointed out, it cannot automatically be assumed that the consequences of corruption are negative. For instance, while it would usually be assumed that a corrupt civil servant is an impediment to the establishment of a foreign enterprise in an impoverished country, the unofficial

provision of incentives (bribes) to civil servants in a bid to cut through red tape and inefficiency may prove the only way to speed up the establishment of a new firm and the employment and profits that it brings. Indeed, sometimes such 'positive' corruption may be systematised, as in the former Soviet Union, where factory managers often resorted to the efforts of *tolkach* (or fixers), who would provide supplies not available through established administrative channels in order to enable factory production targets to be met (Churchward 1975: 153).

Although Leys was correct to highlight such examples, most would argue that they are exceptions and that normally deviations from the law by public officials are likely to have deleterious effects. Hence Susan Rose-Ackerman (1999), a leading contemporary authority, provides an extensive analysis of how corruption is likely to reduce the public accountability of rulers, subvert democracy, undermine the judiciary, detract from the efficiency of public services and lower rates of economic growth. At worst, corruption can lead to the establishment of kleptocracies or mafia states.

Kleptocracy is where corruption is organised from the top of government. In the extreme form, a powerful head of government can organise the political system to maximise its rent-extraction possibilities ('looting'). However, most kleptocrats are not all-powerful. Their goal is wealth maximisation, but while they may rule over a state, the state (we might, for instance, cite that of the Democratic Republic of Congo) may be 'weak' and its public officials disloyal. Likewise, they may have only limited control over the economy. In such circumstances, the kleptocrat has to make trade-offs, settling for less than maximum rents in order to provide incentives to lower-level officials in order to keep the economy going.

In some circumstances, such trade-offs may even involve the kleptocrat embracing 'reforms', such as privatisation or liberalisation, but usually only if they would work to strengthen his or her control and are consistent with his or her own income maximisation. Yet only rarely is kleptocracy equivalent to private monopoly, capable of wholly dominating the 'market' (Rose-Innes 1999: 114-21; see also Andreski 1968).

In contrast, a mafia is an organised crime group that provides protective services, backed by threats of violence against unwilling 'clients', which substitute for those provided by the state in ordinary societies. In extreme cases a mafia may seek to establish control over a government, using the state power thus acquired to maximise profit. Often, if it is not prepared to 'share' territories with rival gangs, it will use violence to limit entry to its fiefdoms and, where necessary, 'eliminate' competitors.

Often mafias will collaborate with corrupt rulers prepared to provide them with political space in exchange for a share of their profits. However, whereas even kleptocratic rulers may have interests in establishing the long-term profitability of their economies, organised crime bosses may be more interested in accessing quick profits through, for instance, the export of a country's assets and raw materials. Even so, both kleptocrats and mafias may establish relationships with multinational corporations, especially in states which are economically dependent on the export of a few minerals or agricultural products. While such criminalised business-government alliances may allow managers to share the nation's wealth, this will come at the expense of ordinary people (Rose-Innes: 121-125).

Updating such analysis to consider corruption in post-communist states, Rasma Karklins (2001) distinguishes among three types of corruption: low level administrative corruption, self-serving asset-stripping by officials and state capture by corrupt networks. This typology would seem to have wider application, with kleptocracies and mafia states falling into the two latter categories.

The literature on corruption is extensive. Suffice it to say here that, in its perversion of good government, corruption describes a relationship between the state and the private sector, sometimes the former being the more powerful, sometimes the latter. Broadly, the relative bargaining power of these groups determines the overall impact of corruption on society and the distribution of gains between the two (Rose-Ackerman 1999: 113). Overall, this literature provides the foundation for any conception of 'state capture', that is, the appropriation of the wealth of a state by a few.

Many of the terms introduced above have been employed to analyse the phenomenon of state capture in South Africa, notably as it has involved procurement and tendering scandals centring on state-owned entities such as the power utility, Eskom, whereby networks of politicians, public officials and private businesspersons (on occasion referred to as a mafia) have engaged in asset-stripping, reducing a number of these entities to de facto bankruptcy and requiring that they be bailed out by the state.

All of this leads to consideration of how elites acquire, sustain and exercise power.

ELITES AND POWER

The examination of elites has a long tradition in political studies running back through major theorists such as Vilfrido Pareto, famous for his theory that changes of regime or revolutions signal only a circulation of elites; Gaetano Mosca, who argued that societies are always ruled by a minority, the 'political

class', and Roberto Michels, who proposed that all modern organisations develop into oligarchies because power within them is entrusted to individuals who, even if democratically elected, come to dominate through exercise of their skills, their control of power structures and membership apathy.

Such theorists argued that history is the interminable struggle between elites to control society and that significant social change only occurs through changes in the composition of the elite, as established elites give way to new ones and their new ideas and interests. It followed from this that the relationship between elites and masses is, ultimately, always one of domination. Although elites may seek to mobilise popular support, the masses are used largely as pawns in pursuit of their interests. This occurs even in democracies, under conditions of universal suffrage, for competitive elections offer ordinary people little more than a choice between competing elites.

It is little wonder that elite theory is often considered inherently conservative, infused by notions of 'realism' and cynicism which rendered it attractive to the fascist movements in Europe in the 20th century. Yet elite theory is not the exclusive property of conservative theorists, for it has also been developed and applied in a highly critical manner.

The doyen of critical elite theorists is C W Mills (1956), who wrote provocatively about 'the power elite' of 1950s USA. Well versed in Marxist theory (although always remaining critical of Marxism), Mills argued that the development of capitalism had driven a progressive enlargement and centralisation of the means of oppression and exploitation, of violence and destruction, as well as the means of production and reproduction. This had led to the rise in power in the US not only of corporate elites presiding over historically unrivalled productive power, but also of military elites who wielded greater destructive power than their counterparts in any previous era.

'The corporate chieftains' and 'warlords' had joined with a 'political directorate' which was increasingly detached from the formal constraints of democracy, to form a power elite whose occupation of 'the command posts' of society enabled it to make (or not make) decisions that affected the everyday lives of ordinary men and women. This did not mean that the power elite constituted a ruling class in the Marxist sense, for the political and military power holders possessed considerable autonomy from the economic domain. It did, however, mean that 'the power elite today involve[d] the uneasy coincidence of economic, military and political power' (Mills 1956: 276).

The continuing relevance of Mills's analysis in a contemporary era of increasing global inequality is obvious. Yet it is important also to recall that Mills rejected the insistence by earlier elite theorists that elite rule across all epochs and all nations was inevitable, for this, he argued, was nothing more

than tautology. In contrast, he argued that the extent to which rulers have exercised power has varied considerably. Accordingly, the extent of elite domination is always subject to empirical verification.

This reminds us that elite theory is not normative theory (telling us how society 'should' be governed), while simultaneously raising hugely important questions about the kind of society we want. In short, if it is true that there is a tendency for democracy to transform into oligarchy, how should we attempt to counter it? How can we summon up 'countervailing power'?

Mills's approach to power elites – the sharing and contestation of power among military, political and economic elites – has remained highly influential. Its particular relevance for South Africa has related to the extent to which the move from apartheid to democracy constituted an 'elite transition' brought about by a compromise deal between the pre-1994 established white elites (capitalist and National Party) and an incoming ANC elite (see, eg, Bond 2000). Such a view implies that while apartheid has gone, the new democratic forms merely obscure a circulation of elites.

Analysis of South Africa's ruling elites today suggests a more nuanced view, of 'an uneasy coexistence of largely racialized political and corporate elites', the former being largely black (composed of ANC politicians), the latter being the overwhelmingly white owners and top managers of the handful of top companies that continue to dominate the economy (Southall 2013).

This disjuncture between racialised elites and the continuing power and influence of an elite drawn from the formerly dominant racial minority (despite formal commitments of corporations to black economic empowerment) has inevitably led to continuing contestation. It also explains the crescendo of complaints about the continuing domination of 'white monopoly capital' and the demands by an aspirant black capitalist class that the government should use all the levers of power at its disposal (notably its control of the major parastatals) to force the pace of 'radical economic transformation'. It is in this context that we need to locate the debate about 'state capture' and the 'seizure of state power' that it suggests.

THE SEIZURE OF STATE POWER

Politics has always been about power; about how to acquire it, how to keep it, and about 'who gets what, when and how' (Lasswell 1936). From Machiavelli onwards, political theory has been developed and put to use by those who want to capture and wield the power of the state. The most famous of these in the modern era was Vladimir Lenin. Marx had insisted that a developed bourgeois capitalist society must precede a proletarian one, but Lenin (in tracts such as *The State and Revolution*) was to argue that peasant Russia was ripe

for revolution. To this end, he devoted his efforts to the forging of a working class political party of a new type.

Constituted as the 'vanguard' of the working class, the Bolshevik party would be one in which power was highly centralised and subject to the command of an ideologically advanced, revolutionary elite. It was to be a party which, given the political developments of the time (the overthrow of the Tsarist regime in February 1917, the ineffectiveness of the provisional coalition government that followed, growing working class militancy and so on), was equipped to seize power. Having captured state power the Communist Party was to become the essential instrument for implementing the dictatorship of the proletariat

The October Revolution which founded the Soviet state was, in its essence, a coup, and its lessons were to be borrowed and applied in vastly different circumstances, albeit usually in countries in Latin America, Asia and Russia which were only semi-developed (in a capitalist sense) or underdeveloped. Normally conducted by armies rather than political parties (although the Cuban revolution of 1959 was a notable exception), coups were justified on a variety of grounds (conservative, nationalist, anti-imperialist, modernising and so on).

Usually militaries capitalised on a loss of legitimacy of incumbent regimes and proclaimed their intention to cleanse the stables of corruption and implement a reformist or revolutionary programme in the general interest of society. Yet, as Edward Luttwak (1968) summarised it when (tongue in cheek) he provided would-be coup-makers with *A Practical Handbook*, the making of a coup would normally involve a conspiracy of commanders of key military units, the neutralisation of potential opponents and the rapid seizure of key sites of power and influence, notably the presidential palace, government offices, broadcasting stations and transport hubs (such as airports and main railway stations).

Successful coups have always been most likely in countries where power has been highly centralised. It was for this reason, for instance, that military coups were so rife in the 1960s and 1970s in Africa, where power was centralised under single or dominant parties, where a single city or handful of cities dominated the countryside and where communications were very largely controlled by the state.

Correspondingly, coups have been less likely to take place in countries with more highly institutionalised public administrations, more industrialised economies and more complex webs of social organisation, where coup-makers are more likely to encounter countervailing power. In such societies the

acquisition of state power by outsiders has been more difficult, more gradual and less violent.

From the left, such campaigns have been theorised as a 'long march through institutions', involving the subversion of bourgeois cultural hegemony and the structures through which the capitalist class rules. From the right, those seeking power have very often resorted to using their financial resources to acquire influence, one prominent method being the funding of political parties. Where recipient parties dominate their political landscapes, donors will attempt to establish mutually rewarding relationships, for instance, by providing funding for elections in exchange for the award of public contracts to their companies, very often by state-owned companies (Butler 2010).

This background is particularly relevant to contemporary South Africa, where the ANC views itself as having embarked upon its own long march through institutions. At base, the ANC was a nationalist movement whose principal focus was on securing control of the state and pursuing democracy, yet its long association with the South African Communist Party was to see it incorporating key aspects of Soviet ideology into its own theories of revolution in South Africa. These included a formal borrowing of democratic centralism and emphasis upon the primacy of the party over the state and of the state as the driving force of the economy and of 'transformation'.

Accordingly, its pursuit of what the party terms the 'national democratic revolution' charges it with using its newly acquired state power to deracialise the economy. This, in turn, has predisposed the ANC to view the parastatals as 'sites of transformation', enabling it to extend its control over 'the commanding heights of the economy' (see, notably, ANC 1997). However, while indeed providing scope for social transformation, the ANC's control of the state machinery has also lent itself to widespread corruption, the establishment of extensive patronage networks and the monetisation of relationships within the party.

Any political party, whether of the left or the right, faces the difficulty, once it has seized the state, of maintaining its revolutionary zeal and not being dragged down by the corruption to which the establishment of a monopoly of power so easily lends itself. Once it finds itself enjoying power and using it to reward itself and its followers it becomes increasingly susceptible to influence, perhaps even to 'capture', from outside.

IS STATE CAPTURE NEW?

This review indicates the contributions to contemporary thinking about 'state capture' made by analyses of corruption and power elites alongside theories about the seizure of state power. But this compels us to ask, 'what is

particularly "new" about the term', and what value does it add to our thinking about 'state capture' in South Africa?

Given that Hellman and his associates developed their thinking about 'state capture' in relation to the specific circumstances of the transition of post-communist states to market economies, the initial question that must be posed is whether their concept can legitimately be borrowed to analyse what appear to be similar processes in other countries. In other words, is the value to be gained by the application of the concept to countries that are differently situated greater than the danger of diluting its value by removing it from its specifically post-communist context?

The suggestion here is that it would probably be rash to be too prescriptive and that we should leave the matter to wider debate and empirical verification. It may well be, for instance, that extreme inequality and poverty in Latin America has been aggravated because certain states, and specifically their fiscal policies, have been 'captured' by business groups or political elites so as to favour their own interests (Knight 2016). However, it is not immediately obvious why the use of a concept of 'state capture' is more illuminating than analysing such elite manipulation of the state in terms of corruption or kleptocracy, unless it is that high-level corruption such as asset stripping, kleptocracy or the drift towards a mafia state are seen as a consequence of state capture.

Likewise, as noted above, Transparency International (2014: 2-3) has cited state capture as having occurred in a wide swathe of countries across different continents, being found in countries where

> the military, ethnic groups, kleptocratic politicians or organised criminal groups become extremely powerful and manage to shape laws and policies. For instance, this is the case in Colombia, Pakistan, conflict states in Sub-Saharan Africa, among others.

While there may be no need to dispute that elites in these different countries have subverted the fiscal and political systems to their own advantage, it must be asked whether a concept which is so generally applicable really has much explanatory value.

Similarly, while Transparency International (2014: 3) goes on to describe as 'state capture' the lobbying of the US Congress by multinational corporations and their funding of politicians' campaigns for re-election, the exposure of corporate influence has been a staple of analysis for decades, as any reading of Mills's work on the US power elite in the 1950s will testify.

The argument here, then, is that too broad a use of the term 'state capture' is likely to hollow it out and deprive it of any new explanatory value.

Consequently, the debate about the extent to which it can add value away from the post-communist context is likely to continue. However, if it is to be applied, several considerations would seem to be necessary.

First, countries in transition – not from one government to another but from one political and economic system to another – would seem to be particularly open to state capture. Secondly, this is especially the case because such countries are, today, operating in a global context in which massive corporations are increasingly freed from national fiscal constraints and are prone to involvement in criminality and dubious legal practices (ranging from bribery of politicians to hiding of profits in offshore tax havens). Thirdly, state capture is more likely to occur in countries where economic power has historically been highly concentrated.

We may conclude that although South Africa's background and experience has been very different from those of the post-communist states, its state has been susceptible to 'capture' for a number of reasons. The first, obviously, is that it remains in the throes of a transition from apartheid to democracy. This process was embedded in simultaneous transfer of political rule from an apartheid-era white elite to a post-apartheid largely black liberation elite alongside a transition from a heavily protected and isolated (or 'closed') economy to one which is now open to international capital flows.

Although, politically, this transition has involved the deliberate attempt to render the state bound by the constraints of a negotiated Constitution, the Constitution has itself entrenched certain rules and practices (some would cite the national list proportional representation system) that have detracted from the accountability of politicians.

The South African economy has long been dominated by a small number of enormously powerful corporations. Although they may have 'unbundled' the conglomerate structures that brought about massively concentrated ownership structures under late apartheid (as local corporations bought up the assets of foreign companies which disinvested under anti-apartheid pressure or fears of political instability), their monopolistic powers continue to operate through their control of value chains.

Despite the transitional efforts of the corporations to legitimise their role in post-apartheid South Africa by forging collaborative relationships with the ANC through such 'transformational' strategies as 'black economic empowerment', these efforts have had limited impact.

Accordingly, the ANC has used its newly-acquired de facto ownership of the state-owned entities (which themselves enjoy significant monopoly powers within the economy) to 'empower' black business, a practice that has facilitated the mutation of much 'black empowerment' into patronage and corruption.

The economic transition that South Africa has been undergoing since 1994 has led to a significant degree of de-industrialisation as a result of the limited capacity of the manufacturing sector to compete internationally. This has added considerably to the already disastrously high level of unemployment, which, in turn, has increased the political salience of the ruling party, the ANC, as the fount of state employment and the source of political goods and favours.

As Mills reminds us in relation to elite theory, we must be wary of analysis collapsing into tautology. The characteristics of its transition may have rendered the South African state particularly susceptible to capture. However, as the Gupta family and the Zuma faction of the ANC to which it hitched its wagon is now finding out in the post-Zuma period, South Africa also boasts important assets, notably an independent judiciary, lively media and a relatively broad and strong civil society which appears to be winning the battle to send 'state capture' into reverse. When that battle has been won the ANC may be able to embark upon a more transparent and viable route to 'transformation' – inclusive of an assault upon any unacceptable dominance of the economy by 'monopoly capital'.

AFRICA AUSTRALIS
IMPERIUM IN IMPERIO?

Anthoni van Nieuwkerk[1]

the deep state thesis is that fundamental policy continuity exists
regardless of which party controls the levers of government

Lofgren 2016: 13

ABSTRACT

The title asks whether, in South Africa, a sovereignty exists in a sovereignty, or a state within a state. 'State within a state', or deep state, refers to a political situation where an internal organ or organs, such as the armed forces and civilian authorities (intelligence agencies, police, administrative agencies and branches of governmental bureaucracy) do not respond to the civilian political leadership but rather steer the affairs of state in the (perceived) interests of the nation. Although 'the state within the state' can be conspiratorial in nature, the deep state can also take the form of entrenched unelected career civil servants acting to further their particular interests (in the name of the national interest or national security) and in opposition to the policies of elected officials, by obstructing, resisting and subverting the policies and directives of elected officials. This chapter explores the assumed features of the deep state; how it undermines democracy and good governance and its presence in several countries, then asks to what extent South Africa is afflicted by this phenomenon.

INTRODUCTION

The concept of a deep state, also known as a 'state within a state' or a parallel state, has not been thoroughly interrogated in academic inquiry. It is usually discarded as a conspiracy theory which scholars should not bother with. A deep state is usually associated with authoritarian regimes and unconsolidated democracies such as Turkey, Egypt, Russia and apartheid South Africa. In these cases, elements such as military and intelligence services collaborate with private enterprise and criminal networks to subvert elected political leaders (Park 2008: 54).

In this sense, deep state is conceptually different from 'state capture' as described in this volume by Lodge and Southall, namely efforts by private

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1   This chapter benefited from research assistance undertaken by WSG postgraduate students Lerato Mpobane and Phakamile Hlungwane.

interests to shape the regulatory domain that affects their operations. The difference between the two phenomena lies in motivation: 'state capturers' seek to extract rents from the state; deep state operatives seek to steer affairs of state towards an end (eg, 'control of a state-owned arms industry', 'regional hegemony') regardless of democratic political control. In addition, scholars have been reluctant to admit that a deep state could be a global phenomenon which affects many states, including established democracies. This preliminary exploration seeks to determine whether such a line of inquiry is worth undertaking.

The arrest of Bradley Manning in 2010 after she admitted having passed sensitive secret state documents to Julian Assange of Wikileaks has thrown some light on the existence of a deep state in advanced democracies such as the United States. The further revelations by Edward Snowden in 2013 provided more evidence that a deep state is, perhaps, not a conspiracy theory that should be dismissed by academics but, possibly, an American reality if not a global one (Lofgren 2014: 7). Since then, scholars and political commentators have started to interrogate the concept of the deep state. The possible reality of such a state is now part of the political discourse in many parts of the world, including the United States, Brazil, Egypt, Italy, Algeria and Iran.

The question of the existence of a deep state is also being asked in South Africa, particularly in relation to the Zuma administration. A plethora of literature, albeit largely not academic, suggests that a powerful deep state could be operating in South Africa. Former President Zuma could have been at the helm of this deep state, or, at least, have been its visible political head. The recent report published by the Public Affairs Research Institute entitled *Betrayal of the Promise: How South Africa is Being Stolen* alludes to the possibility of such a situation.

Recent books by Prince Mashele and Mzukisi Qobo (2017) and Jacques Pauw (2017) are among those that illustrate that a deep state could be active in South Africa. The so-called 'Gupta leaks'[2] and the Bell Pottinger saga[3], are some examples cited in support of this theory, although the South African version differs in its political objectives from those operating in the United States, Turkey and Italy.

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2   The immigrant Gupta family, the main members of which are three brothers, established an intimate relationship with then president Jacob Zuma and members of his family and have been implicated in the acquisition by various nefarious means of billions of rands through their involvement in irregular tender processes and the corruption of state-owned enterprises, among many other shady activities.

3   British public relations firm Bell Pottinger was hired by the Guptas to launch a campaign that would draw attention away from their activities. The result was the spread of a narrative stating that whites in South Africa had seized resources and wealth while depriving blacks of education and jobs. The message was popularised by the increasingly widespread use of the pejorative phrase 'white monopoly capital'.

This chapter attempts to contribute to a scholarly inquiry about the features of a deep state, how it undermines democracy and good governance and its presence in several countries, and then asks to what extent South Africa is affected by the same phenomenon.

THEORETICAL AND CONCEPTUAL EXPLORATION

The alleged existence of a deep state is not a recent phenomenon but it is yet to be thoroughly explored as an academic concept. The concept of a deep state is generally dismissed as a conspiracy theory which scholars should not be bothered with because its existence is difficult, if not impossible, to prove. However, it is a concept that predates the modern state. As early as 1605 Francis Bacon is said to have promoted a deep state as the best form of government for England when he stated that a deep state is a government of God over the world [which] is hidden from ordinary people (Grandin 2017). In 1624 King James I warned his subjects not to 'meddle with our government or deep matters of the state' (Grandin 2017). The question that then arises is what sort of state is 'obscure and invisible' yet has an impact on the lives of the citizenry but is hidden from them.

The deep state as an academic concept

As is the case with many concepts in the social sciences, there is no universal scholarly definition of the deep state. However, most definitions sum it up as a political concept used to explain the situation in a country where the organs of the state collude with private enterprise and criminal networks to undermine the work of elected political officials with regard to the political course of the country and the implementation of government policy (Scott 2015). The state organs in question are usually the armed forces, intelligence services, police, administrative agencies and government bureaucracies.

This definition also explains why and how agents employed by the state sometimes act in a way that directly damages the state and, in doing so, trample on the laws of the country (Gingeras 2010: 152). The deep state represents a 'a political interplay between the unacknowledged or unrecognised factions inside and outside regular government' who are working together to direct state policies in their favour even though these figures do not account to the public (Gingeras 2011: 439). In this respect, deep state can be seen to be similar to state capture, with the distinction being the purpose for which the collusion takes place. In a deep state the motivations are often primarily geopolitical and not necessarily as mercenary as the rent-seeking state capturer impulses for control over the state.

The deep state as an academic concept originated in Turkey (where it is known as *derin devlet*). There it was used to explain political scandals such

as the assassination of Sah Ismai in 1921, the assassination of high profile journalists in the 1970s and the 'Susurluk scandal' of 1996, which involved the close relationships among the Turkish government, the armed forces and organised crime (Gingeras 2010: 152). For this reason, in academic discourse deep state is usually associated with weak or transitional democracies and authoritarian regimes where a group of powerful individuals from the military and intelligence services colludes with bureaucrats and criminal networks to run a parallel state that undermines elected political officials and democratic reform (Crowley 2017; Grandin 2017).

This perspective is now changing as evidence continues to emerge that even robust democracies such as those in the United States or post-apartheid South Africa are experiencing the impact of the phenomenon. Almost all democracies have some form of a deep state, but the modus operandi and political objectives differ (Scott 2015: 13). All countries have a visible state that can be analysed and felt by everyone because citizens expect it to meet some standards of transparency and accountability.

While the officials of a visible state are normally elected and mandated to steer the country's political course (Lofgren 2016: 31) the deep state continues to operate regardless of changes among elected officials (Lofgren 2014: 2). The deep state, as argued below, is, therefore, distinct from 'state capture'.

According to Edwards (2017), the classical definition of state capture refers to the way formal procedures (such as laws and social norms) and government bureaucracy are manipulated by private individuals and firms to influence state policies and laws in their favour. State capture seeks to influence the creation of legislation that protects and promotes influential private interests. In this way it differs from most other forms of corruption, which seek selective enforcement of existing laws.

In some cases state capture may not be illegal, it might be attempted by means of private lobbying and influence over a range of state institutions, including the legislature, executive, ministries and the judiciary, or through a corrupt electoral process. It is thus similar to regulatory capture but differs because of the wider variety of bodies through which it may be exercised and because, unlike regulatory capture, the private influence is never overt and cannot easily be uncovered by lawful processes, especially where the legislative, judicial and electoral processes and/or executive powers have been influenced and subverted by private special interests.

The deep state is usually portrayed as a phenomenon comprising 'dishonourable individuals subverting a virtuous state for their private ambitions' (Grandin 2017). This is problematic because, as discussed above, sometimes the elements of a deep state subvert the instruction of elected

political leaders as a matter of national interest. But it must be acknowledged that even though, from the perspective of the deep state operatives, they are acting in the interest of a greater good by undermining the decisions of elected political officials, as a matter of democratic principle they should not be doing so.

A case in point is the nuclear deal debate in South Africa. Under the Zuma administration (2008-2018), the government pursued a grandiose nuclear energy plan that would cost R1 trillion, favouring Russian suppliers (Lindeque 2015).

From the deep state perspective, what if some officials within the Department of Energy or the Treasury sabotaged the nuclear deal because they knew that the country could not afford it? Or what if they were aware that most of the money would be lost through corruption associated with the tender process?

Another example can be seen within the military. In the mineral-rich and volatile Central African Republic (CAR), the African Union has, since the early 1990s, been at the forefront of peacemaking and peacekeeping efforts, but with little effect. South Africa was invited to participate in these efforts. At the same time, members of the Zuma family established business interests in the CAR. In a tragic turn of events in 2013, 13 South African soldiers died in a gunfight with rebels (Defenceweb 2013). The question is whether their deaths were in the cause of defending the national interest or private interests.

From the deep state perspective, South African military generals might have stalled the deployment of an extensive army contingent to the CAR because they knew that such deployment was intended to guard the interests of private individuals connected to that country's political elite.

Surely the state officials involved in the two cases cited above were subverting the policies and instruction of elected public officials? The question of whether they did so in the interests of the country is yet to be determined – can one assume that the managers of the deep state act with honourable intent?

ELEMENTS OF THE DEEP STATE

To further understand the concept of a deep state it is useful to analyse the main actors, their political objectives and their *modus operandi.*

Components

Traditionally, at least according to the Turkish experience, the main actors in a deep state are military and intelligence officials. They act as ring leaders who employ the services of other state institutions such as the police and senior administrative staff of the government and bureaucrats to undermine the

policies and instructions of the elected political officials who should, in theory, determine the country's political course (Gingeras 2010: 152; Scott 2015: 1). To achieve their political objectives, members of the state who form part of the deep state collaborate with private enterprise and the criminal underworld to fund and execute a determined plan (Gingeras 2010: 152-153).

A deep state, whether in Turkey, the United States or elsewhere, has no known organogram (Ambinder and Grady 2013: 5). Lofgren (2014: 5) argues that in the United States the key actors in the deep state comprise a 'hybrid of national security and law enforcement agencies: the Department of Defence, the Department of State, Department of Homeland Security, Central Intelligence Agency, and the Justice Department'. It remains to be seen, however, how and whether the charge of collusion among the military industrial complex, financial institutions on Wall Street and the tech giants in Silicon Valley, as pointed out by Lofgren (2016: 36), holds true.

Political objectives and motives

If the deep state is composed of state elements collaborating with private enterprise and criminal networks to undermine democratic outcomes, a justifiable question would be, 'what is their motive and/or political objective?'.

This is not an easy question to answer because a brief literature review reveals that the objectives of and motivations behind different forms of the deep state differ. The consensus among scholars is that those involved believe they are protecting national security and national interests (Gingeras 2010: 152).

The assassination of Sah Ismail in 1912 and the 'Susurluk scandal' in Turkey are cases in point. The strategic objective of the two incidents was to prevent the country from taking a political course different from the one preferred by the conservatives, whose aim was to prevent the democratisation process (Scott 2015: 13).

There was a similar incident in Italy in the 1960s when the intelligence services staged a series of terrorist attacks and blamed them on the Italian Communist Party (ICP). The objective was to discredit the ICP, which was gaining political ground in the midst of the Cold War, and, ultimately, to prevent the growth of communism in Italy (Gingeras 2010: 154).

More recently it is alleged that the American deep state is working hard to undermine the Trump administration. A shadow network drawn from members of the intelligence services, state bureaucracy and Silicon Valley is alleged to be leading the pack. Intelligence sources claim that Trump's presidential campaign was backed by the Russians, bureaucrats prevent his administration from implementing some of his government programmes and Silicon Valley interests provide a platform for so-called 'fake news' that undermines Trump's administration (Davis 2017; Holt 2017).

Of course, as stated above, these allegations have not have been proved, hence any talk about the deep state is discarded as a conspiracy theory. A deep state, however, does not stand at the door and knock, saying, 'I am the deep state, can you please recognise me'. It operates in deep secrecy, hence its existence cannot be confirmed. Even when active players are caught they deny their actions and there is no proof because they are protected from prosecution.

Modus operandi
The strength and power of the deep state lie in its ability to operate below the surface. It is able to do so because it is so 'heavily entrenched, so well protected by surveillance, firepower and its ability to co-opt resistance that it is almost impervious to change' (Lofgren 2016: 217).

It is therefore not surprising that Lofgren (2014: 2-3) writes that despite the differences in the personality, level of political sophistication and intelligence of George Bush and Barack Obama they both followed (or were guided towards) similar positions with regard to national security and foreign policy. Put differently, in the US it does not matter whether a Democrat or a Republican is at the helm of the White House, they follow similar policies because the locus of power is located in the deep state, therefore it is irrelevant who the elected officials are, the deep state 'operates according to its own compass regardless of who is formally in power' (Lofgren 2016: 31). An example would be the relentless use of war to protect and advance American geostrategic and economic (oil) interests in the Middle East (Jones 2012).

The deep state is willing to do anything to achieve its political objectives, even if it means assassinating its opponents, sacrificing innocent civilians as collateral damage, kidnapping, laying fake charges, character assassination and propaganda.

According to Park (2008), in Turkey in 2008 the deaths of key political activists were facilitated by specific elite power centres. The existence of the deep state was exposed by the Susurluk scandal, which opened a window into its operations and resulted in the death of Huseyin Kocadağ, a senior police official whose career had included heading a special anti-terrorist unit. At the time of his death Kocadağ was travelling with an internationally wanted criminal, Abdullah Catli, who had once lead Turkey's far-right Grey Wolves movement.

It was believed that the deep state comprised 'an ultra-nationalistic, arch-Kemalist and authoritarian network of bureaucrats, lawyers, soldiers, policemen, criminals and the like', who sponsored killings, encouraged collusion between politicians and a criminal cabal and engineered false riots.

THE DEEP STATE AND SOUTH AFRICA

In South Africa, recent publications suggest, the notion of a deep state did not emerge only after 1994, the apartheid state, too, was directed by such a network.

The apartheid era

In *Apartheid, guns and money: A tale of money*, Hennie van Vuuren (2017) details what appears to have been the behaviour of the deep state in apartheid South Africa between 1975 and 1990. He begins his book with a vivid story about a day in Pretoria when key documentary evidence of apartheid atrocities was destroyed in furnaces at a steel works – a cynical act that effectively erased intimate documentary evidence of an entire era – arguably an act of self-preservation by deep-state operatives.

This action demonstrates the ends to which the deep state went to ensure the gains it had achieved remained unchallenged. In his book Van Vuuren examines the attempts of the South African apartheid state to undermine international sanctions, through collusion and profiteering among individuals, private organisations and the state.

The environment that facilitated this form of deep state intensified over time under the presidency of PW Botha. It began with the establishment of Armscor, a state-owned company charged with research into and development of arms, followed by the purchase of media companies which would distribute positive propaganda defending the status quo; covert channelling of oil to South Africa through various networks of suppliers, traders and transporters who charged huge premiums; local and international banking allies who facilitated extensive acts of money laundering and the invisible networks of the Broederbond, a secret society intent on preserving white Afrikaner supremacy, which concealed the effects of political power and the emergence of a deep state.

The deep state, according to Van Vuuren (2017: 23), consisted of the military, or, more precisely, securocrats (Frankel 1985; Van der Westhuizen 2007), Armscor, military intelligence, business people and the international business sector. Its formation was intended to facilitate the rise of Afrikaner business interests, while, lurking under the surface, was a money-laundering machine which sought to circumvent the sanctions imposed at the time. What is clear is that the culture, values and ideologies of the participants in the deep state intertwined to the extent that it surpassed and diverted from the views of the electorate.

Van Vuuren claims that PW Botha acted as leader of both the deep state and white Nationalists. Botha contributed skilfully to the growth of

white democracy and the collective public belief in good governance, while, unbeknown to the general public, widespread corruption and rent-seeking consumed the core of the state.

The period that followed the establishment, in 1974, of the Special Defence Account (SDA) (Van Vuuren 2017: 34) was one of entrenched secrecy that resulted in the expenditure of approximately R50 billion on propaganda projects and, to some extent, oil and military procurement.

Information about the expenditure was given to only a few individuals. Another account of this phenomenon (Open Secrets 2018) notes that most military spending was channelled through the secret SDA and that this account was not scrutinised by the Auditor General. The SDA was intended to enable military procurement through Armscor. To a lesser extent it also funded propaganda projects and sinister third-force activities that targeted civilians and political opponents in the late 1980s and early 1990s.

Under the leadership of PW Botha state institutions and oversight bodies were effectively weakened by the passing of several Acts, including the Armaments Act, which barred the disclosure of any of Armscor's activities. Further to this, the appointment of a retired South African Defence Force general, whose sole responsibility was to issue audit certificates on behalf of the Auditor General, cemented the secrecy of the SDA account (Open Secrets 2018: 10).

During the Botha era propaganda was used to create a state of panic that made the majority of the Cabinet and the white minority believe the country was in a state of war. According to Van Vuuren, Botha exploited this setting and relied on Armscor to facilitate secret payments and, at times, criminal conduct, to ensure that weapons were bought and sold and allies kept financially happy, or, as Van Vuuren (2017) puts it, greased 'the wheels' of corruption by paying commissions of up to 65% to facilitate arms deals. Effectively Botha's Cabinet covered up the actions of politicians on the pretext of protecting the interests of the minority (Van Vuuren 2017: 40).

To what extent were Botha and his Cabinet aware of the existence of a deep state? Did he, individually, or with a team of operatives, steer it? The logic of the deep state is that members of the executive are often used by or collaborate with elements of the deep state to do its work – directing state affairs from the shadows. Was Botha merely an agent under orders from somewhere inside the state? It is more likely that his political ambitions and Afrikaner capital merged and were used at some level to advance the material interests of a hidden group of deep-state operatives. The aim of this deep state was to preserve the Afrikaner state. An interview with Botha on the question of dismantling the apartheid state's nuclear weapons programme is revealing:

> President PW Botha personally told me that he was extremely unhappy with De Klerk's dismantling of nuclear bombs. Botha believed that De Klerk dismantled much more than just the nukes – by destroying Pretoria's nuclear deterrent, he destroyed the Afrikaner state. PW's own words to me about the nukes was that he never intended to use them. He told me he wanted to use them as a 'negotiations tool' … a bargaining chip.
>
> Von Wielligh and Von Wielligh-Steyn 2014: 263-4

Arguably, the same group was at the forefront of calling for a truce with the 'enemy' – the liberation movements – at a time when it became obvious that the apartheid project was on the verge of defeat (although Afrikaner capital was not). Aziz Pahad, who, together with his brother Essop, Thabo Mbeki and other senior members of the African National Congress, facilitated 'secret' talks with senior members of the apartheid government as a prelude to the negotiated settlement of 1990-1994, usefully details the process of 'talks about talks' and 'secret negotatiations' in his personal account (Pahad 2014).

The alleged deep state during apartheid was shut down with the obliteration of key documents which would confirm its actions or even its existence. Sadly, the Truth and Reconciliation Commission was unable to probe this matter fully (for a personal reflection, see Boraine 2000). Van Vuuren's publication is a valiant attempt, after years of meticulous research, to piece together and map the existence of the deep state and its behaviour. Clearly, much of the story remains hidden and requires further research and analysis.

The post-apartheid era

Is there any evidence of the continued existence of the deep state – if, indeed, it ever existed? Are we instead looking at state capture as the explanation for the politcal and economic malaise that erupted after 1994 and intensified during Jacob Zuma's time in office, as argued by Lodge and Southall in this publication, or perhaps a hybrid phenomenon called a `shadow state'?

Bhorat et al (2017) suggest that, like other countries, South Africa suffers from the rise of a neopatrimonial, authoritarian regime in which a symbiotic relationship between the Constitution and a 'shadow state' is maintained through targeted actions. The authors' argument is that despite all-round agreement that the economy needs to be transformed radically to change the inherited apartheid status quo, the shadow state and state capture take place under the cloak of seeking 'radical economic transformation'. The key question is why the deep state – if we presume it still exists – did not act decisively between 2007 and 2017 to prevent the rise to power of the Zuma cohort of exploiters, or, failing that, why it did not neutralise the criminalisation of the state?

CONCLUSION

Many academics, journalists and officials are now giving accounts of theft on a grand scale. Van Vuuren's 2017 publication describes the inner workings of the security sector that manipulated the apartheid government and state, while the Public Protector's 2016 report, entitled *State of Capture*, describes the conduct of Zuma and other state officials and the awarding of state contracts to companies linked to the Gupta family. Bhorat et al (2017) describe how outsourcing under the Zuma administration led to the 'betrayal of the promise' of the post-apartheid state and Pauw (2017) describes how a corrupt president sought to protect himself by creating a shadow security state that would undermine the police and the National Proscecuting Authority.

Crispian Olver (2017) describes in horrific detail *How to Steal a City*, Basson and Du Toit record the criminal behaviour of a group of corrupt elites in *Enemy of the People: How Jacob Zuma stole South Africa* (2017) and, in 2014, Mashele and Qobo alerted readers to *The Fall of the ANC* and asked *What next?*. Several years earlier, Moeletsi Mbeki had warned of the links between Afrikaner and African nationalism in *Architects of Poverty: Why African Capitalism Needs Changing* (2009).

These authors all describe the situation in which the post-apartheid state has been captured for criminal purposes. None claims the existence of a deep state, referring to a political situation where the organs of the state collude with private enterprise and criminal networks to undermine the work of elected officials in determining the political course of the country.

Recall Lofgren's explanation that 'the deep state thesis is that fundamental policy continuity exists regardless of which party controls the levers of government' (2016: 15). The closest South Africa has come to this situation is the creation of the National Development Plan (NDP 2012) as government's integrated long-term macro-policy guide, but it must be said that despite the charismatic influence of the National Planning Commission's chair and co-chair (veteran politicians Trevor Manuel and Cyril Ramaphosa) it has proved difficult to implement and has become a subject of dispute among the members of the ruling party (Coleman 2014).

Bhorat et al (2017) ask whether the post-apartheid state has a strategic centre. In their view, there is no single powerful network that overrides all others – rather, they believe Zuma tended to govern via a set of 'kitchen cabinets' comprising selected groups from different networks.

Kitchen cabinets, they write, are small informal reference groups that are convened as needed. In the process of the capture of the South African state they were drawn from the state security establishment, Gupta networks, state-owned enterprises, sub-groups of Cabinet ministers and deputy ministers,

family networks, international networks such as Russian intelligence, key black business groups, the African National Congress (in particular, the group of Zuma-supporting provincial premiers dubbed 'the Premier League') and selected loyalists in the public service (usually directors general of government departments).

As Bhorat et al (2017) make clear, these 'power elites' are essentially key individuals united by a sense that they have an historic mission to ensure the emergence of a black business class powerful enough to displace the white business class that remains a dominant force in the economy. It could be argued that the compass that guides the 'power elite' (members of the deep state) is the 'national interest', a term referring to the interests of a nation as a whole, separate from the interests of subordinate areas or groups. Intriguingly, the Zuma administration apparently adopted a national-interest strategy at the start of his second term in office, yet the document remains shrouded in secrecy and is said to be poorly articulated. An uninspiring, secretive Cabinet memorandum with no clear strategic value does not really qualify as deep-state guidance.

The conclusion is that the emergence of a powerful black business class with an historic mission does not readily equate to the existence of a deep state inside South Africa. To make the case that it does, one must go beyond the argument that the current 'power elite' became entangled in state capture, the mafia state, the shadow state, or the criminalisation of the state.

SECTION 2

CAPTURING DEMOCRACY:
THE HOLLOWING OUT OF STATE
INSTITUTIONS

ENCODING THE RULES
CAPTURING THE STATE THROUGH THE ELECTORAL PROCESS

Olufunto Akinduro and Grant Masterson

ABSTRACT

The electoral process gives state captors an avenue for exerting their influence because it provides access to the organs of state power, which is crucial in enabling them to continue their enrichment activities. This chapter provides an overview of the interaction between the state capture networks and the electoral process to identify how the process of encoding the rules of the electoral game offers an opportunity for state capture. It also explores types of rent seeking which could be classified as a form of crude state capture and indicates ways of differentiating state capture from electoral campaigning. The chapter also argues that the political context in Africa (and rent seeking in particular) provides a conducive background for the electoral process to be captured.

INTRODUCTION

In the past two decades the number of unelected governments in power on the African continent has been reduced because elections have almost become a norm in most countries. Between 1989 and 2007, 21 African countries conducted a fourth cycle of legislative elections and 120 competitive presidential elections were held in 39 countries (Ranker & Van de Walle 2009).

With most countries having established electoral democracies, the focus has shifted to deepening democratic governance within these transitional democracies. While elections have been conducted they have not necessarily translated into good governance. The reasons for this include the challenge of widespread corruption, the emergence of exclusionary politics, political controls and uneven development (Lynch and Crawford 2011).

While noting the existence of corruption at different levels, scholars have also highlighted a trend that takes corruption beyond the willingness to pay to access public goods, extending it to the existence of networks that seek to control organs and processes of the state in order to use them to their advantage (Transparency International 2015). Hellman, Geraint and Daniel (2000) identify and define three forms of practice in transitional democracies

through which an elite or interest group seeks to manipulate the state to its advantage. They are state capture, influence and administrative corruption.

State capture in this context is defined as a systematic attempt to shape the rules of the game through illicit private payments to public officials. Influence, on the other hand, seeks to achieve the same impact without illicit payments. Administrative corruption is defined as payments made to public officials to distort the implementation of set rules (Hellman, Geraint and Daniel 2000). State capture is perpetrated by a network of individuals connected to key decision-makers within the government, in most cases, the executive.

This chapter argues that elections provide both powerful opportunities for and threats against state-capture agents. It looks at examples of electoral 'capture' where either political candidates engage their constituencies in the practice of rent seeking or elite groups drive rule-making processes to their advantage without obvious direct material benefits accruing. Both forms are complicated by their similarities in appearance and form to corrupt administrations on the one hand and weak democratic institutions on the other.

The debate about state capture has largely focused on its impact on the financial sector, which is examined and analysed through the involvement of elite networks in public procurement and appointment processes. The trend towards state capture has also, however, become deeply entrenched throughout the different systems and processes of the state over which the executive arm of government has an influence. The electoral process, like any other democratic process, is not exempt from the actions of state captors and influencers. Within the context of African politics, which is largely characterised by strongmen and dominant parties, as opposed to strong institutions, the rules of the electoral game play an important role in either institutionalising democratic governance or further entrenching the political strongmen and their networks of beneficiaries. It is therefore important to examine the possible points of entry for state captors in the process of setting the rules of the electoral game.

Democratic elections are at the core of institutionalising good governance. They provide the opportunity for the expression of the people's will as the basis of holding legitimate power (Article 21 of the Universal Declaration of Human Rights). Within the context of the captured state, the network of captors seeks to manipulate this process to remove the guarantee of the people's free will by making it an expression of the will of a few, even though an election still takes place to create a façade. To understand the impact of state captors on the electoral process it is necessary to interrogate the actions and motives of the network of captors in the rule-making process.

POLITICAL CONTEXT OF STATE CAPTURE IN AFRICA

While the return to democracy in many countries on the African continent raised expectations that it would be accompanied by development, these expectations are yet to be met, as many countries have remained underdeveloped. The little development there has been has been uneven and largely informed by ethno-religious and clientelistic relationships.

Within this context the central power or political strongman becomes the one source of privilege and patronage. Lynch and Crawford (2011) argue that as much as separation of powers seems institutionalised in these states, clientelism and presidentialism are also on the rise, with power revolving around the strongman and his network of beneficiaries.

Clientelistic politics provides a conducive space for state capture to thrive because it is based on the distribution of patronage by elected officials and political gatekeepers. The context of uneven development breeds widespread dissatisfaction and desperation, resulting in citizens looking to patrons to connect them to the corridors of power rather than approaching formal institutions for their needs.

Ethno-religious politics

Politics in Africa is largely driven by ethno-religious sentiments that erode issues. Ethno-religious and personality-driven politics has also contributed to the lack of institutionalised political party systems. State capture is likely to thrive within the context of ethno-religious politics (coupled with weak or non-institutionalised party structures) because of the exclusionary character of the political space, which feeds the competition for a sense of belonging (Lynch and Crawford 2011).

In the context of ethno-religious politics, the way to access state resources and public goods is to be affiliated with the 'correct' ethnic or religious group. In such cases, factions develop around individuals who are considered to be 'kingmakers' or representatives of the different ethnic or religious groups, thus contributing to the cycle of clientelistic politics and strengthening the network for state captors. Nigeria and Kenya are examples of countries in which this form of politics predominates.

Within the theoretical framework of voting behaviour, scholars argue that voters are influenced by sociological factors (especially, ethnicity, religion and class) that allow individuals to identify with a social grouping through which their political choices and preferences are shaped. In Africa these factors are largely driven by ethno-religious considerations and, over time, socio-economic developments have further stratified divisions along class lines. The emergence of entrenched ruling parties led by political strongmen who are

supported by their beneficiaries reinforces the psychosocial model of voting behaviour in which voters are driven by partisan interests based largely on longstanding (sometimes generational) loyalty to a political grouping or party.

Groupings that changed from liberation or nationalist movements into political parties enjoy this form of partisan support, which is not driven by clear decisions about a political agenda but by generational support. Ruling parties in most Southern African countries enjoy this type of support, which continues to grow, reportedly through state capture. Examples are Mozambique and South Africa.

The rational choice model of voter behaviour provides a strong basis for the clientelistic voting patterns seen in Africa, where voters choose candidates and party based on who they believe responds best to their individual interests, which, in systems characterised by rent-seeking politics, are largely driven by economic considerations (Antunes 2010).

Clientelism

Clientelism is neither a new phenomenon nor a particularly distinctive indication of state capture within the electoral system. The forms of ethnic rent seeking that play out in African states where identity politics are a key consideration in elections do not in and of themselves characterise a state as 'captured'. However, clientelism and rent seeking are often the preferred methods through which state capture agents employ their control over state resources when other more direct forms of influence and vote buying are not easily utilised

Gryzmala-Busse (2008) characterises clientelism as the form of state capture most compatible with political competition. Thus, in transitional states where institutional governance places some limits on the exercise of power and ensures that the 'rules of the game' are at least partially applied, clientelism is often used as a means of soft 'vote buying', normally accompanied by some form of identity politics or other distinction which creates sub-sets of beneficiaries and non-beneficiaries among the electorate.

Entrenched incumbency

Entrenched incumbency, which is another element of politics in Africa, is also usually advanced in terms of identity politics. While the conduct of regular elections has become a norm in most countries, actual alternation of power based on electoral outcomes has been limited (Lynch and Crawford 2011).

The trend has been for elected officials to attempt to retain power either by amending the constitution, ensuring they are replaced by a family member or completely disregarding the constitutional order (Khadiagala 2017). Posner

and Young (2007) note that between 1993 and 2005 four African presidents succeeded in extending their stay in office, while three failed to do so.

More recently, the attempts of President Paul Kagame of Rwanda and Pierre Nkurunziza of Burundi have succeeded, while, in the Democratic Republic of Congo, Laurent Kabila has taken the route of completely disregarding the term limits set in the country's Constitution.

Although Posner & Young (2007) argue that there has been a gradual shift from the focus on personality politics in Africa to a situation in which the formal rules of the game now matter, this shift is yet to be firmly established, as governance institutions remain weak in most African countries. They argue that although many African leaders have attempted to remain in power beyond their term limit, this trend is decreasing, as the actions of the executive are now being constrained by state institutions.

In many instances where presidents attempt to change laws that place limits on executive terms this is done by mobilising support based on identity or perceived self-interests/association between the president and a particular ethnic or other identifiable group within the state. It is often the support of this rent-seeking group that is responsible for successful attempts to extend presidential terms.

Constrained civil rights and freedoms

Most African countries have democratic constitutions that recognise the ballot as the means of ascending to power and have met the conditions for becoming electoral democracies, holding regular elections. However, the fact that there are few institutions to entrench the rule of law or guarantee important rights such as freedom of information means they retain some characteristics of authoritarian rule (Schedler 1998).

As at December 2017 only 11 African countries had passed a Freedom of Information Act. The 2017 *Freedom in the World Report* indicates that, globally, freedoms have declined in the past two decades.[1] In Africa specifically, in 2016 and 2017 there was an increase in repression of dissent and restrictions on media freedom, both of which are a recipe for state capture. In the absence of a strong civil society and an institutionalised framework for civil rights and freedoms, state captors are given the space to undertake their activities without checks by other institutions of state and civil society in their role as watchdogs and whistle-blowers.

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1   The 2017 *Freedom of the World Report* highlights a consistent and steady decline in human freedoms. Available at: https://freedomhouse.org/report/freedom-world/freedom-world-2017

Single-resource-dependent economies

After two decades of democracy on the continent most African economies remain slow growing and undiversified. Most are dependent on a single resource, which makes them more vulnerable to the influence of global commodity market prices (OECD/United Nations 2011). Such single-source economies, coupled with weak institutional frameworks, are conducive to state capture because it is easy for elite networks to build around the single resource and monopolise the space to their advantage.

Examples of this trend are Madagascar and Nigeria, where networks around the petroleum and rosewood sectors largely influence politics. Gryzmala-Busse (2008) notes the role played by the politics of exploitation in which political elites exploit state resources without necessarily giving back or 'sharing'. The existence of a single space for exploitation is conducive to state capture.

OPPORTUNITIES FOR STATE CAPTURE THROUGH THE RULES OF THE ELECTORAL GAME

Electoral processes are founded on the legal framework of a country. Elklit and Svensson (1997), defining the concept of 'free and fair' elections, highlight the importance of the rules that lie at their core. These rules set the basis for fairness and other democratic principles required for the conduct of elections with integrity. The process of setting the rules is just as important as the outcome because it determines the design of the entire process of ascension to power.

The rules of the electoral game are set out in a country's legal framework, which must guarantee the citizen's right to vote and be voted for in free and fair elections. According to the Principles for Election Management, Monitoring and Observation (PEMMO), which were adopted at a conference of the Southern African Development Community (SADC) held in Johannesburg in November 2003 under the auspices of EISA and The Electoral Commissioner's Forum of SADC, the legal framework determines:

- Eligibility criteria for candidates and voters;
- The electoral system by which the people will be represented;
- The institutional framework for managing the electoral process;
- The framework for managing party and campaign finance; and
- The system for electoral dispute resolution;

The ability to capture or control the process of setting these rules grants the captors or controllers an opportunity to decide who gets into power and to ensure that the persons who get into power protect the interests of the captors.

Capture through legal and constitutional reforms and legislative processes
Because of the cyclical nature of elections there is an opportunity during the periods between them to learn from experience and to review and reform processes. In a captured state, where incumbents are keen to remain in power at all costs and their networks are anxious to keep them in power, the post-election reform process provides an opportunity to influence the rules of the game.

In Africa the most common way to capture the reform process is to manipulate the constitution to ensure that the incumbents are eligible to run in an election after the completion of their legally-mandated term. In their study, Posner and Young (2007) note that incumbents who chose to remain in power after the end of their term were all about 60 years old and feared early retirement. They also noted the fear of losing an election and the fear of prosecution as key reasons for remaining in power.

Khadiagala (2017) argues that incumbents attempt to remain in power by claiming that their work is not yet done. In such cases the trend has been either to change the constitution (to remove sections that limit their eligibility) through legislative processes or to call for a referendum. He further notes that extensions of tenure have been common in countries such as Chad, Guinea, Uganda and Rwanda, which have dominant parties and strongmen.

The situation in Uganda is a case of state capture through constitutional reform. In 2005 President Yoweri Museveni removed presidential term limits from the Constitution by means of a referendum. After 30 years in power he won his sixth presidential term in 2016. Cognisant of the fact that the Constitution sets an age limit for presidential candidates, Museveni initiated a process to remove the age-limit clause from the Constitution, thus paving the way for a lifetime presidency through a process characterised by intimidation and bribery (Khadiagala 2017; VOA News 2017).

Museveni, a political strongman, has now survived in office for more than 30 years because of the clientelistic character of Ugandan politics. Access to state resources in the country is centralised in the person of the president, who hands out patronage. The campaigns in the lead-up to the 2016 elections were characterised by promises to reward or punish segments of the country according to whether or not they supported his presidential bid.

His antecedents as a leader of the country's liberation movement give him a strong network of ex-military officials, who, over time, have morphed into captors who control different sectors of the economy. It is in the interests of this elite group that Museveni remain in power and they will continue to support his efforts to do so, despite the corruption cases that have involved his close associates (Makara 2010: 42).

President Olusegan Obasanjo's attempts towards the end of his second term to change the Nigerian Constitution is another example of a move to capture the state by means of a legal reform process. In that case, the process was characterised by bribery and the intimidation of the legislature. The Nigerian case also related to the politics of petroleum. Albert (2012) called the elite group that controls the oil sector and, by extension, many other sectors, 'cabals'. These cabals become involved in the political space in order to ensure that the government in power favours their interests.

The decision of the Obasanjo regime to subsidise the pump price of fuel and to continue to support the importation of petroleum products worked to the advantage of the oil cabal, which is why the business sector supported his third-term bid. The bid, however, failed at Senate level when a decision was taken to transmit the proceedings live on national television (Ibrahim and Egwu 2013). Despite receiving bribes from the president and his close associates, the senators were compelled to vote in line with the people's demands.

In addition to the issue of presidential term limits, incumbents have manipulated legal reform processes to satisfy certain interest groups and curtail access by some segments of the citizenry to the political arena. In Côte d'Ivoire a 2016 constitutional review removed the nationality clause from the Constitution, addressing a legal provision that excluded citizens from the northern part of the country from standing for the position of president because they were not of full Ivorian descent. The new Constitution now mandates that only one parent of a presidential candidate has to be of Ivorian descent (Kazeem 2016). Such exclusionary provisions have been used by incumbents and their networks of supporters to reserve the political space.

Capture by design: electoral boundaries and electoral systems

An electoral system is defined as 'a set of essentially unchanged election rules under which one or more successive elections are conducted in a particular democracy' (Lijpart 1994: 13, cited in Golder 2005: 103). It is also defined as the rules of electoral competition by which votes are converted into seats (Mozaffar & Schedler 2002). The design of the electoral system is an important aspect of rule making in an electoral process because it determines crucial issues such as: criteria for representation (whether through proportional representation or majoritarian systems), the size of the assembly, the size of electoral districts, the rules of the political game and the system of voting and who gets elected (Golder 2005).

Electoral systems in most African countries were designed during transition negotiations, which were managed either by warring factions or by

political elites driven by particular interests that influenced the character of the electoral systems that emerged. Golder (2005) notes that electoral system in most countries have changed over time, modified for a variety of reasons.

In the context of state capture, the incumbents and their network of interest groups take advantage of the process of designing the electoral system to retain control of the political space and restrict the level of access for political opponents. In Uganda, for instance, there is a history of creating new electoral districts in the lead-up to elections, thus altering the size of Parliament and creating new constituencies.

Ahead of the 2011 elections 23 new constituencies were created and ahead of the 2016 elections the number was increased by a further 53 as a result of the creation by the president of 75 new counties (EISA EOM 2011 and 2016). The reason for the increase was to break up areas where the opposition seemed to be gaining support, thus maintaining the president's hold on power. Parliament, controlled by the president, had no choice but to agree to the increase.

In Egypt, the 2013 constitution-making process that culminated in the January 2014 referendum resulted in a Constitution that did not stipulate the electoral system but left it to Parliament to decide. In Egypt the military constitutes a strong interest group that has controlled different sectors of Egyptian public life. The 2014 Constitution largely protected the involvement of the military in areas beyond its traditional mandate of securing the state.

Following the election of General Abdel Fattah el-Sisi to the presidency, the electoral law that was adopted was designed to give more room to independent candidates. While in other countries such a provision might not, in itself, have a negative impact on politics, in Egypt it is perceived to have been designed to enable members of el-Sisi's network to contest elections and to weaken the political party system, promoting clientelistic politics that favour the president and the military.

Capturing the empire
Elections are complex processes that require an institutionalised framework for their management. Mozaffar & Schedler (2002) note that election management is an important aspect of implementing the rules of the electoral game because it determines the organisational structure and the mandate, functions, mode of appointment and funding of the electoral authority.

The establishment of the institutional framework provides another opportunity for state-capture networks to manipulate the process to their own advantage. Incumbents, particularly, take advantage of the power to set the mandate and functions of the electoral authority and also the power to appoint and dismiss officials working for it.

The interest of elites in the process of election management design stems from their need to retain potential beneficiaries and exclude those who will not do their bidding. In this regard, most African countries have a framework that gives the executive the power to appoint members of the electoral authority. In some countries the executive also has the power to fire the members, while, in others, the security of the electoral authority's tenure of office is guaranteed in the constitution.

Networks of state capture and political strongmen have been seen to take advantage of the power to appoint by influencing the president to nominate certain individuals. For instance, in Nigeria, where members of the electoral authority are appointed by the president subject to approval by the Senate, the trend has been for members of the ruling party to influence the drawing up of the list by nominating individuals who they need to 'reward'. The nomination process is, therefore, entrenched within the context of patron-client relationships.

The decision of the government of Malawi to disband the Malawi Electoral Commission after the 2009 elections shows the ease with which the incumbent and a privileged network of friends may maintain a hold over the political space by determining who works at the commission.

Capture via gatekeeping: candidate nominations and appointments

The candidate nomination process is another area in which those seeking to influence election outcomes are able to ensure that their preferred candidates will succeed. In Nigeria these patrons are known as 'godfathers'.

Ibrahim (nd) defines godfathers as 'men who have the power personally to determine both who gets nominated to contest elections and who wins in a state'. He argues that godfathers are elites who act through proxies who, once elected, are expected to deliver the profits of office to their benefactors. These profits may include illicit payments, acceptance of nominees for positions, contracts and other forms of financial and material benefits.

In the context of uneven development and poverty in Nigeria, where the state remains the primary source of power and financial fortune, the price of becoming a candidate is high and political actors will do whatever is required to gain the party ticket. Godfathers are no less desperate, wanting to get their hands on government resources.

The rise of godfathers in Nigeria's Fourth Republic changed the face of politics in the country. They act as political entrepreneurs who are willing to 'sponsor' a candidate who will, in return, allow them to be the de facto decision makers for the office held by the beneficiary. The godfather and his businesses are also given preference in public procurement processes and in

the nomination of persons to fill appointed positions in state organs.

After the 1999 transition elections a number of cases of disputes between godfathers and their beneficiaries were reported in the media, as the elected officials could not uphold the terms of the agreement with their sponsors. Of specific interest is the role of the Late Alhaji Adedibu, the renowned garrison commander of Oyo State, who told the media:

> Whether you like it or not, as a godfather you will not be a governor, you will not be a president, but you can make a governor, you can make a president … he was collecting N65 million as security vote every month. You know that governors don't account for security vote. He was to give me N15 million of that every month. He reneged. Later it was reduced to N10 million. Yet he did not give me.
>
> Sahara Reporters 2007

Ahead of the 2007 elections in Nigeria godfathers were very involved in setting the rules for the conduct of party primaries. In some cases they manipulated the outcome, while in others they set aside the rules of the party and simply pronounced their pre-selected candidate as winner. The powers wielded by political godfathers who are at the centre of the state-capture networks go beyond electing the anointed candidates, they also nominate appointees for positions such as minister, ambassador or commissioner.

State capture is entrenched through informal agreements ahead of elections. When the candidates supported by elite networks win, they are left with little control over the organs of state.

WHAT CAN BE DONE?

Redressing the damage to the institutional framework caused by state capture requires a broad cross-sectoral approach. There is a need to address the contextual challenges identified in the second section of this chapter as these form the basis for state capture.

More specifically, to address these challenges it is necessary to revisit the framework for access to information. Only 11 African countries have a Freedom of Information Act, a fact that comes as no surprise in view of the growing trend on the continent towards restricting the media. This creates a transparency and accountability gap within the governance framework. Governments should take steps to strengthen the framework to protect citizens who wish to blow the whistle on cases of corruption at any level.

Citing the case of President Obasanjo's failed third-term bid, Posner & Young (2007) argue that the official rules of the game are gradually beginning

to matter again. While this is true if one examines the trajectory of Africa's democratic development in the past three decades, more recently, incumbents seem to be more brazen in their disregard for the rule of law. However, in the specific case of this failed attempt, the media and civil society played a significant role in pressuring senators who would otherwise have been intimidated by the president.

We share Posner & Young's optimism that more and more African states now respect the rule of law and there is little likelihood that Africa will revert to military rule or that the quality of democracy will depreciate to a point where the continent returns to electoral-authoritarian regimes. More work needs to be done, however, to identify the trends and practices of state capture networks within the electoral process to protect the integrity of the process and ensure that the will of the people is not compromised by the interests of these networks.

STATE CAPTURE AND THE EXPLOITATION OF NATURAL RESOURCES
THE 'ROSEWOOD SCANDAL' IN MADAGASCAR

Randrara Rakotomalala

ABSTRACT

The establishment of collusive networks around the illegal rosewood trade in Madagascar, which involve politicians and public officials, has severely affected the process of democratic consolidation and had an adverse impact on the 2013 elections. The illegal rosewood trade has also become a major issue for the government, which has come under pressure from the international community. Many Malagasy people associate the rosewood industry, which is infamous for corrupt practices, impunity and intimidation, with the mafia. However, an examination of the practices and dynamics of the collusive networks reveals a more complex system of state capture. This chapter analyses how parts of Madagascar's executive, legislature and judiciary have been captured for the benefit of a new Malagasy economic elite operating in the rosewood industry, and the implications of this for democracy and elections. It shows how, after the 2013 elections, some of the economic captors joined the state apparatus, resulting in penetration of the legitimate state by a parallel state bent on destabilising it from within.

INTRODUCTION

The island of Madagascar is renowned for its unique and diverse ecosystem. Some of its precious wood species, particularly rosewood, have become highly coveted in recent years because of their rarity and exceptional quality. The lucrative nature of rosewood logging, compounded by high international demand, has profoundly influenced the political climate on the island.

A symbiotic relationship has developed between the illegal rosewood trade and the political sphere in Madagascar. The establishment of collusive networks involving operators, foreign exporters and Malagasy state actors has resulted in multiple scandals, false promises and battles relating to rosewood playing out in the political landscape of the country.

Specifically, the 'rosewood scandal' significantly tarnished the national electoral processes of 2013, revealing a deeply flawed democratic system influenced by collusive national and international networks. This case study explores how the presence of these collusive networks has weakened the democratic processes, with profound implications for the forthcoming 2018 national elections.

The analysis in this chapter is guided by the notion of state capture as defined by Joel Hellman and Daniel Kaufmann (2001), namely, the behaviour of oligarchs – captors who manipulate policy making and even go so far as to shape new rules to their advantage, by bribing public officials.

According to its original definition, state capture is a form of corruption exercised by private companies over the state to influence the rules to their advantage and to control state institutions. This definition highlights the importance of the mechanisms employed by companies to shape the decisions made by the state in order to derive benefits. Over time, however, different empirical cases have led to a more flexible and broader re-definition of the concept to describe different situations.

The category of captors has been expanded to extend beyond private companies. It now encompasses political leaders and groups or social strata outside the state that have a decisive influence over state institutions and policies and use it for personal benefit and against the public good (Pesic 2007).

Transparency International (nd) defines state capture as 'a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to influence a nation's policies, legal environment and economy to benefit their own private interests'. The key element for the purpose of this study is the dimension of control and influence exercised by a group outside the state through corrupt conduct and mechanisms – illicit payments, lobbying, and so on, for its own benefit.

This chapter shows that in the case of Madagascar parts of the executive and the judiciary have been captured for the benefit of a new Malagasy economic elite through lobbying, fraudulent payments, complex legislation, a culture of impunity and the personal involvement of high-ranking civil servants. After the 2013 elections some of the economic captors joined the state apparatus, resulting in the penetration of the legitimate state by the parallel state, not to strengthen it or benefit from its influence, but to destabilise it from within for the benefit of the captors.

Madagascar's post-independence political history has been characterised by cyclical crises that followed periods of economic progress, thereby making democratic consolidation and attempts at national reconciliation impossible.

Aggravating the loss of legitimacy of the state of Madagascar (Bruhn 2013), the existence of these collusive networks, at odds with the primary constitutional purpose of the state, may be one of the main obstacles to advancing the democratic agenda envisioned by the people of Madagascar. As the 2018 elections approach it is important to understand the scope and implications of the capture of the state through the illicit rosewood trade in order to avoid the same failures that undermined the credibility and transparency of the 2013 electoral process.

THE MALAGASY ROSEWOOD TRADE: CYCLES OF DEMAND AND EXPLOITATION

There are three main species of precious woods in Madagascar: rosewood, ebony and palisander (GW and EIA 2009). The value of rosewood, and the reason it is classified as precious, is that it is considered noble, making it a sought-after material for musical instruments and valuable furniture. The species most harvested in Madagascar are found predominantly in the forests in the north-eastern part of the island, a region commonly known as SAVA (Sambava, Antalaha, Vohemar, Andapa), which has become the primary logging region in the country. Antalaha is the most important of these areas.

When examining the cycles of economic boom and political crisis in post-independence Madagascan history, patterns of corruption start to emerge. The illicit rosewood trade in the SAVA region is intricately woven into these patterns. It is important to note that, historically, fluctuations in, and the intensity of illegal rosewood logging are directly related to political events and natural phenomena, thus having a significant impact on the legality and feasibility of the logging of precious woods (GW and EIA 2009).

Pre-democratic periods

In modern times, the rosewood industry in SAVA has brought about the development of a new economic elite who have built their fortunes on trading the wood. However, commercial logging of precious woods is not a new phenomenon in Madagascar, it dates back to the pre-colonial period, under the 19th-century monarchy, when it was governed by strict legislation. Fraud relating to the business already existed at that time, with the state accounting for about 50% of the fraud, according to available sources.

Although 30 000 hectares of forest around the town of Maroantsetra were under concession in 1899, when the island was colonised by the French, only 20% was actually exploited (Randriamalala 2013). New French forest operators, mainly three companies – La Grande Île, La Compagnie Coloniale and La

Compagnie Foncière et Minière – close to the French colonial administration, emerged at the beginning of the 20ᵗʰ century, setting off an unsustainable and environmentally damaging exploitation of these resources (Fremigacci 1998). Patches of the Malagasy forest were divided up and distributed to commercial operators and senior colonial officials for exploitation purposes and as rewards for services rendered.

2000-2009

While there were political crises in 2002 and 2009, there was also significant economic growth. Marc Ravalomanana was elected president in 2002 after a post-electoral conflict that brought the country to the brink of civil war, and was re-elected in a landslide victory in 2006. Despite the economic stability that prevailed during his first term, he gradually became unpopular as analysts noted that the line between his personal business and political interests was becoming increasingly blurred (Marcus and Ratsimbaharison 2005).

The economic growth during this period is partly attributable to an explosive growth in rosewood logging linked to an increase in Chinese demand (Randriamalala and Liu 2010). The volume of exports increased from 1 000 tonnes in 1998 to 5 000 tonnes in 2000 (Annexure 1). Rosewood is particularly sought after by newly-rich Chinese for technical, aesthetic and cultural reasons. Cameroon, Gabon, Equatorial Guinea, Myanmar, Cambodia and Laos are among the other countries that supply China with the wood.

Some operators from the East Coast who were operating legally when Ravalomanana was in power set up illegal export chains in 2004, circumventing a once-off rosewood export authorisation (Pellerin 2017). In early 2009 Ravalomanana's government was overthrown in a military coup d'état, immediately followed by the establishment by Andry Rajoelina of a transitional regime known as the High Transitional Authority. Complicating this political situation, the increasing demand for rosewood from China throughout the 2000s hit an unprecedented high in 2009.

Rosewood logging has evolved into an activity that is primarily run by collusive networks in a black market formed by a small group of private operators who, with the complicity of government officials, influence the market to their advantage and at the expense of the public good. As a result, the available figures generally only reflect a portion of the actual value of the volume of wood that is logged and exported; the volume derived from contraband is unknown. In the minds of many Malagasy people the rosewood industry is associated with the mafia.

Figure 1

Registered Chinese imports and suspected volumes of smuggled precious woods 2006-2016
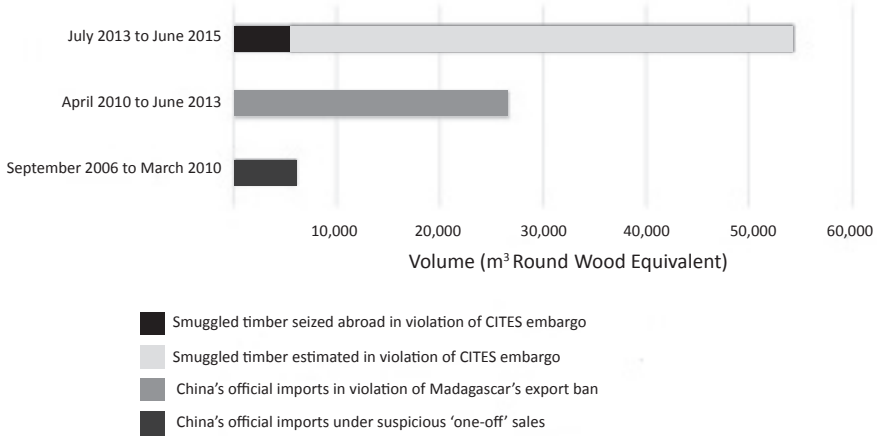
Source: EIA, 2016, based on Chinese Customs data.

2009-2013

Between 2008 and 2009 levels of exports from Madagascar increased dramatically, a rise attributed to the unstable political environment (GW and EIA 2009) that followed the 2009 coup. The implementation of the illegitimate High Transitional regime led to the exclusion of Madagascar from the African Union (AU) and the Southern African Development Community (SADC) and to four years of negotiations and uncertainty.

A sharp escalation in rosewood demand and exports, to approximately 36 000 tonnes in 2009 (Annexure 1), led to a significant increase in revenue generated by the trade and, consequently, to the emergence of new elites who built their fortunes on the illegal rosewood trade in the north-eastern part of the island. Many of these new elites are local people from the region, but they also include members of the Chinese communities in the SAVA.

This new economic elite gradually acquired influence, first over officials and the local and regional economy, then over the state apparatus. The political and economic environment in 2009 created a situation in which the opportunity for economic operators to grow the illegal rosewood trade coincided with the guarantee of a significant and sustained source of revenue for a precarious state that was crying out for funding (International Crisis Group 2010).

Like any parallel state, the model put in place in Madagascar in 2009 and its ties with the 'official' state relied on a complex system comprising a large number of formal and informal structures which allowed for control over, access to and the movement and distribution of resources (State Capacity Research Project 2017).

The refusal by international donors to recognise the illegitimate transitional regime led to a radical break in international funding for a country in which more than 70% of the state's operating budget comes from international aid (Pellerin 2017). The pressing need for state resources and the need to fund the new regime, along with the considerable weakening of the central authority, drove the leaders of the High Transitional Authority to collusive networks linked to the illicit rosewood trade as a primary source of funding. This trend continued for almost four years. According to one of the main rosewood operators, during a visit to Brickaville, Andry Rajoelina stated that revenue from the sale of rosewood made it possible to keep the country running for two years without the help of foreign funders (Pellerin 2017).

The transitional period, from 2009 to 2013, was characterised by a lack of transparency surrounding the origins of the resources and the methods used to fund the government.

2013-2018

The 2013 elections were supposed to mark the end of the political crisis and bring about a return to democracy in Madagascar. The capture of the Malagasy state by rosewood operators, however, had a significant impact on the 2013 electoral process, particularly with regard to the transparency of campaign financing and the inevitable consequences for a level playing field for election candidates.

Rosewood trafficking, therefore, remained the focus of debates during the 2013 elections. Successive scandals relating to accusations that the proceeds generated by trafficking were being used by key candidates to fund their campaigns and parties tarnished the process. So-called 'trafficking barons' participated as candidates or 'sponsors' in the shadow of certain candidates (*Jeune Afrique* 2013). The main candidates accused each other of involvement in rosewood trafficking and of using the proceeds to fund their campaigns and parties. Many candidates competing in the legislative elections in the north-east region, who were subsequently elected, were found to be operating in the sector (TanaNews 2014).

There have been distinct developments in state capture in Madagascar since the establishment of the new regime in 2013. New operators in the rosewood sector who stood for election were democratically elected despite

allegations of vote buying and opacity surrounding the funding of their campaigns (Anonymous 2017, EIA and AVG 2017). Likewise, numerous individuals tied, in one way or another, to the collusive network around the rosewood trade, were appointed to posts in successive cabinets of the new regime (EIA 2016).

Madagascar, therefore, went from state capture by elements outside of the state to a situation in which, after 2013, the captors joined the state apparatus, which they had previously controlled from the outside. However, the new members of Parliament, who were also rosewood operators, not only joined the state apparatus to secure direct control over resources and rules, they later set out to destabilise the state from within.

A possible reason for this development was the breakdown in relations between the president of the republic and his former associates from the sector who had joined state institutions. The discontent of the MP operators may have been partly due to the existence of piles of rosewood whose sales have been suspended in the north-east, representing a shortfall for the operators, but which the state is hesitant to sell as a result of international pressure (Anonymous 2017).

MP operators were, therefore, allegedly behind the motion of no confidence in the government in 2015 and proceeds from the illegal rosewood trade were reportedly used to bribe other MPs to support the motion. This type of funding, which is now referred to as 'rebel money' (Ratsiazo 2014), is used not only to fund destabilisation from within but also to finance external unrest among workers who are unemployed because of the limitations imposed by the state as a result of international pressure. Some operators, therefore, turned against the state, which they had previously influenced to their advantage, and even fostered popular unrest against it in order to secure a relaunch of the precious-wood trade.

Despite the attempt to return to democracy in 2013, Madagascar's political stability has remained fragile. The new regime has struggled to implement public reforms and three different prime ministers have been appointed since 2014 (IMF 2017, Midi Madagasikara 2016). The political landscape as the 2018 elections approach is characterised by escalating popular discontent reminiscent of the period immediately before the 2009 coup d'état. Another crisis would aggravate the cycle of political instability and further jeopardise Madagascar's democratic consolidation.

A SYSTEM OF STATE CAPTURE

Although it is a form of meta-corruption, state capture is different from administrative corruption, which requires recourse to illicit and non-

transparent payments made to government officials to influence the application of administrative functions. In the case of state capture, corruption by the group outside of the state is carried out ahead of the drafting of laws and regulations to influence the rules to the benefit of the group, and incomes generated by the parallel system are shared between captors and corrupt officials (Hellman, Jones and Kaufmann 2000).

A further distinction is made between state capture and the influence system, whereby companies influence the drafting of laws and regulations but without recourse to illicit payments to civil servants. In these cases, the company that exercises the influence is the sole beneficiary of the rents generated.

Certain features are specific to state capture. Firstly, it is an ongoing phenomenon which takes the form of a system maintained by regular transactions, in contrast to traditional corrupt acts, which are sporadic or irregular. The benefits received by the group of captors are thus ongoing and prolonged. Moreover, state capture is always conducted by a particularly influential small group, in contrast to situations involving large groups from the community or the broader public. This gives the small group an advantage over other competing groups.

The privatisation of a section of the state and the emergence of a parallel state, at odds with the original constitutional objective of state institutions, generally constitute the collateral effects of state capture (Karklins 2002). In practice, state capture takes different forms. It can be as much about companies influencing legislation through corrupt acts to amend it for their benefit as about specific cases where the boundaries between political interests and the private economic interests of public officials are ill defined (Karklins 2002).

The condemnation by civil society organisations of both the large-scale logging of precious woods in protected areas and the unprecedented increase in rosewood exports in 2009, followed by a range of political indiscretions, lifted the veil on the collusive network that existed between the state and operators involved in the illegal rosewood trade. However, the system was not identified and labelled as state capture. The collusive network discussed here does, however, illustrate the role played by 'captors' together with state actors – supported by various intermediaries.

State captors
Captors are groups that influence, through illegal payments and other corrupt practices, the formation and development of sector-specific laws, rules and regulations, in order to amend them to their advantage. According to Hellman and Kaufmann (2001), captors are generally newcomer to a given market. In

the case of the illegal rosewood trade in Madagascar, the captors are mostly concentrated in the Antalaha region (Annexure 2).

While local operators play a critical role by influencing decisions and the drafting of decrees and regulations relating to the rosewood trade, importers, who are Chinese for the most part, play a major role in funding local operators through regular purchases of containers of precious woods, paid for in cash. In parallel, the same Chinese importers are at the root of the corruption at central-government level, which ensures continuity of exports and enables them to circumvent certain sporadic legal restrictions (Randriamalala 2011).

It is worth noting that the Malagasy state issued a list of approved rosewood operators by means of a ministerial decree. Until September 2009 there were only 13 approved vendors, concentrated in Antalaha, but between September and December 2009, 23 vendors were authorised to export rosewood (Annexure 2.1). By 2013 the number of operators had reached 109 (Pellerin 2017).

Rosewood operators use different forms of technical and administrative fraud, with a view to circumventing certain legal requirements (Randriamalala and Liu 2010). Smuggling, especially by means of the undocumented shipping of containers or the shipping of undeclared containers, is also common practice within the sector.

In 2002 the proceeds derived from smuggling made up approximately 40% of the volume of exported rosewood (Stasse 2002). The origin of the harvested rosewood is an indication of its illegality. Since 2009 more than 60% of precious woods have been sourced from protected areas, including the famous Masoala National Park, located in the north of the country, and operation documents are seldom compliant with the applicable standards (Randriamalala and Liu 2010).

Numerous illegal practices, such as intimidation of officers, authorities and communities; violence; imprisonment of activists; looting of stock and felling outside of authorised periods and zones are systematically employed by logging kingpins. These practices are facilitated by a variety of intermediate actors such as local authorities, law enforcement, banks, shipping companies and brokers, who have played or play a role in the functioning of the collusive network (GW and EIA 2010, Randriamalala and Liu 2010).

State institutions
State capture has crept in and affected all three arms of the Malagasy government – the executive, the legislature and the judiciary – as well as implicating state officials in the various tiers of government from the national down to the local level.

Legislative and executive capture

An analysis of changes to and application of the legislation governing the sector reveals the influence exercised by rosewood operators over the executive and legislature, with the goal of regulating the sector in a way that is advantageous to the operators.

Despite the existence of legislation, the rosewood trade in Madagascar has gradually developed into an illegal business dominated by large-scale fraud and corruption and, in recent years, there have been few changes in the stakeholders operating in the sector (GW and EIA 2009). Some local operators even boast about having more than a decade of experience.

One of the striking features of Madagascar's precious-woods logging sector is the contradictory nature of the legislation that regulates it. While the principles and general conditions of forestry are set out in No 97-017 of 8 August 1997 concerning the revision of forestry legislation, a raft of particularly vague and contradictory implementation decrees and inter-ministerial ordinances, which contradict Acts that are higher up in the hierarchy of norms, was systematically adopted by certain ministers who came to power in the 2000s.

The main consequence of this legal imbroglio (Randriamalala and Liu 2010) is that it became impossible to apply the law and made it compulsory for operators to negotiate with the state by means of corruption and lobbying to allow them to conduct their business with the protection of the state. As Karklins (2002) notes, muddled and conflicting legislation creates a space that is conducive to corruption.

This legal haze manifests itself through a succession of ministerial decrees authorising and suspending the logging or export of precious woods, as well as decrees relating to technical aspects such as the size and shape of exportable wood. About a dozen ministerial decrees contradicting each other were adopted between 2009 and 2010. One of the major consequences of this confusing and contradictory legislation was that it favoured the interests of a small group of operators in the sector and facilitated fraudulent practices. For example:

- Article 6 of Inter-ministerial Decree no 003/2009 of 28 January 2009 stipulates: 'the inventory liquidation operation mentioned in Article 1 above must be completed by no later than 30 April 2009. After this date, no exemptions [to allow exportation] will be issued …'
- Decision no 338/09/MEF/MI of 30 July 2009 contradicts this decree: 'an export quota of 25 containers of rosewood is allocated to each of the thirteen operators featured in Ministerial Decree no 003-2009 ...'

These regulations, which appear restrictive and contradictory, seek to secure continued business for the operators, and the liquidation and export of rosewood stocks, in the face of international pressure to limit the logging of precious woods in Madagascar. The state thus finds itself in a position where, as a result of pressure from the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and civil society, it has to adopt measures to combat the trafficking of rosewood but must also continue to satisfy the interests of the operators.

The same applied in August 2011, when, faced with pressure from international donors, Rajoelina issued anti-logging decrees prohibiting all operations and cancelling all previous permits and legislation, and imposed heavy fines. Then, a few months later, in total contradiction of the legislation, the Minister of the Environment adopted a separate ministerial decree (0741/2012) authorising himself to distribute new export permits at his discretion (Randriamalala 2012).

The cooperation of some ministers is essential for the maintenance of the collusive network and the sector and to influence the legislation to benefit the captors. Ministers close to the sector and its operators were thus systematically appointed to key ministerial portfolios such as the Ministry of the Environment (EIA 2014). Their presence in government guarantees control by the captors within the state apparatus in order to ensure the implementation of rules to their advantage and enables the regime to consolidate its political base (Pellerin 2017) by focusing on influential operators.

The Minister of the Environment is a key player in the rosewood trade because the implementation of the state's policy with regard to the smuggling of precious woods is largely dependent on him and the sector is mostly regulated by decrees, orders and inter-ministerial decisions. People close to the operators have succeeded one another in different governments and various ministerial posts under the current regime since 2014 (EIA 2016; Pellerin 2017).

In 2014 the incumbent prime minister handed the newly elected president of the republic a list containing the names of some key players in the collusive networks surrounding illegal rosewood logging (*Madagascar Tribune* 2014). The list, which contained the names of operators and a state official who were involved in trafficking, was intended to enable the president to deliver on his promise shortly after his inauguration to 'personally lead the fight against rosewood trafficking' (http://observers.france24.com/fr/20140617-images-trafic-bois-rose-bat-son-plein-madagascar). However, no investigations or prosecutions have been undertaken by the new president.

Decentralised authorities

The collusion in recent years between operators and the state in relation to the logging of precious woods would not have been possible without the cooperation and protection of local authorities. In Madagascar's decentralised system the regional head is both a local representative of the state and the head of the regional executive. His/her activities are monitored closely by central government and he/she is appointed by government decree.

The presence of a regional head who maintains close ties with local precious-woods operators and approves sector-specific illegal practices was a key factor in ensuring that the collusion between operators and the state, in which the head acts as an intermediary, flourished. Therefore, in 2009, the president of the transition appointed as head of the SAVA region a candidate named Abdillah, who had been recommended by the cartel of precious-woods operators (Randriamalala 2011). Abdillah, who had a private stockpile of more than 100 tonnes of rosewood (Randriamalala 2011), was later elected deputy of the Vondrona Politika – Malagasy Miara Miainga (Malagasy people rise together – VP-MMM) Party in the 2013 legislative elections.

Collusion with other dignitaries from the north is also essential to ensure the continuity of the sector and its illegal practices and to guarantee local redistribution capacity to protect the operators. This is ensured in practice, as evidenced by the legal matter known as 'Bekasy'. In 2015 a technical advisor to the Minister of Public Safety was arrested for his alleged involvement in exporting rosewood. He was later released, however, following the intervention of a presidential advisor and pressure and support from public figures from the region (Pellerin 2017, EIA and AVG 2017). The existence of a support base at the level of the local authorities whose political and personal interests are intertwined is thus beneficial for operators in all aspects of their business – the transportation and storage of logs, protection and impunity.

Capture of the judiciary: A culture of impunity and intimidation

Corruption within and control of the judicial system by illegal rosewood operators, with the complicity of members of the executive, contributes to a culture of impunity for trafficking kingpins. The systematic failure of judicial institutions to apply existing laws and regulations ensures the continuity of trafficking operations.

In 2015 some alleged precious-woods trafficking barons were prosecuted as a result of the combined efforts of civil society and the Independent Anti-Corruption Bureau (Bureau Indépendant Anti-Corruption – BIANCO). However, the proceedings were quickly abandoned in spite of strong evidence of illegal activities on the part of the suspects (EIA 2016). Failure to apply the

legislation is also partly related to its contradictory nature and the existence of the inconsistencies mentioned in the previous section.

The most blatant and recent case of impunity took place in 2016. After Singaporean authorities seized a shipment of more than 30 000 logs of Madagascan rosewood, illegally exported on a merchant vessel in 2014, various high-ranking civil servants intervened in the legal proceedings to testify in favour of the accused. This was despite the fact that other high-ranking civil servants had previously refuted the validity of the documents that accompanied the shipment (EIA 2016).

In March 2017 the importer was convicted by the Supreme Court of Singapore (*L'Express de Madagascar* 2017a). The personal involvement of members of government in this affair indicates collusion between traffickers and the state, as well as the position of the new regime, which is still under the influence of members of collusive networks from the old regime.

Corruption within the judiciary takes place at different levels, so, when rosewood fellers are arrested and threatened with imprisonment, leaders of the collusive networks intervene. In cases where fellers are arrested or sentenced, they are usually acquitted or their sentences are reduced as a result of the intervention of a member of the collusive network who pays the judicial authorities for their release (EIA and AVG 2017; Bainier 2014).

Civil society members who speak out against illegal rosewood trafficking and the collusion between the state and operators in the sector are subjected to intimidation, arbitrary arrest and trials (Amnesty International 2017; EIA and AVG 2017). On some occasions when activists have condemned the protection of traffickers and the participation of public figures in trafficking the protestors have been imprisoned.

In general, the power and influence of groups involved in state capture means such capture is difficult to prove and combat (Karklins 2002). This is certainly the case in Madagascar, where there is little information about the collusive networks and the parallel state that has been put in place. Changes to regulations and the development of political events over time suggest that the influence exercised over the political sphere by precious-woods operators dates back to the early 2000s, before being institutionalised as state capture in the context of Madagascar's 2009 political crisis.

A COMPROMISED ELECTORAL SYSTEM

While the links between rosewood, election funding and campaign finance marked the 2013 electoral cycle, they had existed in Madagascar for a long time before that. As noted above, legislation governing the rosewood sector is characterised by fluctuations, contradictions and inconsistencies. An analysis of changes to the regulations since the early 2000s reveals that rules

are arbitrarily tightened or relaxed and specific authorisations are issued during election periods.

Rosewood logging was systematically facilitated through legislation or the issuing of specific authorisations prior to key elections. This was the case before the presidential and legislative elections of 2002 and 2013 as well as the 2006 referendum (Annexure 3). These periods of relaxation were immediately followed by others during which bans on operations and exports were put in place with the aim of funding the elections, but also to satisfy voters from operating regions. This phenomenon, which demonstrates the collusion between operators and the state, also reveals the source of a portion of the funding used for election campaigns, in theory for the benefit of the ruling party.

Furthermore, on two occasions – in 2013 and 2017 – the Malagasy state mentioned the possibility of selling stockpiles of rosewood but the fact that this plan coincided with pre-election periods aroused suspicions that led to an outcry on the part of civil society and CITES (EIA and AVG 2017; *L'Express de Madagascar* 2017b).

The state has not yet compiled an inventory of precious woods in accordance with the required standards and there is an increased risk that quantities of illegal logs may be laundered through the stockpiles scheduled for sale. There is also a significant likelihood that the proceeds of the sale might be used to fund the elections. There is, thus, an established link between the funding of elections and election campaigns and the rosewood sector.

It is important to note that there was no monitoring or regulation of the funds used for the 2013 election campaigns, undermining the transparency and credibility of the electoral process. This problem is a consequence of the gaps in national jurisdiction, which fails to provide for any monitoring of the proceeds and expenses of electoral campaigns or the capping of expenses. The final report of the Carter Center election observation mission highlighted the fact that voters' confidence in the 2013 process was significantly affected by a lack of transparency about the electoral processes.

> [T]he general lack of transparency relating to the campaigns, coupled with the refusal of both presidential candidates to publish the details of their campaign expenses, contributed to an opacity of the 2013 presidential and legislative campaigns, undermining Madagascar's obligations for democratic elections.

Direct access to the proceeds of the illegal rosewood trade and their use by candidates involved in the collusive networks, coupled with the lack of regulation of campaign funding, has contributed to the uneven playing field

for candidates and has restricted political competition, to the detriment of small parties and candidates with fewer resources. In the north-east of the country, candidates who were also rosewood operators were thus able to conduct campaigns characterised by extravagance and punctuated by vote buying (Anonymous 2017), which helped them secure their victory.

At the time of writing (April 2018) members of Parliament from the two main opposition parties, Miaraka Amin'i Presida Andry Rajoelina – Together with President Andry Rajoelina (MAPAR) and the I Love Madagascar (TIM – Tiako i Madagasikara) party of Marc Ravalomanana, had teamed up to protest against electoral laws they claimed could prevent some aspirants from standing in the forthcoming presidential elections and would mainly benefit the incumbent president.

Rallies that were initially planned to report to the population on the way laws were adopted by Parliament quickly turned into protests to demand the resignation of President Hery Rajaonarimampianina, who regarded them as an attempted coup. The series of daily protests and calls for general strikes led by the parties of Ravalomanana and Rajoelina may suggest the dawn of a new political crisis in Madagascar.

The international community – the African Union, SADC, the United Nations and La Francophonie – is in the process of dispatching representatives to contain the crisis and open dialogue among the politicians involved. In view of the link between the illegal rosewood trade and politics in Madagascar, a new political crisis would certainly create ideal conditions for the relaunch of illegal activity, and all that it entails, ahead of the 2018 presidential elections.

CONCLUSION

Ever since independence Madagascar has undergone cycles of political crisis which are, to a large extent, associated with the loss of legitimacy of the state (Rajerison 2013).

With rosewood-related cases having been a thorn in the side of successive governments since the transition and with the involvement of state actors in collusive networks, the state has been progressively criminalised (Pellerin 2017) and its legitimacy has been weakened. The collusive network of rosewood operators and the state, which Madagascans frequently liken to the Mafia, is very close to state capture. The hold of a powerful and corrupt group over the legislature, executive and judiciary and the gains shared between the state and the captors all point to the existence of state capture in Madagascar.

This phenomenon had major consequences for the transparency and credibility of the 2013 elections and, with the country about to enter a new election period, if the necessary steps are not taken and the legal gaps, in terms

of campaign financing, are not addressed, the 2018 process could be tarnished with the same shortcomings that were encountered in 2013.

The infiltration of some operators into the state apparatus after the 2013 elections resulted in the destabilisation of the political regime and indicates the nature of the dynamic within the collusive networks responsible for state capture. The result is uncertainty about the influence the operators continue to exert over the stability of the country.

The Malagasy state is trapped between international pressure to limit rosewood logging for both environmental and ethical reasons and the demands of the operators, whose business has been limited and whose dissatisfaction is mounting.

ANNEXURE 1
Exports of rosewood between 1998 and 2009
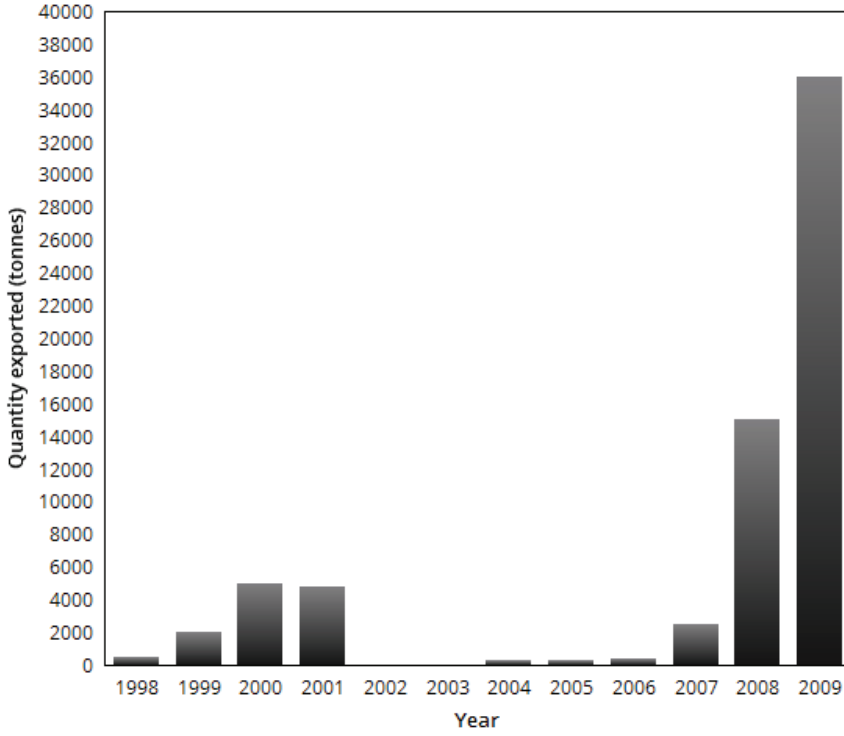
Source: Randriamalala and Liu 2010.

ANNEXURE 2
2.1 Rosewood exporters 2009[1]

Surname	Name	City
ANONA	*Etienne*	Antalaha
BEKASY	*Johnfrince*	Antalaha
BEMATANA	Marlin	Antalaha
BETSIAROANA	*Jean Galbert*	Antalaha
BEZOKINY	Christian Claude	Antalaha
BODY	Thierry	Antalaha
CHAN HOY LANE	Kara	Antalaha
DESIRE		Antalaha
GUERRA	William	Antalaha
LAISOA	Jean-Pierre	Antalaha
MALOHELY	Jean-Michel	Antalaha
MBOTIFENO SAO KUNE	*Edith*	Antalaha
NDAHINY	Grégoire	Antalaha
PATRICIA	Soa	Antalaha
RAKOTOARIVONY	*Nosiarivony*	Antalaha
RAMIALISON	Arland	Antalaha & Toamasina
RANJANORO	Jeannot	Antalaha
RASOANIRINA	*Joséphine*	Sambava
SAM SOM MIOCK	Eugène	Toamasina
SOA	Elia Rolaine	Antalaha
THUNAM	*Roger*	Antalaha
TOTOBE	*Eric*	Antalaha
SUPERWOOD	*Sarl*	Antananarivo

Source: Randriamalala and Liu 2010

[1] *Names in italics are newcomers who were not included in the decree No 003/2009 of 28 January 2009.*

2.2. Chinese companies named as recipients of shipments

Company	Location
CECIEC Tianjin International Trading Co., Ltd.	Tianjin
Chang Sha Wei Chu Seed Industry Ltd. Co.	Changsha
Changshu Jinbianf Craft Furniture Co., Ltd.	Changshu
China Artex Corporation Fujian Co., Ltd.	Fuzhou

China Jilin Forest Industry Group Import & Export Co. Ltd.	Dalian
China National Forest Product Industry Co. Ltd.	Beijing
China Tushu Shanghai Pudong Imp. & Exp. Corporation	Shanghai
Dalian Rising International Trading Company	Dalian
Dalian SK International Freight Forwarding Co., Ltd.	Dalian
Dalian Yulin Imp & Exp Co. Ltd.	Dalian
Dongguan Silver Dragon Commercial Co., Ltd.	Dongguan
Foshan Everlasting Enterprise Co. Ltd.	Foshan-Guandong
Foshan Nanhai Guicheng Youway Co., Ltd.	Foshan
Guangzhou Peijia Imp & Export Trading Co., Ltd.	Guangzhou
Herowise Engineering, Ltd.	Hong Kong
HH International Trade Co., Ltd.	Tianjin
High Hope International Group Jiang Knit Wear & Home Textiles Imp & Exp Corp Ltd.	Nanjing
Jiang Su Guotai International Group	Zhangjiang City
Jiangsu Skyrun International Group Co., Ltd.	Zhangjiang City

Source: GW 2010

ANNEXURE 3

Timeline of events influencing the rosewood trade

Very rough approximation of relative logging levels in the northeast

impeachment, later overturned
logging and export ban
election
selective authorisations
Logging and export ban
selective authorisations
export authorisation
export ban
export ban
election
export authorisation
salvage logging permits issued
election followed by political crisis
export ban
salvage logging permits issued
impeachment folowed by election
election
political crisis

Rajoelina · Rajoelina · Ravalomanana · Ratsiraka · Zafy · Ratsiraka

1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016

Source: Anonymous 2017

STATE CAPTURE AND ELECTIONS IN ZIMBABWE

Derek Matyszak

ABSTRACT

In order to win the 2013 elections without overt violence and malfeasance President Robert Mugabe and his ZANU-PF Party used the capture of key institutions of state to subtly manipulate electoral outcomes at both national and constituency levels. The latter was most evident in the case of Mount Pleasant constituency, previously thought to be a safe seat for the opposition, where the outcome was determined through a combination of the efforts of the Zimbabwe Electoral Commission, the security sector and the courts. The registrar-general, at the behest of the security sector, unlawfully registered thousands of ZANU-PF-voting security sector personnel in the constituency, with the courts facilitating the scheme, brushing aside legal actions which would have exposed the constituency stuffing.

INTRODUCTION

Elsewhere in this book state capture is regarded as performed by individuals or organisations and aimed at shaping the rules of the game to their advantage, through the illicit, non-transparent provision of private gains to public officials with the intention of systematically controlling state institutions. Because of the conflation of state and ruling party (the Zimbabwe African National Union-Patriotic Front – ZANU-PF), Zimbabwe demonstrates a peculiar instance of this.

The result has been described as the 'Zanuisation'[1] of the state, and comparisons with National Socialism are neither far-fetched nor without traction (Scarnecchia 2006). Through a powerful executive presidency and a highly centralised system of governance, the appointment of public officials is closely controlled to ensure that ruling-party loyalists pervade the

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1   While the words 'Zanuisation' or 'Zanufication' appear frequently in the literature on Zimbabwe there does not appear to be a comprehensive analysis of this phenomenon, or what precisely is meant by the term. It is, however, generally understood to refer to a hierarchical and authoritarian style of governance; one in which ZANU-PF controls all institutions of state and other levers of power by placing ZANU-PF loyalists in key structures. There have been analyses of the Zanuisation of specific institutions, such as the military (Rupiya 2013).

establishments of all key institutions of state, including those that are formally independent under the country's Constitution.

Thus, in Zimbabwe, the capture is by an organisation, the ruling party, and the gain for the officials is the appointment to public office itself. Pre-existing loyalties, rewarded through an elaborate patronage network, and the rent-seeking opportunities provided by these appointments, result in state institutions producing outcomes intended by ZANU-PF as part of their regular functioning, without the need for further intervention.

The system is best conceptualised by considering the institutions of state as parts of a machine which produces desired outcomes for ZANU-PF as the beneficial owner.[2] The public officials within these institutions are the cogs in the machine, moving in a preset manner determined by the cogs ahead of or behind them, and which are greased or replaced as required.

Elections and the judicial component of the machine provide a vital insight into the processes that reproduce this system over time. The party and state captured the judiciary and made it a part of the machinery in several coordinated attacks on its independence after 2001. The removal of unsympathetic judges from the bench and executive control of judicial appointments ensured the judicial component of the machine worked as required.

This chapter demonstrates the functioning of this machine through a specific and empirical case study arising from Zimbabwe's general elections in 2013. It details how a parliamentary seat, regarded as a safe seat for the opposition, was won by ZANU-PF. The win was manufactured by three components of the state machinery: the security sector, the elections management body and the judiciary. The first was the primary driver, the second the implementer and the third coated, polished and ensured the finished product was free from overt blemish.

In the 2013 elections ZANU-PF aimed to redress the constituency losses of 2008. The party planned nationally, but also had customised strategies for particular constituencies. ZANU-PF had targeted five seats in Harare Metropolitan Province (Bulawayo24 2013). One such seat was that of Mount Pleasant, a seemingly invincible safe seat for the opposition. Mount Pleasant was identified as vulnerable because, despite the fact that it is in an opposition stronghold, the presence of police depots allowed the constituency to be stuffed with police officers who could be relied upon to vote for ZANU-PF because of the Zanuisation of the force.

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2   The November 2017 military intervention in Zimbabwe, which resulted in the ousting of President Robert Mugabe, was essentially a factional contest for the beneficial ownership of the machine. With the military describing themselves as the 'stockholders' of ZANU-PF and backing one of the factions, their intervention to protect the benefits of ownership should have been unsurprising.

SETTING THE ELECTION DATE

At least by the end of March 2013, and probably well before then, in stark contrast to the MDC formations, ZANU-PF appeared to have done the groundwork it felt necessary and was fully prepared for an election. At the same time, the party and its president were rankled by considerable pressure from the Southern African Development Community (SADC) and South Africa to implement the electoral reforms believed necessary to conduct a free and fair poll, and which had been set out in an agreed 'roadmap' (*The Standard* 2011).

These factors suggested that an early poll would be to ZANU-PF's distinct advantage. However, a natural reading of the Constitution indicated that the elections did not need to be held until the end of October 2013. Since President Robert Mugabe had already made his desire for an early election well known (Southall 2013), when an urgent application (*Jealousy Mawarire v Robert Gabriel Mugabe*) was brought to compel elections before 29 June, the mandatory date for the dissolution of Parliament, many people believed that the applicant had been put up to the task by ZANU-PF. The purpose was to obtain judicial cover for the early election date and for what would be seen as a snub to SADC (*Financial Gazette* 2013).

The court upheld the application. To do so, it was necessary that it violate basic rules of grammar when reading the relevant constitutional provision and, by the court's own admission, treat colons as inserted where none was intended. Having created two possible interpretations of the provision in this manner, the court rejected the one which it held created an absurdity – the supposed absurdity being that government would continue without a legislature. As the minority judgement pointed out, there is ample precedent in other jurisdictions for a break in the convocation of Parliament – even for the five months which would result from the alternative reading. The court thus found an absurdity where none existed, to resolve an ambiguity it had created (*The Zimbabwe Independent* 2013).

However, statutory timelines rendered it impossible to hold elections before the dissolution of Parliament on 29 June 2013. To 'restore legality as soon as possible', the court held that polling must take place by 31 July. The judgement was heavily criticised by the legal community and others (Veritas 2013; Matyszak 2013a; Vollan 2014). Furthermore, the 31 July date still meant that there could be no simultaneous compliance with statutory and constitutional deadlines.

THE COURT ORDER AND LEGISLATIVE CHAOS

The court's failure to consider mandatory timelines set in the Electoral Act resulted in a succession of illegalities (Matyszak 2013b).

For the purposes of the election it was a constitutional requirement that a 30-day intensive voter registration period be conducted and that there be a 30-day period for the inspection of the voters' roll (Constitution 2013: Sixth schedule, para 6(3)). As the Electoral Act then stood, voter registration had to end the day before the Nomination Court sat, and the elections themselves could be held no sooner than 30 days after nomination day. The cumulative effect of these provisions was that there had to be a 90-day period between the start of the intensive registration period and the election. Registration would have to commence on the day of the court ruling to meet these requirements and the constitutional provision read to mean, egregiously, that inspection of the roll would take place concurrently with the 30 days of registration.

Despite this difficulty, the Zimbabwe Election Commission (ZEC), announced that it was fully prepared to conduct the elections (*Newsday* 2013) and scrambled to start the intensive registration period. However, it was only able to start the process on 9 June. As a consequence, the Nomination Court could not sit before 9 July if registration was to be done over 30 days and to end before nomination day, and the election, which could not be held less than 30 days later, could not be before 9 August 2013.

Instead of ZEC approaching the Constitutional Court to point out that the date did not conform to extant legislation, to preserve the precipitate election date the remedy adopted was to change the electoral law. The problem for ZANU-PF was that it did not have the necessary majority in Parliament to do so.

There was an additional difficulty. The period between the presidential proclamation of the election and polling day could not be shorter than 44 days. The proclamation had to be issued post haste. But once the proclamation was gazetted the Constitution proscribed any further changes to the electoral law. And the electoral law had to be changed to accommodate new requirements demanded by the Constitution, such as provisions (re)introducing elements of proportional representation.

The solution adopted by Mugabe was to bypass Parliament. He purported to deploy legislative powers granted to him under Chapter 10:20 of the Presidential Powers (Temporary Measures) Act to effect the requisite changes to the Electoral Act by presidential regulation (SI 85 of 2013), including a provision that voter registration could continue beyond nomination day.

However, the Constitution provides that elections must be conducted under an 'Act of Parliament', not presidential regulations, and Para 2(2)(c) of the Presidential Powers (Temporary Measures) Act itself stipulates that it may not be used in this manner. The elections thus proceeded in terms of an electoral law which was invalid – a direct consequence of the Constitutional Court ruling setting the early election date to accommodate Mugabe and ZANU-PF.

VOTER REGISTRATION

Although Zimbabwe's 2013 Constitution places responsibility for voter registration solely in the hands of ZEC, for purposes of the 2013 elections 'sunset' provisions (Constitution 6th Schedule, in casu, para 6(2)) provided that the Registrar-General of Voters, Tobaiwa Mudede, who had demonstrated his pro-ZANU-PF bias in past elections, would remain responsible, 'under the supervision of the Zimbabwe Electoral Commission', for registering voters (Johnson 2011: ix; Matyszak 2014a: 18). ZEC adopted the same approach to voter registration that it had taken in 2008. In violation of the Constitution, it abjured its duty to supervise the process.

Mudede, who was left in full control of the registration process by ZEC, connived with the commissioner-general of police and military officials to stuff Mount Pleasant constituency with police and army officers. A subsequent examination of the constituency roll,[3] which was to form part of an electoral petition challenging the results, revealed that 9 419 police and army officers were unlawfully registered in the constituency in 2013. By the time registration closed some 35% of those who had registered in the constituency were listed against security sector addresses and the voter population exceeded, by some measure, the number of eligible voters resident in the constituency, as indicated by the census of the preceding year (Matyszak 2014a).

Zimbabwe has a single-member, constituency-based first-past-the-post-system for election to 210 seats in a 270-seat legislature. It is thus a requirement of the Electoral Act that voters register in the constituency in which they are resident, a requirement that was clearly violated by the security sector personnel, with the assistance of the registrar.

CONCEALING THE FRAUD

Had ZEC complied with electoral law, this otherwise blatant instance of constituency stuffing would have readily been detected before the election through an audit of the roll. The audit should have taken place during the 30-day inspection period provided for by the Constitution. As noted, the truncated election period required that the inspection period run concurrently with the registration process. The final version of the roll was thus unavailable during the inspection period, as registration was still ongoing, considerably reducing the value of any inspection.

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3   The analysis was possible because the hard copy of the roll for the constituency had by then been converted into a soft copy using Optical Character Recognition software. Information to this effect was supplied to the author by those involved in the process at the time of the petition.

After registration ended on 9 July 2013 ZEC connived with the registrar-general of voters to block access to the roll so that it could not be audited. With 31 594 entries in the constituency roll for Mount Pleasant any audit would have had to be conducted electronically. Section 20 of the Electoral Act requires ZEC to keep electronic copies of the constituency and ward rolls. The commission did not comply with this statutory requirement and the registrar-general had sole custody of the rolls, making it impossible for ZEC to meet its statutory obligation to supply the electronic version on demand, even if it had wished to do so.

Regular requests by the Movement for Democratic Change-Tsvangirai (MDC-T) to see the rolls were repeatedly frustrated by ZEC officials, acting in collusion with the Office of the Registrar-General (Matyszak 2014a 19). Rather than exposing Mudede's failure to release the roll, the chairperson of ZEC, Justice Rita Makarau, went to inordinate lengths to cover up his unlawful behaviour.

On 30 July 2013 the ZEC chairperson declared at a press conference that the commission was ready for the poll the following day. Advising candidates to collect hard copies of the roll at this late stage, not from ZEC, as the law requires, but from the registrar-general's office, Justice Makarau said that 'due to logistical challenges' the office 'might not be in a position to issue the electronic copies' (*The Herald* 2013b).

Justice Makarau was unable to explain how hard copies could be made available, but not the more easily produced electronic version. The question was referred to Mudede, who refused to answer (Matyszak 2014a: 19).

The 'logistical challenges' claim was patently false. On the same day as the press conference a non-governmental organisation (NGO), Zimbabwe Lawyers for Human Rights (ZLHR), had brought an urgent application to the High Court, demanding that ZEC supply the electronic copy of the roll (*Biti v the Zimbabwe Electoral Commission*). ZEC had responded by asserting that it was unable to supply the roll because the registrar-general's '[computer] system was down'. The registrar-general had proffered the same excuse when refusing to supply the electronic copy of the roll ahead of the elections in 2008.

Presumably aware that a claim of the same supposed technological failure would be met with some scepticism, Justice Makarau had resorted to the vague claim of 'logistic challenges'. Furthermore, the assertion that there was a computer fault would lead to a demand for explanations of why there was no backup copy of the roll or, if there was, why that could not be supplied.

ZEC offered no explanation as to why it was the registrar-general who had the electronic version, not ZEC, as required by the Act. The court failed to interrogate these issues in adjudicating the ZLHR application, merely

ordering that the roll should be supplied when the 'electronic equipment becomes operational'.

Well before this, the MDC-T candidate for Mount Pleasant, Jameson Timba, had also made repeated requests for the electronic copy of the roll for the constituency. Mudede refused to supply it, again claiming that only a hard copy was available. When, in the face of Timba's persistence, an electronic copy was issued in June 2013, large segments of the data were missing, rendering it useless for auditing purposes, as was undoubtedly intended.

Unable to obtain a full electronic copy, Timba painstakingly scrutinised an (unfinalised) hard copy for anomalies (Timba 2013: 40). Although he could not then detect the full magnitude of the constituency stuffing, it was so extensive it was apparent even from the visual inspection of the hard copy. Timba wrote to the chairperson of the commission accordingly. The response was that if he had a problem with any entry he should proceed in terms of the Electoral Act, which required that he file separate objections to each of the several thousand entries he wished to have removed. Furthermore, in terms of the Electoral Act, no objection of this nature may be made less than 30 days before an election and the chairperson thus knew, or ought to have known, that this time limit had already been reached (Timba 2013: 42).

In view of ZEC's constitutional obligation to ensure that elections are conducted freely and fairly, the commission should have conducted an investigation, but nothing was done. The security sector personnel stuffed into Mount Pleasant constituency remained there. During the hearing of the election petition the chairperson defended her stance, stating that she did not have the power to remove entries from the roll (Veritas 2014a).

SECURING THE POLICE VOTE

In 2013 specified police officers were entitled to cast 'special votes' ahead of polling day. ZEC, 'relying on information supplied by the police' (*Newzimbabwe* 2013), accepted 63 268 applications for special votes (*The Herald* 2013c), which was stated to be the entire complement of the force and auxiliaries.

However, being a member of the police force was a necessary but not sufficient condition for the granting of a special vote. The applicant also had to be someone who would be unable to cast a vote on election day because he or she was assigned to duty outside his or her constituency. In accepting applications from the full complement of the police force, ZEC had, implausibly, to believe that all members of the police force would be outside their constituencies on election day.

In March 2008, it may be noted as a useful contrast, ZEC issued only 4 350 such ballots (ZEC 2008: 28) for the entire security sector. The consequence of

granting special votes to all police officers was that all the officers unlawfully registered as resident in Mount Pleasant would cast their vote through this process.

THE PLOT THREATENS TO UNRAVEL

Ironically, the concertinaed electoral timetable placed the scheme to capture Mount Pleasant in jeopardy. The timelines set by the Electoral Act, and the 31 July election date, left ZEC only 14 days to deal with the highly complex issue of special votes, which required preparing customised voting envelopes for each of the more than 63 000 applicants. As a result, it was impossible to complete the logistical arrangements for the special vote or to conduct balloting as required by law.

ZEC blamed the logistical failure on the fact that the printing of ballot papers had been delayed, saying the delay had been caused by appeals the MDC-T had brought against the ruling by the nomination courts (*The Herald* 2013d). The real cause lay in the foreshortened electoral period.

It is an offence in terms of the Electoral Act for any person who has been granted a special vote, whether it has been exercised or not, to vote on Election Day. When 26 160 police officers failed to cast their special votes; votes which could prove essential to ZANU-PF's strategy to capture Mount Pleasant, ZEC moved quickly to rescue the situation.

It immediately filed an application with the Constitutional Court, requesting that those granted a special vote should be allowed to vote on election day, notwithstanding the provisions of the Electoral Act and notwithstanding the fact that the special vote should only have been granted to these officers precisely on the basis that they were unable to vote on that day. This latter fact passed without comment by the Constitutional Court, which speedily granted ZEC's application.

POLLING

Although, through malfeasance, ZANU-PF had already ensured that it was at a considerable advantage before polling even began, further electoral fraud took place on polling day itself. Several ZANU-PF supporters were found in possession of forged voter registration slips (Matyszak 2014a: 27) and anomalous ballot tallies strongly indicated extensive fraudulent and multiple voting (Matyszak 2014b).

In Mount Pleasant, police officers who appeared to have ink on their fingers were allowed to vote (again) by ZEC officials, who readily accepted the excuse that the purple stain was boot polish (Timba 2013: 108). Inexplicably, the ultra-violet machines previously used to detect traces of silver nitrate

contained in the ink into which each person who has voted is required to dip his or her finger, were absent from all polling stations for the 2013 elections. The 'boot polish' excuse could not, therefore, be tested (Veritas 2014a).

THE SUCCESSFUL IMPLEMENTATION OF THE SCHEME

Mount Pleasant has two wards, 7 and 17. The majority of those with security sector addresses were registered in ward 7. Table 1 shows the election results.

Table 1
Election Results Mount Pleasant

	MDC-T	ZANU-PF	Others & Rejected	Total
Presidential				
Ward 7	3 915	7 780	263	11 956
Ward 17	3 625	2 521	168	6 314
	7 540	**10 301**	429	**18 270**
National Assembly				
Ward 7	3 605	7 797	547	11 949
Ward 17	3 290	2 536	485	6 311
	6 895	**10 333**	1032	**18 260**
(Compare NA, 2008	*3 875*	*1 738*	*1 578*	*7 191)*
Local Authority				
Ward 7	321	1 725	45	2 091
Ward 17	3 687	2 496	68	6 251
	4 008	**4 221**	113	**8 342**

Source: Compiled from official election results

The furore around the special vote and the importance to ZANU-PF of making sure the police exercised their vote is readily apparent from the results. Without this vote, ZANU-PF's confidence that it would capture the seat would have been greatly diminished.

The table also shows a significant discrepancy in the polling returns. With three polls taking place simultaneously, each prospective voter was issued

with three ballot papers. Voters were not given the option of casting a ballot in only one or two of the elections, they had to vote in all three if they chose to vote at all. It is also an offence to remove a ballot paper from a polling station (Section 85(1)(d)).

Table 1, however, shows a disparity of nearly 10 000 votes between the numbers for the presidential and parliamentary elections on the one hand and those for the local government seat on the other. The numbers for all three should match. The question thus arises as to how the discrepancy came about and could have been answered by an inspection of the election residue – something which, as will be seen, ZEC, aided and abetted by the courts, resolutely resisted.

THE MOUNT PLEASANT ELECTION PETITION

Jameson Timba, seeking to challenge the result of the Mount Pleasant election, lodged a petition with the special Electoral Court established for the purpose, with the bench comprising judges chosen by the chief justice (Section 162(1) of the Electoral Act). Numerous hurdles confront any person bringing an election petition. Inordinately complex regulations around the process are combined with petty requirements of uncertain purpose. Of some 101 electoral petitions challenging constituency results filed with the court in 2013 only one was heard. The court adopted an inflexible approach whereby a petition would be held fatally defective for the slightest deviation from the rules of court, regardless of how inconsequential or lacking in prejudice to a respondent.

In order to give effect to the requirements of verifiability and transparency in elections demanded by the Constitution, the court should have applied a liberal rather than a narrow approach to the rules. Timba's petition, however, had been meticulously prepared and was without procedural fault. However, to prove many of the assertions in the petition, he required access to the electronic version of the voters' roll.

To this end, he brought an interlocutory application, an application once again opposed by ZEC. The application failed. The judge referred to the court order issued pursuant to the earlier application for the electronic copy of the roll brought by ZLHR. That order, the judge noted, stated that the roll was to be supplied when the electronic equipment was operational. And Timba, the judge ruled, had not proved that the equipment was now operational and was not entitled to the roll until he did so. In her testimony on the issue during the petition hearing, Justice Makarau commented cynically that since neither candidate had been given the electronic copy both had been 'equally disadvantaged' (Veritas 2014a).

Timba also sought to examine the election residue from the poll. Inspection of the ballot counterfoils and ward rolls would have explained, inter alia, the discrepancy in vote tallies there and removed the suspicion that some police officers granted special votes had voted twice in the constituency.

Rather than welcoming the transparency that inspection of the residue would bring, ZEC opposed the application. The basis for the opposition was that the inspection could not be allowed as, since the elections were harmonised, inspection of the residue for the constituency polls necessarily would involve sight of the residue for the presidential poll, and that was not permitted, it was claimed, in the absence of authority from the Constitutional Court and an extant petition pertaining to the presidential poll – and such a petition had already been brought and dismissed.

This absurd argument was unquestioningly accepted by the court. Indeed, the court itself accepted that its finding was anomalous, as the effect was that petitioners were unlikely ever to be able to exercise the statutory and constitutional right[4] to examine election residue.

One example of the egregious effect of this interpretation of the law is that while the law required a detailed register of assisted voters to be kept, no one would ever be allowed to read it. The court avoided the obvious conclusion that its reading of the legislation was erroneous if it led to this absurd result. Instead, it stated that this was a matter requiring the attention of the legislature. There was no basis upon which the court's reading of the relevant sections of the Electoral Act in this way could be justified and links with any jurisprudential reasoning in the judgement were tenuous at best.

The election petition itself was also dismissed. The judge ruled that Timba was 'groping in the dark for non-existent reasons to reverse the outcome of the election' and that his petition was 'riddled with irreconcilable irregularities' since his electoral agents had not raised any of the allegations he had subsequently made.

THE PRESIDENTIAL PETITION

The various legal applications relating to the Mount Pleasant election demonstrated the irrelevance in the Zimbabwean context of jurisprudential theory about judicial decision making. Although the determinations were juridical in form, handed down by persons formally appointed as judges, they were devoid of juridical substance.

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4   Section 156(a) of the Constitution requires that the electoral process must be transparent and verifiable. On appeal, this absurd reasoning was rejected, but the inspection of the residue was still disallowed on the basis that, since the inspection would allow access to the presidential residue, candidates in that election should have been made party to the proceedings (*Timba v Chief Elections Officer*).

The judges presiding over cases with political implications differed from one another only in the extent to which they made an effort to cloak patently political decisions in the garb of jurisprudential patois. The function of the judicial component of the ZANU-PF machine, understood by the judicial officers without the need for specific instructions, was manifestly to ensure that the operations of the other components remained occluded.

The elections, commencing with a flawed ruling from the Constitutional Court, were neatly bookended with another of similar merit. A brief reference to this judgement suitably ends this chapter and illustrates the 'polishing and finishing' function of the judiciary.

Challenges to a presidential election are heard in the Constitutional Court. The Electoral Act, unusually, refers to the hearing being by way of trial. In legal terminology, the term 'trial' infers that oral evidence may be led to prove the claim. This was disallowed by the court. Efforts by Tsvangirai's lawyers to gather documentary evidence through an urgent application to inspect election residue from the presidential election were blocked when the court ruled that the application was not urgent – notwithstanding the seven-day time limit within which the petition had to be brought (*Tsvangirai v Chairperson of the Electoral Commission*).

Unable to present oral evidence or to gather key documentary evidence, Tsvangirai's lawyers sought to withdraw the petition, which is generally allowed, provided wasted costs are tendered to the opposing party.

What happened next was singularly revealing. The chief justice was not to be deprived of his prey. Relying on the unique nature of presidential petitions, he ruled that, unlike a regular court application, a petition in a presidential election, once brought, cannot be withdrawn. Without any evidence advanced by the MDC-T he proceeded to adjudicate the matter and issue an order.

In a presidential election petition the nature of the order which may be given by the Court is constitutionally restricted to only one of three options (Constitution Section 93(4)): to declare a winner, to invalidate the election or to make any other just and appropriate order. The Constitutional Court went well beyond this, not just holding that Mugabe was duly elected but also declaring that the presidential election was held 'in accordance with the laws of Zimbabwe and in particular with the Constitution of Zimbabwe and the Electoral Act' and 'was free, fair and credible and a true reflection of the free will of the people of Zimbabwe' (*Tsvangirai v Mugabe*).

The finding that the election had been held 'in accordance with the laws of Zimbabwe' and was 'free, fair, credible' and 'a true reflection of the free will of the people of Zimbabwe' was quite remarkable. The court did not engage in election observation and its finding did not accord with those of

most of those who did. In the absence of any evidence having been adduced by Tsvangirai there was nothing upon which the finding could hang. Even more remarkably, the ruling that the elections had been held 'in accordance with the laws of Zimbabwe' not only ignored the litany of violations of electoral law that had accompanied the poll, but also the Constitutional Court's own ruling, permitting ZEC to act outside of electoral law following the special vote debacle. The court indicated that the reasons for the ruling would be delivered 'in due course'. They never have been.

CONCLUSION

The polling in Mount Pleasant is arguably the most salient instance of institutional capture in the Zimbabwean electoral context, but possibly only because the continued occlusion of the voters' roll used for the elections of 2013 has rendered comprehensive analysis of other constituencies impossible. At a farewell dinner to mark his retirement, the former chief justice spoke at length and inappropriately of his great admiration for President Mugabe and referred to the fact that he used to 'brief him' on cases before the highest court (*The Herald* 2017). The statement was not revealing, it merely confirmed what was already known from the nature of the judgements, particularly in electoral matters, that had emanated from the Chidyausiku courts.

The instance of Mount Pleasant shows how the seat was captured through the coordination by three institutions of state – the electoral management body, the courts and the security sector. It was not necessary for the three to have met and schemed to determine the electoral outcomes. Each component, as part of the ZANU-PF machinery, was inherently aware of the role expected of it and structurally primed as part of a captured edifice.

The custodians of an institution of state, ZEC, violated electoral law and process, and did so with an impunity afforded by the courts and at the instigation of the security sector. The ability of the system to reproduce itself was also made evident. The capture of three institutions of state facilitated the capture of a fourth, the legislature, and restored it as a component of the Zanuised state machinery.

THE BATTLE FOR KENYA'S FOURTH ESTATE

STATE CAPTURE AND THE KENYAN MEDIA
DURING THE 2017 ELECTION

Nanjala Nyabola

ABSTRACT

With 63 licensed digital television stations and 139 FM radio stations as well as the largest-circulation newspapers in the region, Kenya has a reputation for having robust and relatively free media. But this reputation is owed more to the courage and determination of several prominent journalists in the 1990s than to any effort by the state to enable it. During the authoritarian Moi administration (1978-2002) journalists were detained and tortured and at least one has been assassinated under each of Kenya's four presidents. In recent years the combination of commercial pressure, self-censorship and outright intimidation by the state has compromised the integrity and standards of the Kenyan media. This chapter examines the relationship between the media and the political class. It highlights the contemporary history of media in the country and explores the impact of social media on media-state relations to underscore its disruptive effects as the main site of resistance to political capture. Finally, the chapter digs deeply into the 2017 election to underscore how the current administration uses the media to further particular political agendas and how social media allow members of the public to resist.

INTRODUCTION

During the three-day, multi-hour broadcast of the 2017 presidential election petition[1] a lawyer for the Independent Elections and Boundaries Commission (IEBC), Victor Nyamondi, told the court that the website www.public.iebc.or.ke was not the public portal the commission was required by law to use to keep voters updated on the progress of vote tallying. It was a startling admission. So startling, in fact, that the Chief Justice of the Supreme Court of Kenya

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1   In August 2017 Kenya's main opposition party, the National Super Alliance (NASA) coalition, filed a petition in the Supreme Court of Kenya challenging the results of the election and calling for a review of the process. The three-day court proceedings were broadcast live on three television stations in the country. On 1 September the court ruled in favour of the opposition.

made a rare intervention: 'So if it wasn't the public portal, then what was it?' Nyamondi did not have an answer.

The public portal was an issue because the numbers reported on the site were vastly different from the official results published by the IEBC. Moreover, Kenya's media used these 'statistics' in their content even though the managing editors of media houses had announced that they had journalists placed in every constituency tallying centre and therefore had access to raw electoral data (Odunga 2017).

The media could easily have reported numbers directly from the polling stations. Instead, they used the 'statistics', repeating them with alarming regularity – every 10 minutes at some point – reifying the impression that the incumbent, Uhuru Kenyatta, was winning by 1.5 million votes.

Yet less than a month later lawyers for the IEBC disowned the portal altogether. Were the Kenyan media misled, or were they part of a broader conspiracy to mislead voters and those observing the election? Why did they use these statistics even though they had another set at hand? Was the press intimidated into misleading the public?

BACKGROUND TO THE MEDIA

The term state capture broadly refers to the co-option of state apparatuses to further private social and economic interests. In modern democratic societies there is a presumption that the state works for the broader public good and is not beholden to private interests. State capture is more than a euphemism for corruption, it is corruption on a scale that prevents the normal functioning of state mechanisms, or corruption that inverts the logic of normal state operation to gear it towards specific private interests (see, generally, Hellman, Jones, Kaufmann and Schankerman 2009). The wide-ranging influence of Goldman Sachs on United States fiscal policy, or the ability of private commercial interests to shape that country's incarceration policy are examples of this undue influence.

In Kenya, after encouraging developments in the 1990s and early 2000s, there is increasing concern about a reversion to the rampant state capture of the 1970s and 1980s. Unlike these earlier periods, when the primary concern was about autocratic regimes, today the fear is manipulation of the legislative and political system to protect the economic interests of a socioeconomic class. Rather than a solitary culprit who doctors the entire system, it is fear of a network of interests colluding to capture the state.

Abuse of the legislature to facilitate state capture is evident in Kenya. Several retrogressive laws curtailing press freedom (eg, The Media Act 2012),

the rights of refugees and suspects (the Security Act 2015 and the Police Reform Act 2012) and the rights of women (The Matrimonial Property Act 2014) and other groups have been passed in the past 10 years, signalling a broader return to authoritarianism.

The legislature argues that these laws are intended to protect the public interest, but the result has been a shrinking of the democratic space in the country, increasing the influence and power of the executive to worrying levels and primarily protecting the economic interests of the patriarchal economic class.

The Kenyan media are in a peculiar position. On the one hand they are certainly victims of state capture, particularly through intimidation and legislation restricting press freedom. But on the other they are also co-conspirators, abdicating their hard-won role of keeping the government in check in order to protect revenues and access to politicians. They are not merely being captured, they are handing themselves over willingly, undoing their own reputation.

BETWEEN FINANCIAL AND POLITICAL RIGOUR: MEDIA AND POLITICS

The reputation of Kenya's media as robust and critical of the state was literally earned through the blood of several journalists, particularly in the pro-democracy era of the 1990s. However, it is easy to confuse financial robustness with robustness of content or political rigour.

In thinking about media in Africa, too often questions about political rigour are overshadowed by praise or concern about financial rigour. Kenyan newspapers and radio and television stations have been relatively profitable for more than a century. What varies wildly is their political rigour – their willingness and ability to speak directly to the issues affecting the public. The hunger to remain profitable has left the press vulnerable to manipulation by the state, allowing for state capture.

To understand the scale of the loss it is important to recall how Kenya's media earned such a strong reputation when East Africa has generally lagged behind the continent in this regard. It is equally important to stress that this chapter focuses on media that would be considered 'national', not the plethora of vernacular, local language or community-based outlets that have a slightly different relationship with the state but do not have the geographical scope of the national platforms.

George Ogola (2011) has described the contours of the country's media landscape since independence in 1963, highlighting the tug-of-war between state control and media freedom. Ogola argues that under the Kenyatta administration (1963 to 1978) the Kenyan media, at first willingly, then under

duress, positioned itself primarily as an agent for the development agenda. Criticism of the state, and especially of the president, was frowned upon and eventually punished, while the state itself developed media agencies like the Presidential Press Unit to offer politically friendly narratives.

The Moi Administration (1978-2002) began in much the same vein but was significantly disrupted by the attempted coup of 1982, which triggered a wave of repression and intimidation. The most vocal media critics of the administration were detained and tortured. For example, satirist and *Daily Nation* columnist Wahome Mutahi was tortured and detained for two weeks in 1986 (VOA News 2009).

Widespread crackdowns on private newspapers and pamphlets were common during this time, but so was the use of proxy companies to acquire decision-making stakes in the most profitable media outfits (Ogola 2011). However, rather than deter criticism, repression only intensified it, particularly after the privatisation of television and radio from 1990.

The Kibaki administration (2002-2013) also had a complicated relationship with the media. On the one hand the press was a natural ally of an administration that had ended 24 years of single-party rule. On the other, Kibaki – himself a long-serving minister under Moi – did more to permit state capture by private capital than any of his predecessors. Under his rule, local language FM stations owned by key allies proliferated, as did telecoms that facilitated social media connectivity (Ogola 2011).

Until 2006 privately-owned media were more concerned about losing customers to digitisation than about outright repression, but after the referendum on a new constitution the timbre of the interaction changed. After a 10-year reprieve the state and media were back on the warpath.

After 2006 private investment in the media by Kibaki allies increased dramatically. Through his Mediamax company the current president, Uhuru Kenyatta, bought significant shares in Kameme FM, the largest Kikuyu language radio station in the country, and other stations. These acquisitions increased the financial viability of the various media platforms but greatly compromised their political rigour.

This is the context in which social media became the main site of resistance to state capture. By 2007 more than two million Kenyans were living abroad and, after the violence that followed that year's elections, in which 1 500 people died and thousands more were displaced, Kenya's social media scene grew, as a large diaspora relied on it for information rather than on the less accessible traditional media. Eventually many Kenyans would shift to platforms like Twitter and Facebook and today the country has the second-highest number of both Facebook and Twitter users in Africa.

Facebook, the most popular social media platform in the world, started in Kenya in 2004 as a Harvard University-only connecting site (Boyd and Ellison 2007). There are currently more than five million Kenyan Facebook accounts. Facebook's main rival is Twitter, a microblogging site that started in March 2006 (www.twitter.com). In the past 10 years Twitter has been associated with a variety of notable political movements, among them the Arab Spring that swept across the Middle East and North Africa at the beginning of the 2010s, which is inextricably linked to the site (Howard et al 2011). Twitter is the second-most-popular social media platform in Kenya, with an estimated 700 000 subscribers, 250 000 of them active, and is the preferred space for political discourse online (*The Economist* 2014).

Although it is necessary to have to have a Twitter profile to create content, it is possible to consume content without a profile, automatically extending the reach of the website. Even those with a Twitter profile do not necessarily create content, many simply use their handles to follow various content creators and passively consume information, allowing the website to function as a chyron. This passive consumption is the main attraction for those who produce political content.

Social media in Kenya are arguably the most potent site for resistance to the capture of traditional media. One reason for this is their ability to respond immediately to unfolding issues and to the convergence of other entities – government, traditional media, international organisations, and so on – on these platforms. At the same time, social media have also amplified some of the dangerous political rhetoric that exists offline. A study of the 2013 general election found that hate speech was common around election periods and more common on Facebook than on Twitter (Ushahidi 2013).

The state has noticed the influence of social media on public opinion and has invested significantly in increasing its presence on these platforms, while developing laws and regulations to control online behaviour and content. The Presidential Strategic Communications Unit (PSCU) was established in 2013 to replace and perform the functions of the defunct Presidential Press Unit, whose role in the 1960s was to tell Kenyans about the good things that the 'father of the nation' was doing on their behalf.

At the same time, the state has repeatedly proposed regulations to control the digital space, including a licensing regime for information and communication technology (ICT) professionals similar to that of medical professionals (Library of Congress 2016). Still, social media remain among the most important political spaces in the country. Traditional media increasingly take story leads and cues from what is trending online – for example, the primetime show, 'the Trend', presented on television topics that were trending online.

MAPPING KENYA'S TRADITIONAL MEDIA

The rise of social media as a source of political information is a direct consequence of state capture of traditional media; capture that is facilitated by the underlying contours of the media landscape.

Almost all forms of contemporary 'media' – print (newspapers and magazines), radio and television – are present and active in Kenya. There are three national newspapers, of which the *Standard* is the oldest, followed by the *Nation* and the *Star* (formerly known as the *Nairobi Star*). There is also a regional weekly, *The East African*, several smaller papers like the *People Daily*, numerous smaller local language publications and several magazines, among them the *Nairobi Law Monthly*.

The *Standard* was founded in 1902 as a platform for Kenya's colonial community. After independence it became the government's loudest critic before it was allegedly acquired by the current and former presidents Uhuru Kenyatta and Daniel Toroitich arap Moi (Ogola 2011). The Nation family of newspapers (the *Daily Nation*, *The Saturday Nation* and the *Sunday Nation*) has the highest circulation figures in East Africa, with more than 600 000 copies sold daily and many more read but not paid for at roadside kiosks across the country. The Aga Khan, spiritual leader of Ismailia Muslims, is the majority shareholder in the Nation Media Group (NMG). The newspapers are owned by holding companies listed on the Nairobi Stock Exchange and many senior politicians are believed to own stocks. NMG also owns the *Daily Monitor* in Uganda and *The East African*, which is sold in all five countries in the region.

Both the Standard Group and the Nation Media Group expanded in the 1990s through the acquisition, first, of television stations and then of radio stations. The Standard Media Group includes Kenya Television Network (KTN), Kenya's first privately-owned television station, while the NMG runs NTV. In 2017 both KTN and NTV broadcast in Uganda but they have struggled to penetrate Tanzania owing to restrictions on broadcast content.[2] Despite their considerable head start, however, neither of these stations is the most popular in Kenya. That title belongs to Citizen Television, one of many in a family of television and radio stations belonging to entrepreneur SK Macharia through his Royal Media Group (RMG) (Geopoll 2017).

It was RMG's rapid expansion in the 2000s that prompted both NMG and the Standard Group to expand into radio. Today RMG owns 13 radio stations serving a variety of niche audiences, either by language or by age, collectively controlling the lion's share of Kenya's radio audiences (Geopoll 2017). Radio

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2   For example, the percentage of content that can be in English. The threshold for English-only programming is higher in Kenya than it is in Tanzania.

Citizen is the most popular, although local language stations like Inooro FM also attract significant audiences.

Another media group that forced the old guard to diversify is the Radio Africa Group, whose most popular station is Kiss FM, which claims to be the number one English language radio station in Kenya. It also owns Classic FM, which has the dubious reputation of being censured repeatedly for misogynistic content.

Radio Africa shook up the publishing scene in Kenya when it began to publish its own newspaper, formerly known as the *Nairobi Star* and today simply known as the *Star*. With its focus on political coverage and a reliance on blind items (stories in which events are narrated but individuals are not identified), *The Star* publishes political gossip that the more established newspapers will have nothing to do with, thus eating into its competitors' revenues. Royal Africa Group also owns a number of television stations whose viewership has increased dramatically since Kenya's digital switchover. These include Kiss TV and the Swahili language QTV.

Behind all this is the only truly national broadcaster in Kenya – the state-owned Kenya Broadcasting Corporation (KBC), which struggles to compete in this highly fragmented and divided marketplace. KBC has both a radio and a television presence, with both English and Swahili radio stations as well as a youth oriented station that broadcasts in the national patois, 'sheng'. KBC has always struggled for cultural relevance but, in the absence of proper funding from the state and in the face of the slick presentation of its competitors, its broadcasts often appear stale and disconnected. Still, because of exclusive licences to broadcast state-run events, it makes significant money from selling access to its networks to other stations.

International broadcasters are also present in Kenya, including, on radio, the BBC, which broadcasts across the country and online; Radio France International (RFI) in French, and numerous international television stations that broadcast digitally and on satellite. There are also a number of local language radio and television stations targeting niche audiences, which many blame for the proliferation of ethno nationalist hate speech (Rajab 2017). Despite this plethora of options, the major news source for Kenyans remains the 7 and 9 pm local news broadcasts in English and Swahili on both radio and television.

'ONLY FIT FOR WRAPPING MEAT': HOW DO WE KNOW THE MEDIA IN KENYA IS CAPTURED?

The quotation in the heading above comes from a speech given by President Uhuru Kenyatta at a political rally in May 2015, two years into his first term as the country's fourth president (*Daily Nation* 2017). For those monitoring

the diminishing space for press freedom and freedom of expression it was another indicator that the Kenyatta administration held the media in disdain and did not regard it as a valid interlocutor. The face that the state was no longer afraid that the media would perform their accountability function is proof of state capture.

This capture of the media in Kenya is a function of two elements – intimidation by the state and the media's willing concession of space. The use of force in state capture in the post-Moi era peaked in 2006. Prior to this, Kenya's media took full advantage of increased political liberation to sustain criticism of the government that had begun under Moi. However, in March 2006 the offices of the Standard Group were raided by a group of masked men who destroyed expensive equipment, intimidated journalists and set much of the building on fire.

Surprisingly, the government admitted that the masked men were police officers and that the attack was retaliation for unfavourable coverage of the administration (BBC 2006). Thousands of copies of newspapers were burnt and journalists' computers and camera equipment seized. Then Minister for Internal Security, John Michuki, famously said of the raid in an interview 'if you rattle a snake, you can expect to get bitten' (Freedom House 2012).

In 2012, just prior to the election, Freedom House ranked the press in Kenya as only partly free, given that in that year 28 journalists had been threatened or attacked by politicians – usually for reporting on corruption cases (Freedom House 2012). Two years later the same annual report noted the significantly constricted space for press freedom in Kenya, not just through self-censorship but also a general increase in threats to the press and media houses (Freedom House 2014).

Press freedom continued to deteriorate between 2013 and 2017. According to Freedom House, one media house received death threats for running a story about the suspicious death of a former government minister and leading politician, while coverage of the second-largest terrorist attack in the country's history (at the Westgate Mall) was muddied by a mixture of self-censorship and threats from the military and the state (Freedom House 2014).

Significantly, many journalists were threatened and intimidated for their coverage of the International Criminal Court (ICC) proceedings against Deputy President William Ruto, with one journalist feeling so intimidated that he was forced into exile (Freedom House 2014). The Committee to Protect Journalists reports that another journalist covering the ICC case was killed in 2015 (CPJ 2015). Intimidation is certainly present in Kenya, though it is not as publicly visible as it is in other parts of the continent. Furthermore, media have also been willing participants in their own capture, especially given the divergent interests of management and their reporters. Management is

interested in maximising profits and shareholder value, while reporters are interested in their professional survival. To date, the interests of management have triumphed.

By the 2007 election the relationship between the media and the government was fraught. The post-election violence gave the government an opportunity to scapegoat the media for the ethnic tension that fuelled the violence. Instead of refuting the claim, the media capitulated, focusing on conciliatory developmental coverage rather than biting political critique.

During this period there was a rapid increase in self-censorship. During the first week of 2008 every media house in Kenya featured the headline 'We Want Peace' – on the front pages of newspapers, in chyrons across television and in repeated news broadcasts. The press had internalised the criticism that continuous interrogation of political behaviour had contributed to the violence and that its role in maintaining peace in the country was to avoid criticising altogether.

In 2013 Raila Odinga ran against Kenyatta and William Ruto, both of whom had been implicated in the 2007 post-election violence. Although Kenyatta and Ruto had been on opposite sides and had both initially supported the decision to refer the Kenya situation to the ICC, after it became clear that the court would only pursue the six people the court felt were most responsible for the violence, excluding the president and prime minister, they quickly joined forces and positioned themselves against the ICC proceedings. Their campaign platform was based primarily on resisting the process.

Concerned about a repeat cycle of violence, Western diplomatic missions publicly offered their support for the ICC proceedings and, seemingly, for the opposition (Jaselow 2013). This led to charges of neo-colonialism that ultimately swayed the electorate and ushered in the 'Uhuruto' administration.

Almost as soon as it was sworn in the new administration used the law to control the press. In December 2013, mere months after his election, President Kenyatta assented to the Media Act (2013), which, among other things, created a government body with the power to punish journalists and media houses (*Daily Nation* 2013). The law proposed harsh fines for media houses and transferred control of the regulation and monitoring of press conduct from the legislature to the executive (*Daily Nation* 2013).

Similarly, in October 2015 Parliament passed a provision under the Parliamentary Powers and Privilege Bill that was variously called 'draconian' and 'punitive' in creating a new offence labelled 'criminal defamation of parliament' (Malalo 2015). Under this new law, media houses could face fines of up to half a million shillings or a two-year jail term for broadcasting content that is deemed defamatory of Parliament.

Yet the media continued to concede space. In July 2013 President Kenyatta and Deputy President Ruto hosted members of the Editors' Guild of Kenya at what was dubbed an 'introductory tea', that is, a tea during which the two would present their communication strategies to the media (KTN News 2013). This was the first time in the country's independence history that the media had been hosted at State House and the reason for the occasion was supposed to be to allow the media houses to lobby for changes to the Bill. Instead, the Bill was passed without amendments and a statement from Ruto at the time can be viewed as an ominous warning.

> We look at the media as a partner, as people who we need 'their voice' in order to tell their story. It may not be exactly in our words, it may not be exactly how we want it said, but we are sure that it will somehow be received.
>
> KTN News 2013

In fact, the 'partnership' proposed by Ruto turned out be the creeping influence of the government, and specifically the executive, over the press. After 2013 two high-level firings indicated that State House would be far more involved in the day-to-day running of Kenya's newspapers than it had been before.

In January 2016 Dennis Galava, editor of the *Saturday Nation*, wrote a lukewarm opinion piece in which he urged the president to rein in the rampant corruption that was bleeding the country's coffers dry (Allison 2016). Galava maintains that the call to have him fired was made by State House not by the editorial team, who would have reviewed his article before it was printed (Allison 2016). The government did not publicly respond to the criticisms, but Galava's departure signalled the unravelling of the détente between the executive and the press.

The second high-profile firing came some months later. In March 2016 long-serving editorial cartoonist Godfrey Mwapemba, also known as Gaddo, was fired from the position he had held at NMG for close to 23 years (Mwapemba 2016). Gaddo's cartoons have always been edgy – he even co-produced an exhibition of banned cartoons or cartoons that had been deemed too provocative for print. But he admitted in an interview that he felt that his fate was sealed after the victory of the Kenyatta administration in 2013 (Mwapemba 2016).

Gaddo argued that financial incentives had increasingly taken precedence over journalistic quality and integrity and, given that the government is the NMG's largest advertiser (ie, source of revenue), a clash between him and CEO Tom Mshindi was always on the cards. Unlike Galava, Gaddo was not publicly fired. Rather, he was slowly eased out of his role as he was offered

a paid sabbatical and, on his return, learnt that his contract would not be renewed (Mwapemba 2016).

There was also some major behind-the-scenes restructuring at the NMG. After more than 20 years of service the *Nation*'s editorial director, Joseph Odindo, under whose watch both journalists had produced their fiery content, was either fired or resigned (the facts have never been made public) and was soon announced as the managing editor of the rival Standard Group (*Business Today* 2015). Several lower-level editors and entire divisions were also fired from the struggling newspapers as they announced that they would be pursuing a 'digital first' strategy (*Business Today* 2017).

By this time, the media were significantly boxed in by the dual forces of self-censorship and increasing pressure from the executive and were less likely to engage in direct criticism of the government. The high-profile dismissals intimidated even the most seasoned and formidable journalists, and the timbre of political discussion in the country shifted accordingly. But the executive did not leave anything to chance.

In the lead-up to the August 2017 election a series of regulations was proposed to control the nature of content available to the public. On 27 July 2017 the National Cohesion and Integration Commission (NCIC), an independent commission established to oversee and facilitate increased cohesion among Kenya's many political and social groups after the 2007 violence, announced a raft of measures to control the production and distribution of social media content (Mumo 2017). These new regulations were supposed to update 2013 regulations on the use of mass texting, which had been blamed for spreading inflammatory messages that had contributed to the violence.

Under the new regulations (which have the force of law) Kenyans were only to produce social media content that was 'polite, truthful and respectful' and any content with 'tone and words that constitute hate speech, ethnic content and incitement to violence' would be subject to punishment. The rules also required all social media users to reveal their identities and political affiliations. In terms of the NCIC Act, the commission was empowered to impose fines of up to 1 million Kenya shillings (US$10 000), although the commission did not make clear how it would enforce the new regulations.

A few days later, on 30 July 2017, Cabinet Secretary for Information and Communications Technology Joe Mucheru announced that any media houses that announced results or exit polls pertaining to the general election would be censured or even shut down by the government (KTN News 2017a). This last threat was arguably the factor that guided Kenyan media into the trap that was their dismal performance during the 2017 election.

THE 2017 GENERAL ELECTION

The events of the 2017 election revealed the scale of and risks associated with the capture of the media in Kenya. First, throughout the election build-up period the national media ran several unverified stories that would undermine their own credibility and have a significant impact on the vote. For example, in July the opposition accused the government of planning to use the military to help secure the election (*Daily Nation* 2017a).

A few days after broadcasting a story about the alleged plot KTN covered a press conference by the opposition, who insisted that the officer who had first shared news of the plot had disappeared and his family had not heard from him for more than 24 hours (*Daily Nation* 2017a). Several print editions also carried the story on their digital platforms and it quickly went viral online, only to be refuted by the officer himself, who called a press conference to confirm that he was very much alive (*Daily Nation* 2017).

It is telling that the media quickly went public with the accusations without going through the basic steps of fact checking and verification. The press voluntarily ceded ground to power by failing to conform to basic standards of accurate reporting. More importantly, ignoring basic journalistic standards at such key moments fed into the state's strategy of undermining the opposition and the media's credibility. It primed consumers, both domestic and international, to dismiss any claims of foul play by the opposition, which was to have serious consequences.

Secondly, traditional media also participated in crude attempts to manipulate the public that were easily refuted by groups on social media. For example, on 6 August 2017, two days before the election, the *Standard* carried three different headlines, depending on where the newspaper was sold. In areas where Kenyatta was dominant, the headline read 'Uhuru Smells Victory'. In areas where Odinga was dominant, it was 'Raila smells victory'. And in battleground regions, the newspaper headline was 'The choice is yours'.

These contradictory headlines were noted by the robust social media. Yet there was no apology or acknowledgement from the traditional media, only reifying the perception that the press was partial. Lack of trust erodes consumer confidence, which undermines sales, and falling sales increase reliance on advertising revenue and, by extension, on the state, the largest advertiser. Poor journalistic practice is therefore self-destructive.

Thirdly, as stated in the introduction, there was the scandal about 'provisional results'. The final result of the 2017 election was announced at about 9.30pm on 11 August 2017 (Dwyer 2017). In the days leading to the announcement – between 8 and 11 August – all television stations in the country published information and analysis of data from the public.iebc. or.ke website.

The IEBC made no effort to rectify the information announced on these sites, so the public took it for granted that the information was true. But those paying attention to the numbers quickly noticed several disturbing and statistically improbable trends (Epstein 2017). I, personally, was monitoring the statistics on rejected votes and, by 11 August, the public portal was reporting that there had been 404 883 rejected votes, while the final numbers published by the IEBC reflected only 81 000.

As opposition and civil society groups began to point out the flaws in the election they met unexpected resistance in the form of hurried interim reports from various election observer missions that insisted that challenger Raila Odinga should concede defeat in order to spare the country potential anarchy. This was because, as mentioned, the many false claims in the lead-up to the election had primed the public for disbelief.

The head of the Carter Center observation mission to Kenya, former US Secretary of State John Kerry, even issued a statement saying, 'I lost an election, I know how it feels but we have to move on' (Van Heerden and Said-Morehouse 2017). Odinga was only vindicated by a stunning victory in the Supreme Court, which declared the 11 August result null and void.

During a Senate hearing on election laws held in January 2017 S K Macharia, proprietor of the Royal Media Group, testified that the media had monitored every election since 1992, that he personally had all the results for all elections since, and that Raila Odinga had, in fact, won the 2007 election (Odunga 2017). KTN had announced that it was running an exit poll during the election, only to say later that it had failed to ask any voters how they had voted (KTN 2017a).

The media's decision to use the IEBC's official figures was conscious and deliberate.

Kenya's election law requires that that at the end of tallying at the polling station final results must be recorded and posted in a public place at the Constitutional Tallying Centre. The IEBC maintained that it had based the final election result on the aggregation of these forms, even though by 14 August it still could not provide almost 10 000 forms.

The mainstream media were reluctant to cover this story. It was private citizens on social media who began sourcing the forms and checking them to see whether the results affirmed those on the public portal. Many cases of fraud were identified in this way, underscoring the increasing role of social media in keeping traditional media honest.

Finally, the most egregious proof of capture of the media during the 2017 presidential election was the partial coverage given to the protests that erupted after the announcement of the results. According to the Kenya National Commission on Human Rights, by 15 August 24 people had been

killed by the police in opposition strongholds during inexplicably violent security operations (KNCHR 2017).

For several days the traditional media refused to cover the story, which broke on social media platforms because of reports from people who had survived the attacks. Videos of police marching through informal settlements firing indiscriminately into occupied houses and including the disfigured bodies of young men and women shot at point blank range circulated across various social media platforms, particularly WhatsApp.

Once again, it is unclear whether the local media chose not to cover this violence or whether they were asked not to. The truth is probably somewhere in the middle. On 12 August, as he tried to go into Kibera to cover police violence there, Kenyan journalist Duncan Khaemba was detained, allegedly for failing to have a licence for his bullet proof gear (*The Standard* 2017).

International media gained access to many of these platforms and covered the protests, but the attempts to curtail their coverage were similar to the efforts deployed against the local press. A few days after the violence erupted, the Cabinet Secretary for ICT, Joe Mucheru, issued a circular inviting all members of the international press to his office for 'an informal consultation' which turned out to be an informal inquiry into their work (Personal communications).

CONCLUSION

Social media and traditional media are fundamentally different platforms, designed for different functions and working towards different goals. They cannot be held to similar standards when the former is primarily a mechanism for amplifying content created by the latter, rather than producing content of its own. Similarly, the contours of social media almost perfectly replicate the contours of offline society and the platforms suffer from the same challenges.

Notably, Kenya's social media struggle to control the production and dissemination of 'hate speech', that is, language that abuses people based on their social or political background and is intended to incite physical or psychological violence. If people are mysogynistic or ethno-nationalist offline, they will be the same online.

Regardless of these challenges, the space created by social media that allows individuals to interact with and confront institutions that would otherwise be inaccessible offline gives them a political potency that played out to startling effect during the 2017 election. It is notable, for instance, that the managing editor of the *Nation*, Linus Kaikai, tweeted his dismay about the murder of six-month-old Samantha Pendo by the police before his own media house covered the story, but days after the story had gone viral on social media.

This gap between what *can* be done by traditional media and what is *actually* being done hints at the extent of state capture of traditional media and the influence of financial or political interests on the way in which content is created and disseminated on these platforms. Kenya's national media face threats of outright violence and intimidation that trigger self-censorship but also concede space willingly, given the prevalence of brown-envelope journalism (accepting bribes to run favourable coverage) and the pressure to remain profitable above all else (Gathara 2017).

Social media are not yet, and may never be, a perfect substitute for traditional media, given that they replicate and amplify many offline social problems like violent ethno-nationalisms and misogyny. But the experience of blatant misinformation spread by traditional media will only drive more and more Kenyans towards these platforms as a more reliable source of information.

State capture of Kenya's media is not complete – there is resistance from individual journalists and audiences – but the drama of the 2017 election has only underscored that much more work is needed to prevent it completely.

SOUTH AFRICA AND THE CAPTURE OF THE EXECUTIVE
UNDERMINING TRANSFORMATION?

Mpumelelo Mkhabela

ABSTRACT

Under President Jacob Zuma the executive authority of the Republic of South Africa became an entry point for and a facilitator of state capture. The constitutional powers vested in the president as head of the executive provided a logistical infrastructure for captors, while Zuma, his friends the Guptas, Cabinet ministers and some state officials became agents of capture. Zuma's vulnerability to capture and his agency in the process were partly a result of his lack of moral capital, the consequence of which was the institutional denigration of the executive as a whole. This led to the emergence of a shadow state that was constantly clashing with the constitutional state and to the setting in of political decay. State-driven development envisaged in the Constitution and dependent on executive probity were the ultimate casualties.

BACKGROUND

As democratic South Africa entered the third decade after the end of apartheid a dark political cloud hung over it: a daring and unseemly attempt to capture the democratic state. Leniently defined, state capture is the shaping of the basic rules of the game through illicit and non-transparent private payments to public officials for private gain (Hellman, Jones and Kaufmann 2000: 3). In terms of this mild version of state capture, the captors seek only to influence the policy framework so that it produces the outcomes they seek for their private benefit at the expense of the public interest.

The version of state capture practised by the Gupta family members in South Africa, their business associates and friends, is deeper, as it combines the mild version and the cruder form of direct interception of public resources through their companies.[1]

In the South African context, state capture is thus systemic and well organised by people with established relationships. It centres on the executive

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1   The Gupta brothers – Atul, Ajay and Tony, who came to South Africa in 1993 – owned and controlled various business in many sectors from media to mining.

and involves repeated transactions, often on an increasing scale. The focus is not on small-scale looting but on accessing rents and redirecting them away from their intended target into private hands. To succeed, the perpetrators need high-level political protection, including from law enforcement agencies; intense loyalty and a climate of fear; and competitors need to be eliminated. The aim is not to bypass rules to get away with corrupt behaviour, it is to change the formal and informal rules of the game, legitimise them and select the players (Bhorat et al 2017: 5).

For this crude version it is not only the policy framework that matters, the captors train their eyes directly on the rents. It combines what Hellman et al (2002: 7) define as administrative corruption – the extent to which firms make illicit and non-transparent private payments to public officials in order to alter the prescribed implementation of administrative regulations placed by the state on the firm's activities – and direct institutional capture.

That is not what the founding fathers and mothers of constitutional democratic South African envisaged. After a successful transition that led to the first inclusive, non-racial and non-sexist democratic elections in 1994 and the adoption, in 1996, of a Constitution that was a product of inclusive multiparty negotiations, the future looked promising. A legitimate government would govern through a multiparty system and a Constitution which enshrined fundamental rights for all citizens and checks and balances to prevent the abuse of the country's hard-won democracy.[2]

Elections would be held every five years to give meaning to what the African National Congress (ANC), the governing party since 1994, had professed in its anti-apartheid Freedom Charter: 'The people shall govern'. The slogan 'Power to the people!' would be given substantive meaning (ANC 1996). The idea was that the state would be transformed to serve the interest of all South Africans, with a bias towards the formerly oppressed.

The Constitutional Court gave weight to the slogan 'Power to the people!', saying it conveyed a profound reality that state power and resources belong to 'we, the people' (the opening line of the Constitution). It was expected that the exercise of state power and management of the nation's resources would take place at the beck and call of the people (Constitutional Court 2017: 7).

After 1994 Parliament passed a number of transformative pieces of legislation aimed at empowering the previously disenfranchised and outlawing discriminatory practices. In addition, the government adopted

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2   Chapter 9 of the Constitution of the Republic of South Africa (1996) establishes independent state institutions supporting constitutional democracy. They are the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General and the Electoral Commission.

a progressive taxation regime that has helped to extend social grants to 17 million recipients to mitigate extreme poverty, especially among children of unemployed parents. The social security system, now ranked among the world's largest, signified a move away from the racialised welfare system of the apartheid era. But it also betrayed a weakness: the failure of the governing party's policies to create jobs (Bundy 2016: 120).

Despite this failure, intense and substantive public policy debates about the economy took place while presidents Nelson Mandela and Thabo Mbeki were in office (Seekings and Nattrass 2016).

During President Jacob Zuma's tenure, the subject of debate was largely his scandals or fitness for office. His attempts to transform South Africa further through the *National Development Plan: Vision 2030*, the government's overarching plan, were hobbled by the fact that he did not, in practice, support its key goals of building a capable state, promoting accountability and fighting corruption (The Presidency 2011). In 2017 the South African Council of Churches, which conducted a process of 'unburdening' to give a platform to concerned citizens to speak out against state capture, stated:

> There was a trend of testimonies of inappropriate control of state systems through a power-elite that is pivoted around the President of the Republic that is systematically siphoning the assets of the State.

This chapter discusses five elements of capture: the motives, the agents, methods, conditions and outcomes, which include how the nation's transformation project stalled under self-preservative and capture-prone Zuma. The chapter also explains the logical connections among the four factors. To make sense of it all, we begin by outlining the constitutional context of executive power in South Africa's democracy and the premise for transformation.

THE CONSTITUTIONAL VISION

To understand the implications of state capture in South Africa we must first appreciate the constitutional promise and the duty assigned to the state to ensure its realisation. The vision of the Republic of South Africa, as set out in the Constitution, the supreme law of the land, is transformative. The vision, which is contained in the preamble to the 1996 document, is sufficiently and evidently elevated.

It binds all citizens and organs of state to recognise the injustices of the colonial and apartheid past, honour those who suffered for justice and

freedom, respect those who have worked to build and develop the country and believe in the all-inclusive edict: 'South Africa belongs to all who live in it, united in our diversity.' The outcome of negotiations between those who struggled for freedom and the representatives of the apartheid state, the Constitution binds government leaders to work towards healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights.

THE EXECUTIVE AUTHORITY

South Africa's president is, by constitutional design, the holder of the country's executive authority. The president, together with the members of Cabinet that only he has a right to appoint, is responsible for implementing national legislation except where the Constitution or an Act of Parliament provides otherwise. The president and the Cabinet must also develop and implement national policy, co-ordinate the functions of state departments and administrations, prepare and initiate legislation and perform any other executive function provided for in the Constitution or in national legislation (Constitution s84).

Once elected, the president takes an oath of office administered by the chief justice in public through which he effectively signs a contract with the Republic. The Constitution prescribes that the president must 'swear or solemnly affirm to be faithful to the Republic of South Africa' and

> promise at all times to promote that which will advance and to oppose all that may harm the Republic; to obey, observe, uphold and maintain the Constitution and all other Law of the Republic; to discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience; to do justice to all; and to devote myself to the well-being of the Republic and all its people.

The Constitutional Court, the ultimate adjudicator of disputes over matters constitutional, interpreted the role and status of the South African president as that of a 'constitutional being'. According to the court, the president exists, moves and has his being in the Constitution. Virtually all his obligations are constitutional in nature because they have their origin, in some way, in the Constitution. The president must fight whoever and whatever poses a threat to the country's sovereignty, peace and prosperity (Constitutional Court 2016: 13).

Citing a number of legislative instruments, including the Constitution, Deputy Chief Justice Dikgang Moseneke (2014) noted the 'uncanny con-centration' of powers the president has to appoint state functionaries to lead

various organs of state. The president has a hand in more than 30 appointments to positions in various state organs, the judiciary and independent public bodies, either using his sole discretion or in consultation with Parliament.

He appoints ministers, ambassadors, judges, some members of the Judicial Service Commission (which, in turn, selects judges) and the National Director of Public Prosecutions. He appoints the Public Protector (Constitution 1996, s 179(1)(a)), the Auditor General and members of the South African Human Rights Commission, the Commission for Gender Equality and the Electoral Commission, on recommendation from the National Assembly (Constitution, s193(4)). The president also appoints commissioners to the Public Service Commission, the head and the military command of the Defence Force (Constitution, s202(1)), the head of the police (Constitution, s207(1)), the head of the Intelligence Service (Constitution, s209(2)) and members of the Financial and Fiscal Commission, the Statistician General (Statistics Act 6 of 1999, s6(1)), the Governor and Deputy Governor of the South African Reserve Bank (South African Reserve Bank Act 34 of 1997, s4(1)(a)), the Commissioner of the South African Revenue Service (South African Revenue Services Act of 1997, s6(1)), members of the Tax Court (Income Tax Act 58 of 1962, s83(5)(a)) and members of the Independent Communications Authority of South Africa (Telecommunications Act 13 of 2000, s5(1)). Some of the powers to appoint are coupled with powers of removal subject to prescribed processes (Moseneke 2014: 16-17).

MOTIVES FOR CAPTURE

The capture of the state, with the executive as the entry point, was driven by motives contrary to the vision of the Constitution and the commitments it enjoins government leaders to fulfil. These motives included redirecting state institutions from their stated constitutional obligation to transform society in the interest of all South Africans to the goal of serving private interests. The aim was to conquer and control state apparatus, subvert the democratic will of the people, undermine the sovereignty of the Republic and overthrow the Constitution.

The constitutional injunction that democracy was about government by the people was transformed into government by those who had captured the executive. For would-be captors, the president's vast appointment powers provided an infrastructure through which capture pervaded the veins and arteries of the state.

The complex constitutional democratic system was, however, not easy to penetrate because power outside the executive is diffused. Even in instances where the president had the power to appoint it did not always follow that

the appointees would do his bidding. Constitutionally enshrined institutional independence limited the president's imperial intentions. This was evident in the actions of Zuma-appointed Public Protector Thuli Madonsela, who led numerous investigations into the president's activities.

AGENTS OF CAPTURE

There were three types of agents. The first were primary agents – members of the Gupta family, particularly the brothers Ajay, Tony and Rajesh, and their business associates, who used Gupta companies as vehicles of capture. They found willing hosts-cum-participants in the form of secondary agents.

The secondary agents were President Jacob Zuma, some of his Cabinet members, key state officials in the bureaucracy and executives of state-owned companies. The capturing of Zuma and some members of his Cabinet had the effect of subjecting the entire executive to capture because of the collective manner in which Cabinet takes decision. Cabinet members are accountable both collectively and individually and government policies have to be adopted by Cabinet (Constitution, s92(2)).

A captured president or minister has a contagious effect on the whole of the executive. In an increasingly global economy where illegal activities cross borders, primary and secondary agents of state capture also play in the global arena in terms of the flow of their illicit financial gains and the coordination of their activities across borders. This constitutes what Hellman et al (2000: 7) describe as a 'capture economy'.

It is in this context that tertiary agents come in. These agents are multi-national corporations which, desperately seeking to expand the market share for their products and services, are willing to do deals with those who are well connected domestically. The connections to high office, held mainly by the primary and secondary agents, are used as an important resource to be sold to the tertiary agents.

German-based software corporation SAP, supplier to South Africa's state-owned logistics firm, Transnet; American consultancy McKinsey, a service provider to state-owned power utility Eskom; China's China South Rail, a manufacturing provider to Transnet, and India's Bank of Baroda, a pro-Gupta bank, are among those that have played their part in state capture through networks facilitated by Gupta brokers who received commissions for their facilitation of deals for multinational companies.

The brokers are part of cross-border networks through which billions of rands were moved to international clearing hubs to undertake legitimate trade activities (Bhorat et al 2017: 57). These firms have had to conduct business with Gupta-aligned companies to get a slice of the business of state-owned firms.

METHODS OF CAPTURE

The state-capture project in South Africa was executed through the implementation of a patronage-punishment scheme. But the starting point was infiltration into the nervous system of South Africa's constitutional state via the president. The process is similar to that of the attack on a cricket by the parasitic hairworm. Once in the cricket's body, the hairworm controls the insect's nervous system. Whatever the hairworm wants, the cricket does, because it is convinced that it is pursuing its own interests. For the hairworm to reproduce it has to get into water. So, it re-sets the nervous system of the terrestrial carrier, making it jump into water. The cricket dies, but the hairworm reproduces large numbers of offspring (Sanchez, Panton, Schmidt-Rhaesa, Hughes, Misse and Thomas 2008).

This does not, in anyway, suggest that Zuma was helpless in the capturing process. Under his leadership the appointment and dismissal of Cabinet ministers and other state functionaries were carried out to serve his interests and those of his Gupta friends. Officials who followed instructions to help his family members and friends were rewarded handsomely in the patronage scheme. Officials who refused to aid the capture agenda were either removed from their positions, denied promotion or simply harassed. The result was that either the person concerned acceded to the demand to do as instructed or he or she was punished in some way.

Some of the key players were Zuma family members, among them his children and wives. In July 2008, less than seven months after Zuma was elected ANC president, Mabengela Investments, an investment vehicle of Duduzane Zuma, the president's son, was registered, with Duduzane and Tony Gupta as directors. Duduzane paid R45 for his shares, which would be worth millions of rands a few years later. Duduzane's twin sister, Duduzile, was a director of Sahara Computers, a Gupta company, for 15 months.

In the course of the next two years Duduzane was appointed director of 11 more Gupta companies, including Westdawn Investments, Islandsite Investments 255 and Shiva Uranium. Through Mabengela and Islandsite he became a beneficiary of the Guptas' mining, media, labour-brokering and steel companies. In 2011 he told *City Press*, a Sunday newspaper, that his father had introduced him to the Gupta family in 2001 (Basson and Du Toit 2017: 59). The president himself acknowledged that his son was in business with the Guptas and he saw nothing wrong with it (eNCA 2016). In addition, both Tony Gupta and President Zuma have acknowledged that they were friends (Public Protector 2016: 86).

While Duduzane was a useful conduit to the president (Basson and Du Toit 2017: 59), the Guptas had their own direct access too. Themba Maseko, former chief executive officer of Government Information and Communications

System and one of the first people to blow the whistle on the influence of the Guptas, made it publicly known that after he declined to help the family secure a slice of the government's advertising budget for their newspaper, *The New Age*, Zuma personally telephoned and pleaded with him to assist them. Maseko refused and was subsequently removed from his position.

The New Age secured millions of rands in advertising support from various government departments and state-owned companies. Zuma's Communications Minister, Faith Muthambi, ensured that the SABC, the public broadcaster, played its part in supporting the emerging Gupta media outlets. Anti-graft interest group Organisation Undoing Tax Abuse opened a case of treason after it emerged through a huge cache of leaked emails that surfaced in 2017 and became known as #GuptaLeaks, that Muthambi had sent confidential Cabinet information to the family, asking them to ensure that President Zuma transferred certain executive powers to her, not to her colleague, who was responsible for postal services (Pijoos 2017). Such was the extent of executive capture that Zuma's Cabinet ministers were reporting to the Guptas, the *de facto* decision makers.

Duduzane's value to the Guptas was immense. The use of his name alone gave the Guptas legitimacy and Zuma was comfortable knowing that his son was executing the mandate of his friends. Duduzane became involved in matters of the state, including the appointment of Cabinet ministers. The Gupta emails revealed that various business matters that involved the state or required government intervention were forwarded to Duduzane. The Gupta machine absorbed him – he was their ticket to ride (Basson and Du Toit 2017: 58).

There are a number of examples of Duduzane and President Zuma directly intervening in state affairs to promote their interests and those of their friends. One of those that went to the heart of executive capture involving Duduzane was his attempt, working with one of the Gupta brothers, to convince Deputy Minister of Finance Mcebisi Jonas to accept the position of finance minister in order to do the bidding of the Guptas in exchange for cash. Had he accepted the 'offer', Jonas would have replaced Finance Minister Nhlanhla Nene. Jonas rejected the offer because it sought to make a mockery of South Africa's hard-earned democracy and because no one apart from the president should appoint ministers (Jonas, 2016).

The Guptas also had difficulty convincing Vytjie Mentor, a senior ANC MP, to accept a Cabinet position on condition that she agreed to persuade South African Airways to drop its flights to India so the Guptas could launch their own commercial airline on that route. The offer was made to Mentor at the Gupta home in Saxonwold, Johannesburg, while President Zuma was in another room in the house.

Commenting on this incident, Njabulo Ndebele, academic, author, literary critic and chairman of the Nelson Mandela Foundation, would later ask:

> What kind of mentality allows a head of state to be reduced to the indignity of sitting in a room, pretending not to be around, while in the next room illegal transactions are being carried out on his behalf, on his authority as head of state, by people who have no legitimate authority to do so but have the appearance of having bought the power of the president to act on his behalf?
>
> Ndebele 2017

The unwritten constitution of the state capture project did not allow for rejection. President Zuma fired both Jonas and Nene from his Cabinet. Mentor was never promoted. Nene was replaced (very briefly) by ANC back-bencher Des van Rooyen, who, it later emerged, had visited the Gupta family several times before his appointment – an indication of the rewards available for those willing to work with the Gupta family (Wa Africa, Skiti and Jika 2016).

South Africa's National Treasury is a key institution, the only government department established in terms of the Constitution (Chapter 13), because of its centrality in national finances. Its functions include ensuring transparency in public finances and the control of public expenditure. The dismissal of Minister Nene, who had refused to endorse a nuclear procurement project that would have benefited the Gupta-owned Shiva uranium mine, and the hiring of Van Rooyen, with the endorsement of the Guptas, was part of the patronage-cum-punishment method of executive capture.

The reason for capturing the Treasury became apparent when, on his first day in office, Van Rooyen arrived with two Gupta-linked advisors who immediately started to demand that the ministry's director general, Fuzile Lungisa, make decisions that would benefit their companies (Wa Afrika, Skiti and Jika 2016). Public pressure and political lobbying inside the ruling ANC forced Zuma to rescind Van Rooyen's appointment only days later. He reappointed Pravin Gordhan, who had held the position during Zuma's first term – from 2009 to 2014.

Gordhan, who refused to bow to the Guptas' demands or to support them in their bid to force South Africa's four major commercial banks to reopen accounts they had closed because of suspicious transactions, was axed in March 2017. He was replaced by Malusi Gigaba, who, in his previous position as Minister of Public Enterprises (from 2009 to 2014), had played a central role in facilitating the Guptas' access to state-owned enterprises such as Eskom and Transnet (Bhorat et al 2017: 59).

In 2016 Mosebenzi Zwane, who was appointed to the key position of Mineral Resources minister only after he had forwarded his CV to the Guptas,

was tasked with leading a ministerial team to interact with the banks, with a view to assisting the Guptas to have their accounts reopened. He went on to threaten a judicial investigation into the banks (Zwane 2016). The fact that Zwane encroached on the financial sector – the terrain of the finance minister – was clear evidence of his eagerness to assist Gupta companies.

CONDITIONS FOR CAPTURE

Two interrelated factors provided propitious conditions for capture. The first was Zuma's lack of moral capital. According to Kane (2001: 10), moral capital is the positive judgement that people have of a political agent in relation to his or her effectiveness and faithfulness in serving values and goals beyond the mere attainment of private ends.

> The relationship between personal moral capital [of a leader] and … institutional moral capital is generally dialectical. Where, for example, stable institutions exist within a stable regime, and where stability is part of a function of wide acceptance of the regime's legitimacy, political offices will form a significant repositories of the regime's moral capital and be available to incumbents more or less independently of their character or ability. It is also true, nevertheless, that incumbents' actions are liable either to degrade or confirm the reputation of the institution.
>
> Kane 2001: 35

President Zuma, a former anti-apartheid activist and a deputy to President Thabo Mbeki from 1999 to 2005, when he was fired over his role in an arms deal scandal, had only a small stock of moral capital. Zuma had been investigated for corruption and his financial advisor, Schabir Shaik, had been convicted and sentenced to 15 years for securing a bribe for Zuma from a French arms manufacturer. The condition was that Zuma would be an agent of the arms manufacturer should the manufacturer be investigated.

The scandal exposed Zuma as financially dependent and desperate for cash (Feinstein 2007: 218-219). Ahead of Zuma's election as president, Jeremy Cronin (2007: 7), deputy secretary general of the South African Communist Party, which, along with the Congress of South African Trade Unions and the ANC, constitute the Tripartite Alliance, remarked that Zuma would 'hollow out' the ANC and become a 'burden' to the presidency.

Once in office, Zuma did little to build a stock of moral capital. By 2011 Reuel Khoza, businessman and chairman of Nedbank, one of the 'big four' South African banks, wrote:

> Our political leadership's moral quotient is degenerating, and we are losing the checks and balances that are necessary to prevent a recurrence of the

past. This is not the accountable democracy for which generations suffered and fought.

<div align="right">Khoza 2011: 33</div>

The second condition for capture was the lack of constitutional criteria for election to the presidency of the Republic. There was no vetting process. Any member of Parliament qualified to be elected president. In Max Weber's formulation, there was no plutocratic policy on the basis of which the president was elected. Where such a policy does not exist, politicians are more likely to live from politics and not for politics (Weber 2004: 41). The failure to provide for even broad criteria that take into account commitment to ethical conduct resulted in the Public Protector recommending classes in ethics for all members of the executive upon the assumption of their duties (Public Protector 2013: 208). President Zuma's failure to appreciate the importance of ethics in leadership frustrated the implementation of the report. This, in itself, provided a condition for capture.

OUTCOMES OF CAPTURE

State capture has given rise to two outcomes. The first is political decay, the situation that arises when rules or institutions created in response to one set of environmental circumstances become dysfunctional under later conditions but cannot be changed because of the heavy emotional investment in them (Fukuyama 2011: 44). Political decay in South Africa became evident when Zuma became the country's president. He had carried with him two traits that would later become key factors in weakening state institutions, thus allowing space for executive capture: his lack of appreciation of the rules of governance and his financial vulnerability.

According to Moseneke (2014), anecdotal evidence suggests that the wide-ranging powers granted by the Constitution to the president came about because those who created the Constitution had Nelson Mandela's moral standing in mind. The failure to change the rules when the Mandela scenario was no longer applicable signified, in Fukuyama's conception (2011: 44), political decay.

The second outcome was the emergence of a shadow state that came into conflict with the established constitutional state. Bhorat et al (2017) define the constitutional state as the formalised constitutional, legislative and jurisprudential framework of rules that govern what government and state institutions can do. The shadow state, on the other hand, refers to the network of relationships that cross-cut and bind a specific group of people who need to

act together, for whatever reason, in secretive ways so that they can effectively hide, actively deny or consciously 'not know' that which contradicts their formal roles in the constitutional state.

These networks have their own rules and logic that endow key players within the networks with the authority to influence decisions, allocate resources and appoint key personnel. They drew on the informal power that was linked to Zuma as both the party leader and president of the country. Invariably, there is a range of power nodes spread out across the networks. The Guptas and Zumas comprised the most powerful node, which enabled them to determine how the networks operated and who had access (Bhorat et al 2017: 6). Whereas Bhorat et al (1917) see a symbiotic relationship between the constitutional state and the shadow state, Mkhabela (2017) sees friction, as the two are inherently incompatible:

> Jacob Zuma is an incapable and undeserving president of a complex constitutional democracy. He liked the system for allowing him to rise to the top. But he neither understands nor likes how it operates. Zuma enjoys the trappings of the office of the presidency. But he hates the constraints that come with it. He loves power, but he is irritated by the systems designed to ensure that he can't exercise it willy-nilly, and the courts haven't given up lecturing him on this.

The battle of the two states has resulted in victories and losses for both. Whereas the captured executive succeeded in many respects in its efforts, there was a push back by civil society and opposition parties using the rules of review applicable in the constitutional state. As a consequence, it was the judiciary that shielded the constitutional state from full-scale capture.

Ironically, the shadow state derives legitimacy from the constitutional state. For even the beneficiaries of the shadow state enjoy the trappings that come with living in a stable constitutional democracy, but dislike the elements that give rise to such stability: the rule of law, accountability and responsive government.

Agents of capture appropriate the language of transformation to legitimate their actions while they milk state resources. The shadow state poses a threat to the constitutional state. It is a typical parasitic situation where, to survive, the shadow state needs the cover of the constitutional state, even if the latter is weakened. Contrary to the definition of the presidential role in a democracy as presented by the Constitutional Court, which described the president as a 'quintessential constitutional being', Zuma was conflicted as he played another role: the shadowy being of a shadow state.

SECTION 3

CONSEQUENCES OF CAPTURE AND LESSONS LEARNT

ENTER STATE CAPTURE
CITIZEN PERCEPTIONS OF CORRUPTION AND THE CORROSION OF DEMOCRATIC CULTURE AND INSTITUTIONS

Jamy Felton and Sibusiso Nkomo

ABSTRACT

The scale of the corruption or 'state capture' that took place during Jacob Zuma's presidency enabled powerful individuals, institutions, companies and groups to influence South Africa's policies, legal environment and economy to benefit their private interests, with negative consequences for economic development, regulatory quality and the provision of public services. This chapter seeks to understand whether perceptions of state capture influence the way democratic institutions are perceived and, eventually, if and how, as a result, people participate in a democratic society. Some findings show that part of the reason for the achievement of state-capture projects may be the low levels of civic and political participation by ordinary citizens. While citizens tend to approve of independent institutions, they remain sceptical about their capacity to tackle corruption.

INTRODUCTION

State capture is defined by Hartmut Winkler (2017) as the systematic takeover of state institutions by presidential allies and the resulting exploitation of institutions by presidential benefactors for commercial advantage and profit. A more detailed explanation is that state capture is corruption that enables powerful individuals, institutions, companies or groups to influence a nation's policies, legal environment and economy to benefit their private interests, often with negative consequences for economic development, regulatory quality and the provision of public services (Martini 2014).

However, we are cautioned that corruption and state capture are not a simple matter in South Africa. The State Capacity Research Project tell us:

> Corruption normally refers to a condition where public officials pursue private ends using public means. While corruption is widespread at all levels and is undermining development, state capture is a far greater, *systemic*

threat. It is akin to a silent coup and must, therefore, be understood as a political project that is given a cover of legitimacy by the vision of radical economic transformation.

<div align="right">Bhorat et al 2017</div>

Therefore it might be better to use the State Capacity Research Project's definition of state capture:

> Corruption tends to be an individual action that occurs in exceptional cases, facilitated by a loose network of corrupt players. It is somewhat informally organised, fragmented and opportunistic. State capture is systemic and well-organised by people with established relations. It involves repeated transactions, often on an increasing scale. The focus is not on small-scale looting, but on accessing and redirecting rents away from their intended targets into private hands. To succeed, this needs high-level political protection, including from law enforcement agencies, intense loyalty and a climate of fear; and competitors need to be eliminated. The aim is not to bypass rules to get away with corrupt behaviour. That is, the term corruption obscures the politics that frequently informs these processes, treating it as a moral or cultural pathology. Yet, corruption, as is often the case in South Africa, is frequently the result of a political conviction that the formal 'rules of the game' are rigged against specific constituencies and that it is therefore legitimate to break them. The aim of state capture is to change the formal and informal rules of the game, legitimise them and select the players allowed to play.

<div align="right">Bhorat et al 2017</div>

With the above definition in mind, we use data collected by the most recent Afrobarometer citizen perception survey (2015) and those collected since 1999 and we seek to understand whether perceptions of state capture influence the way democratic institutions are perceived and, eventually, if and how people participate in a democratic society. As Bhorat et al (2017) mention in their definition, state capture is a broad term. While Afrobarometer cannot measure *actual* levels of state capture, it does measure the perception of various elements referred to in the definition.

Indirect measures of state capture include the 'by-products' of a captured system. These include measuring perceptions of government service delivery, thereby establishing whether goods have or have not been redirected from the intended targets.

Another indirect measure would be people's perception of the rule of law. Bhorat et al (2017) argue that in a captured state the rules are 'bent' to

legitimise the actions of those seeking power. We argue that in such cases if people perceive that the democratic systems in place are not working or should be changed, there is a perception of a state that has been captured.

The more direct measure of perceived state capture would be whether people believe that officials are corrupt. Thus, our main hypothesis is that citizens who perceive there to be high and widespread levels of corruption may be less inclined to participate in democratic processes and less likely to trust the democratic institutions. In such cases the democratic project is further undermined by state capture through a weakening of civil society.

If corruption has a negative impact on institutional trust, what happens to democratic culture in a country like South Africa? And what is democratic culture? The Council of Europe (2016), in a report entitled 'Competences for democratic culture – living together as equals in culturally diverse democratic societies', tried to answer the question of what 'democratic culture' or the 'culture of democracy' should be:

> The term 'culture of democracy' rather than 'democracy' is used in the present context to emphasise the fact that, while democracy cannot exist without democratic institutions and laws, such institutions and laws cannot work in practice unless they are grounded in a culture of democracy, that is, in democratic values, attitudes and practices. Among other things, these include a commitment to the rule of law and human rights, a commitment to the public sphere, a conviction that conflicts must be resolved peacefully, acknowledgement of and respect for diversity, a willingness to express one's own opinions, a willingness to listen to the opinions of others, a commitment to decisions being made by majorities, a commitment to the protection of minorities and their rights, and a willingness to engage in dialogue across cultural divides.

This definition reflects the South African context because it fits in with the ideals espoused in the 1996 Constitution.

METHOD AND KEY FINDINGS

Citizens' perceptions of corruption are measured by a series of questions asking respondents whether they believe certain actors in the public and private sector are corrupt. In addition, respondents are asked whether they believe that corruption levels have increased, decreased or stayed the same. The institutions and individuals we analyse include, but are not limited to, the Presidency, members of Parliament, government officials, local government councillors, the police, tax officials, judges and magistrates, traditional leaders, religious leaders and business executives.

The South Africa survey is unique in that it asks about institutions and offices beyond the generic questionnaire and has been indigenised to include some Chapter 9 institutions – a constitutional innovation designed to support democracy.

The Afrobarometer surveys focus on democracy and governance, hence the need to ask as many questions as possible that are relevant to those topics. The third aspect of the analysis examines democratic culture, which is measured in the Afrobarometer survey by a series of questions about people's participation in civic and political activity. Lastly, in order to measure whether South Africans believe there are elements of state capture in society, we consider a series of questions about topics such as service delivery and the rule of law that characterise a state that has been captured.

Our analysis shows that most South Africans believe that there is an element of corruption in every sector of governance and leadership but that only some members of the various groups are corrupt. This means that they believe corruption is widespread, but not deeply entrenched.

Furthermore, nearly two-thirds of South Africans believe that corruption has 'increased a lot'. This may be partly explained by public exposure to investigative journalism that has unearthed corruption scandals and looting, from the arms deal to the scandal surrounding former President Jacob Zuma's home in Nkandla, lavishly altered using public funds.

Given these statistics, the understanding, guided by previous work by Bratton, Mattes and Gyimah-Boadi (2005) on public opinion in Africa, is that rational South Africans may lose trust in the ability of institutions to function and serve.

Our analysis indicates that South Africans generally have very low levels of trust in the president, Parliament, premiers, local government councils, the ruling party, opposition parties and the police.

Conversely, we find that the majority trust the Independent Electoral Commission (IEC), the South African Revenue Service (SARS), the Public Protector, the National Prosecuting Authority, the Directorate for Priority Crime Investigation (the 'Hawks'), courts of law, traditional leaders, religious leaders, the public broadcaster, the South African Broadcasting Corporation (SABC) and independent broadcasting services such as eTV, 702/CapeTalk and so on.

This indicates that South Africans are more likely to trust independent institutions or, at least, institutions that seem to be independent, than institutions that govern or are controlled by the president and his Cabinet. Furthermore, we conducted a reliability test and the Cronbach's Alpha, which measures the level of internal consistency among sets of variables. All these

indicate that there is a high level of coherence between these variables =.92 in the South African context, meaning we can assume that people have similar levels of trust in various institutions. When the test was conducted using the generic questions used in all African countries that Afrobarometer surveys we found a strong coherence =.81.

Does corruption affect levels of institutional trust? The beta coefficients, which compare the strength of the effect of each individual independent variable to the dependent variable, indicate that those who believe that there is corruption in the office of the president, local government, the revenue department and religious institutions are less likely to trust institutions. However, those who believe that there are more corrupt business leaders and those who believe that corruption levels have increased are more likely to trust institutions.

THE EXTENT AND DEPTH OF CORRUPTION

When asked 'how many of the following people do you think are involved in corruption, or haven't you heard enough about them to say?', South Africans tended to be circumspect and most said they believed that some institutions or officials within those institutions were corrupt. There was a perception that 'some' judges and magistrates, tax officials, traditional leaders, religious leaders, business executives and members of Parliament were corrupt. Almost one-third thought that 'most' business executives, members of the presidency, police, local government councillors, government officials and members of Parliament were corrupt. About one-fifth highlighted workers in the presidency as 'all' corrupt (see Figure 1).

Figure 1
Who is corrupt? | by institution | South Africa | 2015

Institution	None	Some of them	Most of them	All of them
Religious leaders	26%	52%	16%	5%
Traditional leaders	23%	54%	16%	8%
Tax officials	18%	56%	18%	8%
Judges and Magistrates	17%	59%	19%	6%
Business executives	9%	51%	28%	13%
Presidency	5%	47%	28%	20%
Police	4%	48%	33%	15%
Local government councillors	4%	48%	33%	16%
Government officials	4%	46%	36%	16%
Members of Parliament	4%	50%	33%	13%
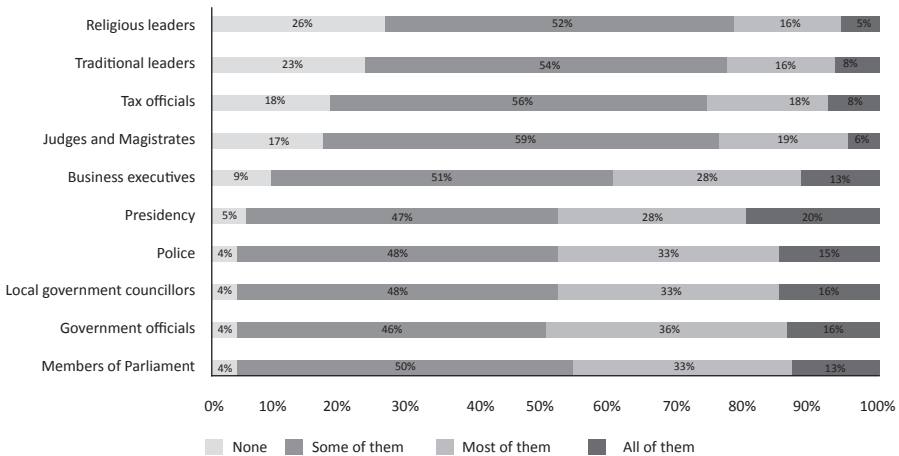
When citizens were asked: '[I]n your opinion, over the past year, has the level of corruption in this country increased, decreased, or stayed the same', eight out of 10 said corruption had increased 'somewhat' or 'a lot'. This number is the highest of the 36 countries that Afrobarometer surveyed in 2014/15.

DEMOCRATIC POLITICAL CULTURE

Almond and Verba (1963) state that political culture 'refers to political orientation' and includes 'attitudes towards the political system and its various parts, and attitudes towards the role of the self in the system'. In a vibrant democratic society we should see a more participatory political culture wherein people assert themselves in the democratic system. This may not necessarily include direct rule or governance, but rather participation through the act of voting, taking part in activities that help to promote democratic values and the legitimisation of the democratic system, or any other forms of civic participation. In this section we focus and limit ourselves to citizen views of politics, civic and political participation, including voting.

In 2015 nearly six in 10 South Africans said they were interested in politics. Half the respondents said they 'occasionally' discussed politics, nearly three in 10 said they 'never' discussed politics and only a fifth discussed politics 'frequently'.

When assessing whether South Africans are active citizens, Afrobarometer asks about membership of religious and civic organisations. Two-thirds of respondents are 'not members' of a voluntary association or community group, with five in 10 saying they are not members of a religious group. But three in 10 are 'active members' of religious groups. Two in 10 are either active or inactive members of community groups and very few are official leaders. This shows that South Africans are not very active in their local communities, which should be a problem for the democratic culture of the country.

When it comes to citizens' action when confronted by problems, six in 10 said they had not contacted officials for help and had not contacted the media but would if they had the chance. South Africans seem to take paying tax very seriously, with seven in 10 saying they would never refuse to pay tax or a fee to government. Only three in 10 would attend community meetings several times or often and about two-thirds would protest or attend a demonstration (see figure 2).

Finally, with regard to electoral behaviour, more than two-thirds claimed they had voted in the last national elections (May 2014) and one in 10 said they had chosen not to vote. However, pre-election activities show that South Africans are not very politically active. Seven to nine in 10 did not work for a candidate or party, persuade others to vote for a certain candidate or attend a campaign meeting or rally.

Figure 2
Citizen action | South Africa | 2015

| | Yes, once or twice | No would never do this | Yes, several times/often | All of them |
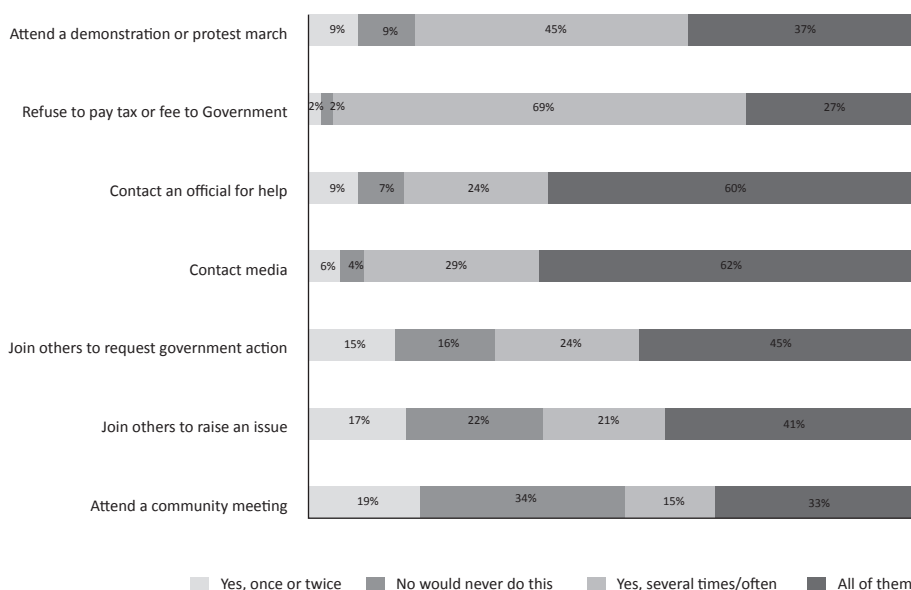
TRUST IN AND APPROVAL OF DEMOCRATIC INSTITUTIONS

What explains trust in institutions? While many factors play a part in establishing an institution's public reputation, one compelling driver is whether citizens suspect corruption. If people think that office bearers are honest, they are likely to deem the institution trustworthy, and vice versa. We would therefore expect to find a strong negative relationship between popular perceptions of official corruption and trust in the state.

In the realm of political attitude formation, subjective perceptions may be more potent than objective experiences. Even lacking a first-hand encounter with a demand for a bribe from a public official, people will form estimates of trustworthiness from what they hear about official graft from family, friends, workmates and the mass media – and perhaps even from the sidewalk rumour mill (Bratton and Gyimah-Boadi 2016; Afrobarometer 2016).

Our analysis finds that when citizens are asked to evaluate how much they trust civic and political institutions their reaction depends on the specific organisation. Institutional trust on average across South Africa is positive, with more than half the citizens saying they trust 'somewhat/a lot'. But four in 10 are critical and do not trust. The most trusted public institutions in South Africa are independent bodies created by the Constitution.

Media score highest, with eight in 10 South Africans trusting independent broadcasters and another two-thirds saying the same of the SABC.[1] The army is the only entity under the executive that does well, with seven in 10 citizens trusting it. SARS, religious leaders, the Hawks, the Public Protector, the IEC and the courts of law are trusted by three-fifths of South Africans.

On the other hand, Parliament, political parties, local government councils and the president, who was Jacob Zuma at the time of the survey, are least trusted. The president was trusted by a mere one-third of citizens (see Figures 3 and 4). In 2016 trust in the president and other public institutions dropped sharply compared to 2011 (Chingwete 2016). Similarly, there was a slight decline in trust in institutions such as Parliament, the courts, the Public Protector and the National Prosecuting Authority, but high marks for the media (Lekalake and Nkomo 2016). In 2015 four-fifths of South Africans saw media as effective in revealing government's mistakes and corruption and seven in 10 supported the media's watchdog role (Nkomo and Wafula 2016).

Lekalake found that South Africans' evaluations of overall government performance had declined significantly in a number of key areas, including management of the economy, crime/security and the fight against corruption. Given the perceived failure to address key economic challenges, it is not surprising that public approval of elected leaders' performance has also dropped.

Approval of then President Jacob Zuma's performance almost halved between 2011 and 2015 and is now well below the presidential average of 55% since 2000. This is the first time that a majority of South Africans has expressed outright disapproval of a president's performance since the initial Afrobarometer survey in 2000 (Lekalake 2015).

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1   In the 2015 survey respondents were not asked about newspapers and digital entities. Broadcasters, including radio and television, in the 36 countries surveyed in 2014/15, account for 87% of everyday media usage compared to only 10% for newspapers and 14% for both the internet and social media. Between 2002 and 2015 a mere 15% read newspapers.

Figure 3
Institutional trust levels | South Africa | 2015

*figures that included .5 have been rounded up so in some categories the percentages total 101%

Institution	Not at all/just a little	Somewhat/a lot
Institutional trust	44%	56%
Independent broadcasters	18%	82%
Government broadcaster, the SABC	24%	77%
Army, the SANDF	27%	73%
Tax department, SARS	33%	67%
Religious leaders	34%	66%
Directorate of Priority crimes, the Hawks	35%	65%
Public protector	36%	65%
National Prosecuting Authority	36%	64%
National electoral commission, the IEC	40%	60%
Courts of law	43%	58%
Traditional leaders	47%	54%
Provincial premier	50%	50%
Police, the SAPS	54%	46%
Ruling party, the ANC	57%	43%
Parliament	59%	42%
Opposition political parties	63%	37%
Local government council	64%	36%
President	66%	34%

Not at all/just a little   Somewhat/a lot

Figure 4
Trust in horizontal accountability institutions| South Africa | 2000-2015

| | Parliament | Courts of law | Public Protector | NPA |
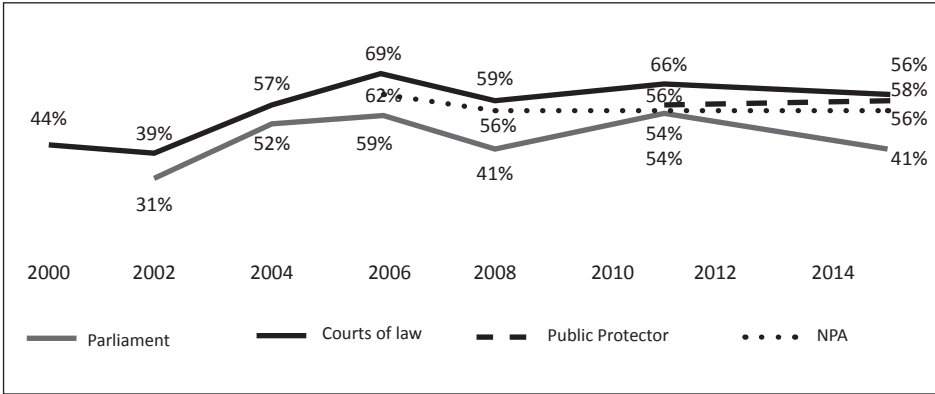
DO PERCEPTIONS OF CORRUPTION INFLUENCE DEMOCRATIC PRACTICE AND TRUST IN SOUTH AFRICA?

Given our hypothesis, we would like to test whether there is any relationship between people's perceptions of corruption and their willingness to participate in a democratic society, or their levels of trust in various democratic institutions. To do so, we conducted a multiple regression analysis,[2] using various perceptions of corruption as the predictor variables. This way we were able to see whether there was any particular area of corruption that influenced people's attitudes. The question items used measured respondents' perception of how corrupt various institutions were.

Table 1

How many of the following people do you think are involved in corruption, or haven't you heard enough about them to say?		
The Office of the Presidency	Police	Religious Leaders
Members of Parliament	Tax Officials	Business Executives
Government Officials	Judges and Magistrates	
Local Government Councils	Traditional Leaders	

2   Multiple regression analysis is used to estimate the relationship between a dependent variable and two or more independent variables, for example, the relationship between the salaries of employees and their experience and education. See www.dummies.com/education/math/business-statistics/how-businesses-use-regression-analysis-statistics/

In addition, the model included a question asking whether people felt that corruption levels had increased, decreased or stayed the same. In the case of perceptions of corruption, lower scores mean fewer corrupt people, while higher scores indicate higher levels of corruption. With the measurement of levels of corruption, lower scores indicate a perceived increase in levels of corruption while higher scores indicate a perceived decrease.

Firstly, we tested whether perceptions of corruption influenced respondents' democratic participation levels. While there are many forms of participation and engagement, we report only instances where the model was statistically significant.

Table 2
Multiple Regression Analysis: Effect of Corruption on Democratic Participation/2015

	Interest in public affairs	Attended a community meeting	Attended campaign rally at last election	Attended campaign meeting at last election	Refuse to pay taxes
Q53A. Corruption: office of the Presidency	-0.076	-0.104*	0.007	-0.007	0.014
Q53B. Corruption: Members of Parliament	0.008	0.092	-0.030	0.008	0.038
Q53C. Corruption: government officials	-0.077	0.076	-0.021	-0.024	-0.021
Q53D. Corruption: local government councillors	-0.073	-0.043	-0.001	-0.027	0.015
Q53E. Corruption: police	-0.018	-0.073	0.003	0.011	0.023
Q53F. Corruption: tax officials	-0.058	-0.155***	-0.053**	-0.035*	0.071**
Q53G. Corruption: judges and magistrates	0.025	-0.099	0.016	-0.010	-0.009
Q53H. Corruption: traditional leaders	0.030	0.007	-0.024	-0.029	-0.057*
Q53I. Corruption: religious leaders	0.017	-0.047	-0.014	0.006	0.077**

Q53J. Corruption: business executives	0.098*	0.135**	-0.002	0.003	-0.026
Q54. Level of corruption	0.008	-0.010	0.034**	0.035**	-0.010
R²	.02***	.03***	.04***	.04***	.02***
Significance Levels: *=.05; **=.01; ***=.001					

As indicated in Table 2, there were only five instances where the test was statistically significant. Within each model we find that only a few sectors of corruption are statistically significant in predicting respondents' participation and engagement. The most consistent predictor was people's perceptions of corruption among tax officials.

The results indicate that the more corrupt people perceived tax officials to be the more likely they were to attend a community meeting, campaign rally or campaign meeting. The results also indicate that the more people perceived tax officials to be corrupt the more likely they were to refuse to pay their taxes. What the regression does indicate is that, although there is some connection between peoples' belief that certain sectors are corrupt and their participation, this does not significantly affect their willingness/ability to engage or participate as democratic citizens.

Secondly, we tested whether respondents' perceptions of corruption were related to their trust in democratic institutions. To conduct this test we created a compound variable called 'Trust in Institutions'. In order to test the reliability of this measure we conducted a Cronbach's Alpha of the question items. The Cronbach's Alpha indicated that there was a high level of internal consistency in the question items measuring trust in various institutions.

Table 3

Multivariate regression test: Corruption Predicting Trust in Institutions	B
Q53A. Corruption: office of the Presidency	-0.070**
Q53B. Corruption: Members of Parliament	-0.004
Q53C. Corruption: government officials	-0.025
Q53D. Corruption: local government councillors	-0.046
Q53E. Corruption: police	-0.029
Q53F. Corruption: tax officials	-0.149***
Q53G. Corruption: judges and magistrates	-0.033

Q53H. Corruption: traditional leaders	-0.052*
Q53I. Corruption: religious leaders	-0.056*
Q53J. Corruption: business executives	0.058**
Q54. Level of corruption	0.165***
R^2	.24***
Significance Levels: *=.05; **=.01; ***=.001	

Using this measure we conducted a Multiple Regression Analysis to determine whether perceptions of corruption reflected people's trust in institutions. The results indicate that the more people perceived the president and his officials, tax officials, traditional leaders and religious leaders to be corrupt the less likely they were to trust institutions. On the other hand, the more businessmen they perceived to be corrupt the more likely they were to trust institutions. In addition, when people perceived corruption to be decreasing they were more likely to have higher levels of trust in institutions. These results indicate that there is a logical link between people's perceptions of corruption and their trust in various institutions. What this means is that the legitimacy of the state may ultimately be under threat if there are high levels of corruption in its leading sectors.

DO CITIZENS BELIEVE THAT SOCIETY EXHIBITS ELEMENTS OF STATE CAPTURE?

Going back to the definition of state capture in Bhorat et al (2017) and given the information we have analysed thus far, the question is, does this lack of participation by citizens increase the risk that elements of state capture will creep into society, the state and the citizenry? Using Afrobarometer data we can test whether respondents feel government is no longer delivering the services they need as well as their sentiments about the rule of law and whether this has diminished over time.

As is evident from Figure 5, South Africans, for the most part, believed that, apart from the delivery of welfare grants, government was not handling problems as well in 2015 as it had in previous years. In almost all cases we see a decrease of more than 10% between 2007 and 2015. This could point to increasing dissatisfaction with the way government was handling problems and may even indicate a belief that government was not contributing either money or attention to these issues. In fact, the percentage point difference for the way government was handling the economy and the way government was handling corruption are the two largest.

Figure 5
Government handling problems Very well/Fairly well
South Africa/2007-2015
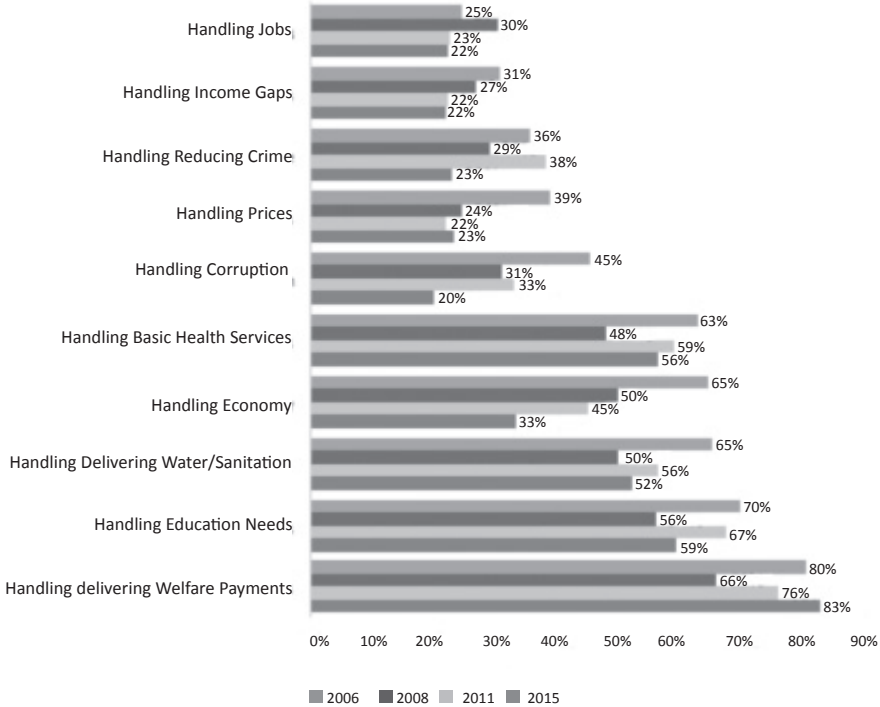
Secondly, we look at the rule of law. Afrobarometer researchers asked respondents whether they believed Parliament or the president should be free to make laws. They also asked whether the president should always obey laws or be able to do as he or she saw fit. In both cases South Africans showed that there is a greater demand for rule of law as time goes by.

More people believed that power should not reside in the president alone, but in the laws and processes that have been put in place. South Africans also seemed to believe that the president was no longer abiding by the law, instead opting to do as he pleased. So even though the demand for rule of law was there, the belief that it was being practised was not. Therefore, it would seem that South Africans might have been moving towards thinking that there were elements of state capture in society, although it was not so deeply entrenched that they believed the rules should be changed to accommodate it.

WHAT DO CITIZENS DO TO STOP CORRUPTION?

When South Africans were asked whether they considered corruption to be among the most important problems, most placed it at the bottom of the list, believing there were more urgent problems such as unemployment, education and health. But when asked how well the government was handling fighting corruption, four-fifths (79%) said it was being handled badly. But nearly six in 10 (57%) believed that ordinary people could fight corruption.

Some of the ways of fighting corruption, they said, were to refuse to pay bribes and to report corruption. When asked whether those in public institutions who committed crimes were ever punished, nearly seven in 10 said officials got away with their crimes (see Figure 6).

Figure 6
Impunity for public officials who commit crimes | South Africa | 2008-2015
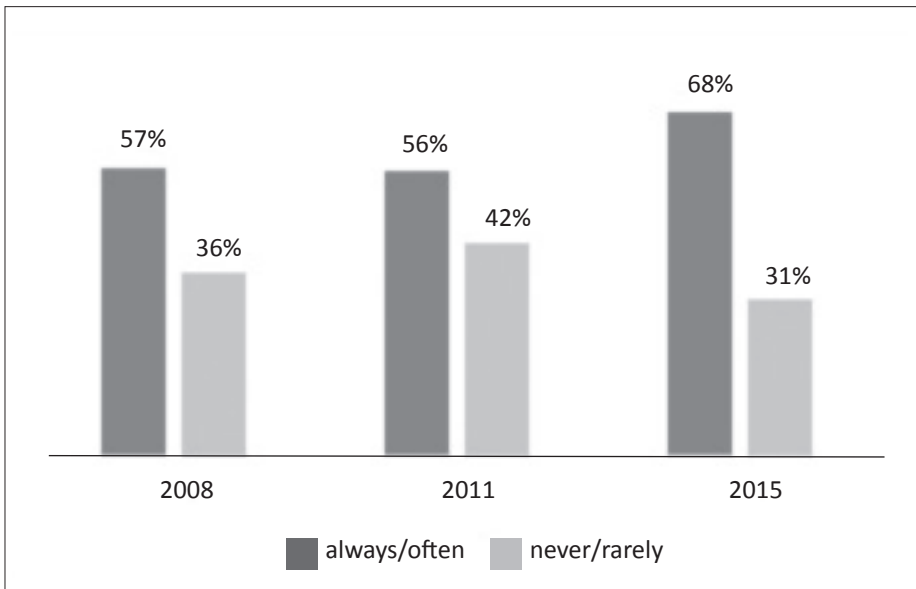
Drawing on recommendations made by Isbell (2017), there are some interventions which could help create an environment in which people feel safe and confident about reporting corruption. These include making it easier to report corruption through the use of campaigns, creating safe methods to report corruption and giving greater publicity to cases in which justice has been served. These efforts might motivate citizens to become more involved in creating a system of transparency and accountability.

However, it is clear that the largest contribution should be made by government and, more specifically, by its leaders. The results indicate that, in general, South Africans are becoming increasingly distrustful of leaders and dissatisfied with service delivery, while also believing that corruption has increased. In addition, there seems to be widespread belief that leaders are getting away with corruption.

It is evident that the lack of accountability fosters an environment that is not conducive to encouraging political participation. However, given the regression results, we cannot say that the relationship is direct. We see that participation does not necessarily mean that people are more inclined to perceive that there are higher levels of corruption. What this indicates is, perhaps, that political participation levels beyond voting are so low that perceptions of levels of corruption are the same among those who do not participate and those who perceive there to be a lack of delivery and accountability as among those who do participate and believe in the system.

Afrobarometer data indicate that participation is declining, though not steadily. Surveys conducted in 2011 and 2015 revealed some of the lowest participation rates, yet indicated that there was an increase in the frequency with which people discussed politics (see Table 4) and incidences of state capture and large-scale corruption were increasingly exposed.

Perhaps the lack of participation and the subsequent weakening of democratic institutions created a space in which state capture occurred, but it might also mean that people's willingness to talk has led to greater exposure of corruption.

As stated above, there is strong support for the idea that the media should play a watchdog role in Africa (Nkomo and Wafula 2016). What this means is that there may be a 'handover' of responsibility from the people to the media in order to expose corruption. This becomes problematic because it means there are fewer eyes on leaders and fewer people trying to expose instances of corruption, which may potentially lead to state capture.

Table 4
Percentage of respondents who engage politically/ South Africa/ 2000-2015

	2000	2002	2006	2008	2011	2015
Attend community meetings	40%	58%	60%	51%	58%	52%
Join others to raise issues	71%	43%	45%	38%	43%	39%
Attend demonstrations or protest marches	24%	21%	25%	19%	11%	18%
Discuss politics	63%	63%	66%	69%	71%	74%

CONCLUSION

Part of the reason for the success of state capture projects may be low levels of civic and political participation. As the theory states, the two work hand in hand. South Africans believe there are corrupt actors in society and that corruption is on the rise. Bhorat et al (2017) mention that with increased perceptions of corruption we can see corresponding low participation levels.

A vibrant democratic society should have a participatory culture. In South Africa there is a low level of active involvement and of holding politicians and officials accountable and there may not be as many committed democrats (see Mattes and Bratton 2016) as some believe. This might also be, in part, because citizens believe that state capture is revealed in the fact that they are not seeing the benefits of a democratic society such as economic benefits and service delivery.

In South Africa the role of watchdog has largely shifted from the citizens to the media. This is problematic as it results in fewer people holding leaders accountable. The dynamic is further complicated by the fact that the media themselves are not beyond capture. The result is a move away from South Africa's founding principles, which allowed for an active democratic culture.

However, there are signs that this may improve. For example, despite the fact that there is little trust in the country's leaders, participation in elections is relatively high among South Africans and they are able to distinguish between institutions and officials who do their work properly and those who do not. While South Africans tend to have higher rates of approval for independent institutions they remain sceptical about their capacity to tackle corruption.

The aim of a democracy should be to foster an environment that creates active citizens who demand that the rule of law is protected and who are encouraged to report on corruption and be vocal about demanding service delivery. It is the presence of such active citizens that leaves less room for corruption and state capture.

STATE CAPTURE IN THE USA
LESSONS AND CHALLENGES FOR SUSTAINABLE DEMOCRACY IN AFRICA

John Stremlau

ABSTRACT

Is the US experiencing an attempt at 'state capture' as a result of President Donald Trump's 2016 election? If so, is this attempt likely to succeed? Might there be lessons there for Africa? Trump's candidacy and election were facilitated by democratic defects in America's Constitution and political history which are outlined and explained in the chapter's first and second sections. Early warning signs of state capture became increasingly evident during Trump's first year in office. The final two sections highlight these and consider whether America's constitutional provisions and the political resolve to use them, are likely to contain the Trump threat and sustain America's democratic experiment. If so, this could have positive political reverberations in Africa and internationally.

INTRODUCTION

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.
> James Madison, *Federalist* No 51, 1788

All democracies, including the United States of America, are potentially vulnerable to 'state capture'. If a political leader can win a legitimate election and is then able to direct state power and wealth to enrich him or herself and the private interests of his or her ruling oligarchy, a case study of that country qualifies for inclusion in this volume.

Whether the campaign and presidency of Donald J Trump ultimately meets our working definition of state capture is best left for future historians to debate and determine. Over a year into his presidency, however, a cliché among his critics that 'Trump campaigns as a populist but governs as a

plutocrat' does not seem far-fetched. Evidence is accumulating that he and his inner circle of family, advisers and members of his Cabinet are challenging, circumventing and changing customs, laws and regulations to further their private financial and business interests. This may already amount to the most audacious attempt at state capture in American history, or in the history of any other democracy. It is, therefore, reasonable for African democrats to ask whether or not there are lessons to be learnt from what is unfolding in the US and whether the events might have practical implications for sustainable democracy on the continent.

The economic benefits that Trump, top members of his administration and his financial backers have already realised through his executive actions and changes in tax laws have been and promise to be substantial and to exacerbate economic inequality in the country. All the while, Trump panders to the populist prejudice and passion of a still substantial segment of Americans who support his tribal appeals to white ethnic nationalism, which deflect attention from economic exploitation and which have constrained and occasionally imperilled sustained democracy since the founding of the US republic.

America's original 13 states confronted, but could not fully resolve, major tensions in their constitutional bargain of 1787. These are the tensions between the primacy of states' rights vs human rights and between the primacy of property rights vs equal rights for all individuals, regardless of racial, religious, gender or ethnic identity.

Intense and sustained bargaining did produce an historic, if limited, system of checks and balances among the main institutions of governance, and a 'Bill of Rights'. These elements of the original bargain have framed much of the nation's politics ever since, and will likely determine the political fate of Donald Trump's presidency.

In the first section of this chapter, which highlights America's particular constitutional history and its relevance for that country's current political conflict, I hope Africa's democrats will find a useful reference as they consider alternative ways to structure and reform their constitutions and democratic experiments.

The second section of the chapter discusses the rise and resilience of a strain of white ethnic nationalism that has poisoned American politics since the country was founded. It nearly ended the political union in 1860 and, to the present day, has impeded the consolidation of democracy based on a more inclusive ideal of civic nationalism. My aim is to shed light on the nature of and prospects for the political support that enabled and will affect both the consolidation of Trump's presidency and the success of state capture.

Ethnic nationalism has been less obvious and obscured in American politics than it has in Africa, but continues to undermine the prospects for sustainable democracy on both continents. The third section of the chapter briefly highlights how Trump, despite prior fame as a plutocrat, exploited these sentiments among a sufficient number of voters to prevail in the 2016 election.

A fourth section summarises how the founders' hope that their legacy of instituting an array of constitutional checks and balances among the three main branches of the national government – the executive, a bicameral legislature and an independent judiciary – is affecting the operation and prospects of the Trump administration.

Crucial to this process is the role of the Bill of Rights. It was added as an amendment to the Constitution but has played a crucial role in helping to adjudicate and manage conflicts and tensions among the competing forces of ethnic and civic nationalism, states' rights and human rights, separation and the balance of power among governing institutions and, ultimately, determination of a politician's fate on election day. The chapter concludes on a hopeful note.

Should Trump's Republican majority in America's legislature be voted out of office in the mid-term elections in November 2018, or should he lose the presidency in 2020, this could signal a democratic revival and reduce the risk of capture in the future. First, however, it is important to recall the historical factors in America's Constitution and democratic politics that created the conditions conducive to state capture which were foreshadowed during the Trump candidacy and have become increasingly evident during his first 14 months in office.

AMERICA'S CONSTITUTION AND THE RISKS OF STATE CAPTURE

After a bloody and perilous eight-year war of national liberation against British imperialism (1775-1783) representatives of America's 13 states spent four years negotiating, and finally concluding, on 17 September 1787, a constitutional bargain to establish a federal democratic republic. The Constitution has been amended only 27 times, the most important of these changes being the addition of a Bill of Rights, accounting for the first ten amendments, soon after ratification in 1789. America's founders were aware of dangers that democrats everywhere continue to grapple with. They had read the writings of ancient Greek democrats, including Aristotle's caution that inequality brings instability and Plato's warning that demagogues might exploit free speech and turn into tyrants (Snyder 2017).

The founders' decision to establish a republic rather than a 'pure' democracy based on direct elections of officials, with all votes of equal

weight, reflected two concerns. The one most applauded and taught is that while indirect rule protects minorities and thwarts tyranny, it is vulnerable to autocrat-backed narrow factional interests, including family and friends, with or without the blind support of a populist mob.

A more immediate and complicated issue, however, was to find a governance formula acceptable to all 13 independent states. Under the US Constitution the protection of minority rights had less to do with human and group rights than with states' rights.

This could not, and to this day has not, been resolved with the more inclusive and defining ideal for all democracies, the proposition of inherent equality so boldly proclaimed in America's 1776 Declaration of Independence from the autocratic rule of Britain's King George.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness … That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

'We the People', the first three words of the Constitution, suggest that it, too, is primarily about securing and advancing human equality. The text that follows, however, differs from that of the Constitution of democratic South Africa, for example. South Africa's Constitution, too, begins with 'We the People', but the two constitutions have very different priorities. Whereas the first priority of America's document is the allocation of rights and protections among states, South Africa's is to affirm that all its citizens are treated equally.

The first substantive section of America's Constitution carefully delineates the relative legislative powers of the member states. South Africa's first chapter deals carefully and comprehensively with human rights and equality. The preambular purpose of America's founders is to form 'a more perfect union' of newly independent states, while South Africa's is to ensure that the 'country belongs to all who live in it, united in our diversity'.

America's founders were a homogenous group, unlike the diverse elite that negotiated South Africa's Constitution. All the Americans were white men of virtually the same ethnic, religious, linguistic and educational backgrounds and social and economic standing. Where they were most divided, however, was over whether rights to hold property without fear of state interference or expropriation included a citizen's right to purchase, to own (for any use the owner wished) and to sell African slaves.

Passionate defence of and equally passionate opposition to slavery nearly destroyed America's democratic experiment in the 1860s and sediments of slavery continue to pollute US national politics and international relations. Indeed, the white ethnic nationalism Donald Trump appealed to so effectively in his 2016 presidential campaign, this chapter argues, is rooted in the slavery era and the legacy of white racist fears of black resistance and integration.

When the American Constitution was drafted and ratified, slavery was legal in all 13 colonies, but enslaved African immigrants comprised nearly 40% of people counted in the census of the six Southern states, where they had already become highly valued factors in agricultural production and export. Elsewhere slaves comprised less than 2% of registered people. In the Northern states, especially Massachusetts, which made its condition for agreeing to ratify the Constitution the addition of amendments comprising a basic, if limited, Bill of Rights, support for abolition was growing.

Concerned wealthy plantation owners in the South, and their representatives at the Constitutional Convention, pressed successfully for the inclusion of a stipulation that there be no consideration of or debate about banning slave imports before 1808. 'Free states' that were beginning to ban slavery must be obliged, legally, not to give sanctuary to or otherwise protect slaves. And, most cynically, the major slave states demanded that enslaved Africans with no rights should nevertheless be counted equally along with everyone else, to boost census numbers and thus their states' representation and power in Washington. The infamous compromise that all agreed to would thereafter assign to Africans a census weight of three-fifths of the value of white people.

Further evidence that constitutional provisions opened ways for the already less populous Southern states to assert disproportionate influence and control over the laws and rules enacted by the central government is clear from the way the founders allocated and separated power in Washington. For example, The Senate, in which all states, regardless of size, have equal representation, must approve members of a president's Cabinet, along with senior sub-Cabinet members and ambassadors to foreign countries. As important were all presidential appointments to the US Supreme Court and the federal judiciary.

Four of the first five US presidents were Southern and large slave owners, as were eight of their successors during the 19th century. Simultaneously, Southern slave-owning oligopolies were able to consolidate their power, locally and regionally, becoming essentially one-party states and ensuring that their representatives to Washington were able to leverage power through

seniority and block-voting as other parts of the country were becoming more diverse and more democratic.

Although America's founders could not have imagined the world of Donald Trump, their allocation of power among the federated states provided his crucial margin of victory. Trump failed by three million votes to win the popular vote. His victory was secured in the 538-member Electoral College, 306 to 232, proportionately greater than his loss of the popular vote.

The total reflects the combined number of national legislators permitted in the lower House of Representatives and an upper chamber or Senate in Washington, DC. Close analysis of state voting totals, however, reveals that if fewer than 100 000 citizens in just three mid-West states – Wisconsin, Michigan and Pennsylvania – had voted differently, Trump would have lost the election. Electors are not formally obliged to vote according to the popular majorities in their home states, but, they normally do.

The democratic deficit arises in the relative weights of votes in national elections, but it also has a major effect on domestic and foreign policies, including national defence and public finances. Less-populated states benefit from disproportionate power at the national level. Those states where single-party oligarchies prevailed, as was the case across the South, could form powerful coalitions in Washington. Their representatives also controlled 'safe seats' in Congress and could leverage additional power by dominating key congressional committees where promotion was based primarily on a member's seniority. The number of members of the House of Representatives is based on population numbers. Membership currently stands at 438, with state delegations revised according to a mandated census every ten years.

The Senate, or upper chamber, however, has a fixed membership of 100, two members for each of the now 50 states. Granting smaller, less-populated states equal representation has greatly enhanced their power in the central government. The population of California, for example, is today 66 times greater than that of its western neighbour, Wyoming, yet both states are represented by only two senators, thus greatly enhancing the influence of smaller states in the national legislature and in the decisive selection of the president. Moreover, Senate approval is also required for all presidential nominations to the Cabinet and other senior executive positions, as well as to the Supreme Court and the other lifetime appointments – to the federal judiciary.

The establishment of the Electoral College as the arbiter of presidential elections was intended to do more than reassure smaller states. It was also meant to prevent the election of a demagogue able to stir sufficient passion among the masses to empower him or her to capture the state and bend it to

satisfy his or her personal and private interests; what, in contemporary Africa, is sometimes called 'electoral authoritarianism' or 'illiberal democracy'.

Ironically, and for only the first time in more than 200 years, votes in the Electoral College in 2016 affirmed the election of a demagogue by overruling the wishes of a slim but significant majority of US citizens. To attribute Trump's victory to this peculiar US deviation from normal democratic voting rules only partially explains it and, with it, the unprecedented risks of 'state capture**',** as defined in this volume. A more important factor was the nature and effectiveness of his populist and elite appeals to majorities of voters, not just in the few swing mid-Western states that gave him his margins for victory in the Electoral College, but the much bigger margins of victory he achieved in less-populated southern and western regions.

TRIBALISM AND ECONOMIC POPULISM

To capture a democratic state, a greedy leader must first be elected. Donald Trump had been a celebrity for decades, primarily because of his insatiable appetite for wealth, glamour and publicity. He had no prior government experience or political platform or ideology. He did, however, have well-known racial views that resonated with many Americans. The nature of his appeal and its historical roots helps explain how he was able to gain the means for state capture and, perhaps, why his core supporters remain loyal despite the fact that the material benefits he is gaining in office don't accrue, and may even hurt, the material interests of his core constituents.

Trump rose to political prominence by suggesting that Barack Obama, America's first African-American president and the son of a Kenyan father, was not actually born an American citizen and was therefore also the country's first illegitimate president. He first made this allegation publicly in early 2011 and refused to concede that it was not true, despite irrefutable legal evidence to the contrary, until September 2016, after securing the Republican Party's presidential nomination.

A presidential campaign with its keynote such a blatant appeal to racial prejudice, and the fact that so many Republican Party members did not consider this sufficient reason to disqualify him as the democratic representative of all Americans, was a shock to many of those who gave Obama his electoral majorities in 2008 and 2012. It also alarmed many in Africa and around the world who still admire Obama as well as those who assumed America's democracy was by now immune to such demagoguery and possible 'state capture'.

The main manifestation of white racism in America arose historically in defence of slavery, a perversion of the constitutionally mandated protection

of individual property rights. Money was the main motivator. Regional economic interests that united the Southern states in demanding that slavery be protected were already substantial when the Constitution bargain was struck in 1787.

Just six years later Eli Whitney invented the cotton gin, capable of separating cotton fibres from seeds far faster and better than manual labour. By the mid-19th century the combined value of cotton production in America's main slave-holding states amounted to the world's fourth-biggest economy. Southern plantation owners, who became extremely rich thanks to the cotton trade, owned slaves whose total monetary value today would represent about $10 trillion.

Securing this slave wealth locally and nationally was the overriding strategic interest of the South's political elites. Although they had important allies in the North, especially in banking and financial circles, there was pressure to abolish slavery and prevent its expansion into the newly-created Western states. Abolitionist pressures were also spreading internationally.

In response to these threats, the oligarchs in the cotton-rich states across the South sought to mobilise local political support by appealing to white ethnic nationalism, or tribalism, and fears of black revolt and empowerment. In the process they succeeded in consolidating one-party, essentially 'electoral authoritarian' states across the South. This variety of 'tribalism' was less complicated and culturally entrenched and far easier to sustain for long periods than is generally the case in many African states dominated by an ethnic faction. It also empowered them to dominate the politics and polices of the federal government, until 1860, and has proved to be remarkably resilient regionally and nationally ever since.

Abraham Lincoln ran as an abolitionist, leading a newly-formed Republican Party to a very narrow and highly contentious victory in 1860. His election as the 16th US president, heading the federation's then 33 states, was soon followed by 13 of them seceding and forming the Confederate States of America. After nearly five years of what was, at the time, history's bloodiest war, slavery was abolished and the country forcibly, if only formally, reunited.

Soon after the war what remained of the Southern political elite reverted to a strategy of appealing to white racial fears and pride that pre-empted more inclusive democratic development across the South. Through their efforts they laid the foundations of racial segregation and the consolidation of one-party government throughout the South and exerted disproportionate power over the law making of the central government, especially with regard to powers that were crucial for the continuing subjugation of African Americans.

The success of the Southern elite's ability to redefine white racism locally in violent and politically potent ways meant that by the end of the 19th century one-party states were firmly entrenched and effectively allied with each other throughout the old confederacy. Moreover, they had repackaged white racism in ways that were generally politically palatable in the rest of the country and which allowed the South's leading and long-serving representatives to exert a disproportionate influence over national legislation, judicial appointments, foreign and national security policy and, eventually, presidential politics, for the next hundred years.

Among the few occasions on which the Electoral College majority overruled popular majorities, the only instance where the proportionate gap was greater than it was in 2016, occurred in 1876, also raising concerns about democratic consolidation and sustainability. In that poll the Democrat, Samuel Tilden of New York, won the popular vote with 50.9% to Republican Rutherford Hayes's 47.9%. In the Electoral College Tilden initially won 184 to Hayes's 165 but with 20 electoral votes unresolved. Hayes eventually persuaded the 20 outstanding electors to vote for him, winning the presidency by just one electoral vote.

In the process, however, the nation paid a high price, politically and morally. Accepting so democratically dubious a win gave further legitimacy to the Electoral College rather than to the democratic majority as the final arbiter of elections. More reprehensible was Hayes's concessions to the Southern electors, which included withdrawing all remaining federal troops.

Taking advantage of this withdrawal, the South's political elite launched a violent campaign of 'Jim Crow' racial segregation; what Bryan Stevenson, Head of the Equal Justice Centre in Selma, Alabama, calls a war of terror, that lasted for nearly 100 years. Slavery was replaced by a brutal regime of segregation that was longer and more violent than the apartheid regime imposed on South Africans in 1948. The Equal Justice Centre has documented at least 4 075 racial lynchings carried out during this war of terror by armed extra-legal white citizen militia across the 12 former slave states between 1877 and 1950.

The Democratic Party, which emerged out of the anti-federalist movement, dominated politics throughout the South from 1780 to 1980, first supporting slavery and then the 100 years of strict segregation that denied African Americans virtually all voting, legal and other civil rights, economic opportunities or education. Although Democrats elected only two presidents between 1870 and 1932, neither from the South, the party's size, unity and seniority in the Congress ensured that there was minimal federal interference in the internal affairs of the Southern states.

When New York Democrat Franklin Roosevelt was elected by a landslide in 1932 at the height of the great depression and launched the New Deal to overcome America's crippling economic inequalities and poverty, Southern Democratic leaders lobbied successfully to restrict these benefits to poor whites only.

Finally, in the 1960s, the courageous and tenacious African-American civil rights movement, led by Dr Martin Luther King, succeeded in securing major civil rights legislation that ensured that post-civil-war voting rights amendments enacted by the Congress (but successfully resisted in the South) were implemented. The president who proposed the legislation and then worked to ensure it was approved was Democrat Lyndon Johnson from Texas, a former segregationist and the first Southern president since the 1860s.

Republicans, sensing an opening, embarked on a new 'Southern strategy' to appeal to the South's political elite and public under the guise of promoting a return to traditional American values that effectively appealed to white ethnic sympathies. As a result, many Southern political leaders left the Democratic Party. Nearly all the Democratic solid South quickly became Republican in an uneasy but electorally successful electoral coalition with the Republican financial and business elite.

A PLUTOCRAT'S STRATEGY TO CAPTURE THE STATE

Donald Trump ran for president as a Republican, apparently because of his personal affinity with white ethnic nationalism and a sense that he could quickly build a base of political support among these like-minded Republican ethnic nationalist (or 'value voters') who, in varying degrees, support a diversity of 'conservative' causes such as opposition to abortion, gun control, same-sex marriage and gay and transgender rights, immigration, feminism, environmental regulations and higher taxes, and generally also support expanding and empowering the US military and police and the role of Christianity in public life.

Before the 2016 campaign Trump showed little interest in or support for most of the issues that motivated the 'value voters' in the Republican coalition. But in 2015/16 his appeal to the white ethnic nationalism implied by his main campaign slogan, 'Make America Great, Again!', proved sufficiently potent to attract the support of substantial segments of the US electorate, particularly in states with marginally greater numbers of Electoral College votes, to ensure his eventual victory.

Trump's earlier fame and notoriety accrued from his business successes in real estate, gambling and entertainment. Although he was never closely allied with the less numerous but extremely wealthy Republican business and

donor elements of that partisan coalition, most acquiesced to his nomination and presidency. Many had been critical of his previous seemingly miraculous recoveries from major bankruptcies and rumours of complicity in illicit money laundering for foreign oligarchs, not to mention his numerous personal scandals and penchant for sensational self-promotion and publicity.

Thanks to extensive social science research and political analysis of the 2016 election much has been detailed about voter attitudes before and after the election. Although economic and other material concerns were relevant, the idea that Trump was able to appeal to the non-college-educated and economically disadvantaged is belied by results showing that he lost by huge majorities among African Americans, Hispanics, Asians and other people of colour, but easily carried all segments of America's declining white majority.

The historic and current nature of this persistent and fundamental divide is, perhaps, best summarised in an essay by Adam Sewer (2017) published in *The Atlantic* and entitled 'The Nationalist's Delusion' and a complementary essay by Joshua Zeitz (2017), published in *Politico* and entitled 'Does the White Working Class Really Vote Against Its Own Interests?'.

Both essays affirm the thrust of this chapter, which is that Trump pulled off the first critical phase of state capture abetted by white ethnic racism rooted not in religion or ideology but reconciling democracy with states' rights and slavery (starting in the 17th century) and segregation (up to the mid-20th century).

Moreover, what Sewer and others argue is that the election of America's first African American president in 2008 did not mark the end of white ethnic nationalism. Rather, it ignited a reaction that, while it was strongest among the vast majority of white Southerners, also made an appearance in other parts of the country, where Trump scored most heavily among white voters in the several historically Democratic and swing states in the middle of the country to win in the Electoral College.

This should at least serve as a warning, albeit where none is needed, to African democrats trying to overcome much more entrenched if more openly politicised ethnic identities that can be mobilised and exploited by demagogic leaders who, once in office, seek to bend the state to serve their private financial interests and those of their families and loyal retainers.

One other aspect of Trump's demagoguery which may resonate with African democrats is his denial of any ethnic bias in his American nationalism. He often and loudly proclaims that he is the least racist person he knows and among his supporters only a radical fringe identifies itself as white nationalist.

The research of American University historian Ibram Kendi (2018) suggests that in 21st-century America 'denial is how the person defends

his superior sense of self, in her racially unequal society'. This conclusion, although still controversial, is derived from analysing clusters such as immigration and religious tolerance as well as racial tolerance and inequality.

Nearly half of Trump voters think whites face a great deal of discrimination, according to polling results reported on 22 November 2016 by a *Huffington Post*/YouGov Survey. Drawing on more comprehensive survey data, Ta-Nehisi Coates (2018) concludes: 'In 2016, Trump enjoyed majority or plurality support among every economic branch of whites.' This may suggest to African democrats that the challenges they face in preventing local demagogues from exploiting much more deeply entrenched ethnic identities to mobilise a populist electoral mandate that can be manipulated as a cover for eventual state capture by private economic interests may be even more daunting than current African politics portends.

AMERICA'S DEMOCRATIC DEFENCES AGAINST STATE CAPTURE

During his first year in office we have seen two aspects of Donald Trump's behaviour that are symptomatic of attempts at 'state capture' by a democratically elected leader. One is the authoritarian leadership traits and dictatorial rule that have resulted from the type of populist demagogic campaign Trump ran, though so far these have not been consolidated into what elsewhere has become dictatorial domination of the state. The second could only be of practical significance once he obtained high office – converting that authority from public service to whatever private enrichment he might desire and can render feasible.

In their book *How Democracies Die*, Harvard scholars Steven Levitsky and Daniel Ziblatt (2018) cast a wider net, drawing on their research into electoral takeovers by autocrats in Germany and Italy in the 1930s and, more recently, in Venezuela, Turkey and the former Soviet Republics, among others.

They cite four fundamental warning signs of electoral authoritarianism, also evident in Trump: his rejection of the democratic rules of the game, denial of legitimacy of opponents, tolerance or encouragement of political violence and a willingness to undermine rivals' civil liberties (Levitsky and Ziblatt 2018). During his campaign and presidency Trump has exhibited at least ten autocratic tendencies, including favouring strong men over strong institutions, non-transparency, attacks on freedom of expression, the political art of lying, opinion over fact, delusions of infallibility, repression, male dominance, tribalism and crony capitalism (Stremlau 2017).

Trump's blurring of the lines between his government duties and his personal financial dealings and interests, which also benefit family members and a small number of business and political associates, reminds Africanists

of the oligarchic behaviour, or neopatrimonialism, that still stymies democratic consolidation in too many African states. In the USA, do the selfish financial interest of Trump, his family and close associates portend or imply state capture? If so, will it succeed or fail and with what implications for sustainable democracy, whether in the US, South Africa, or any other democratic experiment?

For students of state capture all Trump's authoritarian leadership traits are potential ways of extracting private and oligarchic wealth from the state. Conservative writer and former Bush Administration official, David Frum, argues that Trump uses his power to turn off the 'burglar alarms' of the American state.

He attacks the FBI and other institutional and constitutional protections intended to uphold public integrity in order to plunder and enrich himself, his loyal retainers and the plutocrats who populate his Cabinet and fund his many private interests.

Frum (2018) argues persuasively in interviews and in his book, *Trumpocracy: The Corruption of the American Republic*, that Trump's primary drive is to use his position to enrich himself and his family and associates, while undermining the institutions and laws that could threaten these efforts or place him in legal jeopardy.

In the process, Trump has also disregarded and degraded the National Security Council and the Department of State and US Intelligence Services so he can obfuscate and prevail over critics and investigators of Russian interference in the 2016 campaign and, more importantly to him, what appears to be a vast, highly lucrative and possibly illicit web of prior money laundering and other financial dealings with Russian oligarchs.

Frum also argues, apropos the Trump version of state capture, that rather than attempting to change the structures of governance – its centuries-old and generally respected system of checks and balances – he circumvents or overrides them by executive actions, by refusing to disclose financial information and by his endless blatant abuse of power.

Trump's conflicts of interests and possible obstruction of justice in hiding and protecting them are at the heart of the Justice Department's investigation into Russia's role in the 2016 election and whether or not there was any collusion with the Trump campaign. The mandate given to the independent Special Counsel, former FBI head Robert Mueller, is sufficiently broad to include Trump's earlier financial dealings with wealthy Russians, which may have been illicit and could render Trump or others now or formerly in his administration vulnerable to blackmail and/or indictable for criminal behaviour.

There are well-sourced allegations in the US media that since the 1980s Trump and his associates have laundered hundreds of millions of dollars in illicit financial flows from oligarchs in Russia and other former Soviet republics. This money allegedly allowed Trump to overcome major bankruptcies and underwrote several of his major luxury real estate and golf course developments when the major banks would no longer grant him loans. If proved, this could reveal a major motivation for his apparent attempt at state capture and could establish criminal intent should the Special Counsel indict him for obstruction of justice with regard to the investigation into Russia's role in the election.

To the extent that preventing exposure of, or continuing to profit from, illicit financial flows (IFFs) may prove to be a key motive behind Trump's subversion of America's democratic principles, practices and institutions, this, too, will be of special interest to African democrats. African countries incur major losses due to IFFs that deprive them of badly needed tax revenues and profits that might have provided better wages for low-paid workers, thereby exacerbating the already destabilising effects of extreme economic inequality. A high-level panel on IFFs from Africa, sponsored by the African Union and the United Nations and chaired by Thabo Mbeki, conservatively estimates losses to exceed $50 billion annually – perhaps more than Africans receive in international development assistance each year.

Thus far, Trump has managed to advance his personal interests and those of his plutocratic allies without much regard for any collateral damage to the voters who elected him, by maintaining sufficient support among his Republican majorities in Congress, most notably to pass radical and hastily cobbled together tax legislation favourable to America's richest 1%, including Trump and his fellow plutocrats, several of whom hold high positions in his administration.

His severest and best-informed critics, among them Nobel laureates in economics, Joseph Stiglitz and Paul Krugman, point to how regressive and ultimately divisive the huge cutting of taxes on the rich while slashing benefits for the poor is likely to be. There are deep historical roots to this latest example of abuse of African Americans, the county's most economically and socially disadvantaged identity group.

Ta-Nehisi Coates (2018) recounts the current manifestations of this in his new book, *We Were Eight Years in Power: An American Tragedy*. Stiglitz (2018) derides the legislation in 'The US Donor Relief Act of 2017' while Krugman (2017) calls it 'The Biggest Tax Scam in History', with the Republican leaders in Congress willing to indulge Trump's self-serving behaviour, however

outrageous and offensive, in order to achieve their agenda of lower taxes for wealthy individuals and corporations and reductions in government services.

This, of course, serves the private financial and business interests of Trump and his cronies. Among giveaways to the richest 0.001% was a deduction allowing hedge-fund managers and private-equity tycoons, several of whom serve in the Trump White House and Cabinet, a lower tax rate on their profits than the rate paid by many of Trump's middle-class supporters.

Other evidence of incipient state capture is more blatant and more targeted to enrich Trump and his small circle of business associates and senior officials in his administration. One year into his presidency a vast, complex array of possible conflicts of interests has been extensively and reliably documented, despite his denials and persistent refusal to release his tax records or reveal the extent of his personal wealth and holdings.

In August 2017 *The Atlantic* devoted nearly 100 pages to an inventory and an analysis by Jeremy Venook of what he described as a catalogue of 53 of 'the more clear-cut examples of conflicts of interest' (Venook 2017).

Allegations of blatant conflicts of interests have also been levelled against members of Trump's immediate family. White House Senior Adviser and Trump son-in-law Jared Kushner has been warned about questionable personal financial dealings with a potentially hostile foreign power. According to a lengthy and heavily sourced article in the *New Yorker* by Adam Entous and Evan Osnos, Kushner, who owns a vast real estate empire, has alarmed US Intelligence officials by his regular contacts with senior Chinese officials, which he conducts outside regular diplomatic channels, occasionally alone (Entous and Osnos 2018).

US intercepts of classified messages between the Chinese embassy and Beijing reveal that on at least one occasion during these meetings about matters of official relations Kushner discussed the status of Chinese investment in one of his family's major real estate developments.

AMERICAN DEMOCRACY WILL PREVAIL

Donald Trump's attempt to gain sufficient control over the institutions and processes of the US government for private enrichment includes altering regulations and customary norms of transparency and accountability. He has not succeeded in changing federal laws and has so far shown no capacity or resolve to undertake the kind of state capture that has turned fledgling electoral democracies elsewhere into electoral authoritarian regimes.

This form of wholesale state capture has occurred predominantly in states moving from one political and economic system to another, where the checks and balances on power are not yet fully institutionalised. For Trump

to achieve this, he would need to gain personal and partisan control over the army and police, judiciary and national electoral management body, and curb or discredit independent media.

Trump has not hesitated to embrace the military and police, and constantly denigrates the media and questions the integrity of the judiciary and electoral authorities (the US, however, does not have a national election authority, this function is in the hands of 50 separate state electoral bodies). Although not immune from political pressures, all these bodies uphold and likely will continue to uphold the US Constitution and remain largely non-partisan and professionally staffed and respect long-held traditions of 'being above politics'.

The courts and democratic elections in the US continue to maintain their integrity, as does public and official acceptance of judicial rulings and election results. And despite Trump's frequent lying, deception and decrying virtually all criticism in the media as 'fake news', independent fact-checking reporting continues to flourish. These are the greatest democratic bulwarks against state capture in the US, despite fundamental persistent flaws in the world's longest-surviving Constitution. The same positive forces are evident in South Africa, where a much younger but more inclusive and citizen-centric Constitution predominates.

In both countries the constitutional provisions for mustering and informing public and partisan opposition to threats of state capture lie in the protection of peaceful dissent. In America the provisions of the Constitution's first amendment remain vital in checking Trump's abuses. Similarly, it is South Africa's Constitution that has been used to expose and curtail state capture in that country.

Constitutionally guaranteed freedom of speech, the media, and 'the right of people to peaceably assemble and to petition the government for a redress of grievances' have been exercised effectively, with judicial protection for those challenged or threatened with suppression by Trump and his supporters. That freedom to exercise these rights has fuelled growing popular resistance to Trump's ethnic nationalism and sexism and to his substantive actions to enrich himself and his fellow plutocrats, which, his opponents argue, risk creating still greater inequality, instability and the dissolution of democracy.

The Women's March on Washington the day after Trump was inaugurated was reportedly the largest single act of mass protest in US history, and there have been numerous other signs of growing opposition to Trump in cities around the US. While important, the numbers that still matter more than any others in US politics are the votes on election day. The possibility that growing popular opposition to Trump could cause the loss of one or both

of the Republican majorities in Congress in November 2018 and/or Trump's defeat in 2020 will, more than anything else, determine the fate of the most audacious and blatant attempt at state capture in American history.

This chapter has explored several of the founding flaws in the US Constitution that abetted Trump's election, along with a potent re-assertion of white ethnic nationalism that has also stunted, even once imperilled, the sustainability of American democracy.

Reforming the US Constitution so that it may provide a firmer framework for sustainable democracy has been almost impossible due to its inherent privileging of states' rights over human rights. The few successful efforts to amend the Constitution, however, have supported improving self-government, above all the right to vote (Black 1997).

For African democrats seeking salient lessons from America's current struggle with state capture and the consequent threat to democracy, the next two national elections, in 2018 and 2020, could determine the direction and nature of America's democratic development for generations.

CORRUPTION, STATE CAPTURE AND ANTI-CORRUPTION INITIATIVES IN POST-COMMUNIST COUNTRIES

Alexander Stoyanov

ABSTRACT

Most analysts consider state capture a form of corruption. While the concept itself is, to a large degree, a 'work in progress', one key feature is that it covers a situation in which the state/government has lost control of some (or many) of its functions and has, to a certain degree, been remodelled to serve the interests of specific private actors (captors) rather than those of the public. This chapter discusses different aspects of this phenomenon and relates them to the process of remodelling societies in Central and Eastern Europe during the transformation from communism to post-communism. While on the one hand this process has involved concerted attempts by private actors to acquire privileged positions in markets and society, on the other, efforts to counter corruption and state capture have gathered momentum. The chapter discusses both the objective prerequisites for effective anti-corruption (the link between the status of governance and types of anti-corruption and good governance policies) and the role of civil society and non-governmental organisation-driven initiatives to combat corruption. Modest results of anti-corruption efforts in the region lead to the conclusion that further efforts to counter corruption and state capture will require more effective policies and better coordination among anti-corruption stakeholders.

INTRODUCTION

Corruption theory and research are rooted in the idea that the abuse of power for private gain is, generally, a problem of governance and is located in the sphere of relationships between governments (the state) and the market economy. In this respect, corruption and corruption-related phenomena like state capture have been a serious problem for most post-communist transition countries in Central and Eastern Europe (CEE): transition has basically remodelled the governance structure of these societies, introduced multiparty systems, 'recreated' the market economy through privatisation and, essentially, 'opened up' societies to modern human values and rights and international trade.

More specifically, this transformation involved a massive relocation of predominantly state-owned assets, comprising more than 90% of the economy, into private and corporate hands. This asset transfer process evolved parallel to the adoption of the new legal base of societies, that is, rules for relocation developed simultaneously with the relocations themselves.

In this context, corruption appeared as both an instrument of transition and a problem – an instrument in as far as it facilitated wealth transfer to the 'politically correct' actors and a problem because many wealth transfers were out of the control of society and effectively created the elements of what is today labelled 'shadow power'. In this respect, this chapter aims to address three main aspects of the corruption-state-capture-anti-corruption nexus.

First, it explores the functional role of corruption and state capture in the post-communist transition process and the evolution of this role at different stages of the transition. While the illegitimate use of such 'tools' has proved instrumental in the competition for government-owned assets in the early stage of transition, at a later stage the tools have been used to consolidate the rent-seeking efforts of the new political class and business elite.

The second aim of the chapter is to analyse the objective reasons why the progress of anti-corruption in the region has been slow and uneven. In view of the newly emerged interests, opposition to anti-corruption would be logical and expected. On the other hand, however, is the lack of proper structuring of anti-corruption efforts. In this respect the chapter explores the factors that should be accounted for in structuring such efforts.

The third issue discussed is the role of civil society in combating anti-corruption in this complicated environment and process. While overall progress is modest, some anti-corruption initiatives have proved useful and successful at national and regional levels. The process has, however, not been uniform. Certain forms of differentiation have developed between countries that, in the end, have affected both corruption and anti-corruption initiatives.

In countries like Estonia, which are considered anti-corruption success stories, both the economy and the effectiveness of governance have improved. In other parts of the region progress has been slow or even stagnant. It is important to assess the factors that have contributed to both the successes and the failures. Most of the evidence relating to success stories seems to point to the fact that appropriate governance remodelling is, in itself, a deterrent to corruption. On the other hand, no anti-corruption programme can compensate for governance models that are characterised by a lack of transparency, massive subversion of market rules and authoritarian rule.

CORRUPTION, STATE CAPTURE AND TRANSITION

The term 'captured state' generally denotes a situation in which the state is effectively subject to outside influences or (illegitimate) interests; that it does

not operate in a manner generally perceived as 'good'; that it is subject to systematic and/or high-level corruption, or that it no longer serves the public interest.

There are at least two problems with this use of the term. Firstly, it is too general: state capture is used as a label for too many different negative governance scenarios, each with distinct and very specific characteristics including corruption and various cases of bad governance or white-collar crime.

The use of state capture as a negative label of governance presupposes an underlying assumption of a positive governance ideal which is rarely (or never) described explicitly. The common characteristic of all forms of use of the state capture concept is that they refer to a deviant form of relationship among several types of collective actors: the state (a summary label for the executive, the legislature and the judiciary), the business sector (specific business sector entities) and the political class (political networks, parties, and so on).

The use of the term deviant suggests that state capture is considered a deviation from the normal or ideal form of relationship among these actors. In this sense, the state capture concept is purely normative: it is used to analyse the deviations from a certain socioeconomic model generated by corrupt relationships. This automatically implies that both the mechanisms and the results of state capture in different societies and states diverge. In addition, if a state is explicitly or obviously oligarchic or autocratic, the term state capture has no meaning, since autocracy is the norm.

State capture as an 'expanding' term has been used in the context of South Africa (Madonsela 2016) as well as in relation to Russia's economic and energy influence over some European Union (EU) member states (Stefanov, Vladimirov, Conley and Mina 2016). In recent documents the European Commission also expressed concern about state capture problems in some Balkan countries (European Commission 2016).

These cases considerably expand the original concept of state capture, introduced in 2000 to describe a form of corruption in which private companies influence law making and the state's regulatory functions. It was defined as 'shaping the formation of the basic rules of the game (laws rules, decrees and regulations) through illicit and non-transparent private payments to public officials' (Hellman, Jones, Kaufmann & Schankerman 2000). However, when no lobbying legislation exists, all lobbying is illegal in terms both of the advice provided and the resources spent.[1]

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1   In the initial stages of post-communist transition lobbying legislation did not exist in many CEE countries. To date, in some countries (eg, Bulgaria), it has still not been adopted.

The key in this scenario would be the result: whether the involvement of companies in shaping the rules creates advantages for some and relative disadvantages for all the others, that is, rules distort the market and facilitate the emergence of monopolies and/or social or economic 'spaces' operating under the 'shield' of biased legislation. In terms of the differential advantage scenario, larger scale involvement of businesses in 'shaping the rules' (in the range of 10-20% of companies, as registered by the Business Environment and Enterprise Performance Surveys – BEEPS, conducted jointly in 1999 and 2002 by the World Bank and the European Bank for Reconstruction and Development in transition countries) would not be likely.

Massive involvement does not lead to differential advantages; rather, it is a symptom of a different phenomenon – rent-seeking behaviour on the part of officials who provide paid access to 'rule making', extracting contributions from companies to make their voices heard. Another interpretation of such a scenario is that the result of a mass-capture process is essentially that a branch of the public office is dominated by the interests of an industry (Philp 2001).

The term state capture is used quite often to describe post-communist countries in the context of their transition from a totalitarian form of government to a democratic one. While state capture seems to be the most appropriate of the concepts developed thus far in corruption research, its classical definition cannot express all the nuances and complex relations among the different players that have recently been unravelled.

For example, the term is used to refer to the establishment of control by one state over the resources of another state (Brooks, Walsh, Lewis and Kim 2013) in order that the institutional capacity of the executive (or other powers) may be captured by political parties wishing to extract corruption rents (Innes 2014), or when business entities seek to shape (by paying bribes to state officials) the rules of the game (legislation) in order to obtain privileged status or preferential treatment (Hellman and Schankerman 2000; Hellman, Jones and Kaufmann 2003).

State capture is also used as a synonym for oligarchy or autocracy, to describe a scenario in which predatory elites stray from democracy into a particularistic state (Mungiu-Pippidi 2013). Varraich (2014) views state capture as a form of corruption realised through other corruption mechanisms like clientelism or patronage. Transparency International defines it as 'a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interests' (Martini 2014).

Interestingly, here the set of captors is broadened even further to include entities outside the country. The mechanisms of state capture described place

this definition very close to that of clientelism, with illegal lobbying still at the centre of the concept:

> [I]llicit contributions paid by private interests to political parties and for election campaigns, parliamentary vote-buying, buying of presidential decrees or court decisions, as well as through illegitimate lobbying and revolving door appointments.

Corruption and state capture are most relevant to analyses of societies in which the commonly accepted normative ideal is that of a liberal social order in combination with a neo-liberal economic model. These ideal types (in the Weberian sense) presuppose specific norms for the legitimate relationships among the interests of the main actors/participants in the state-capture process (state, business sector and political class). In addition, the economy has a non-monopolist structure, the state bureaucracy is neutral to the different interests in society; the political class (through parties), on the one hand, represents interests whose legitimacy is established through general elections and, on the other, interests which do not undermine the structure of the economy or the neutrality of the bureaucracy.

Evidence from various CEE countries shows that the capture process may be initiated by both non-state actors (eg, business entities) and the state – when public bodies capture businesses on behalf of officials, political groups, networks or parties (Yakovlev 2006; Yakovlev and Zhuravskaya 2006). Occasionally the two processes run parallel. State capture is thus a virtual privatisation of the state, or rather privatisation of certain state functions. In some countries (eg, Russia) a reverse process has also been observed – government institutions are used by politicians to extract undue advantages from businesses (Yakovlev 2006).

To sum up, in the course of transition in CEE countries corruption and state capture have played an instrumental role in restructuring states and reformatting the relationship between governments and the emerging-market economy. Initially, when market economy structures were created through privatisation, corruption played a role in facilitating access to the economic assets owned by governments. The negative result of the operation of corruption has been the formation of several largely illegitimate groups – very affluent and economically powerful public officials and politicians, politically privileged businessmen and the group of endogenous entrepreneurs (the non-privileged group).

At the next stage, acquired resources underwent a process of consolidation which contributed to the formation of several groups of legitimate and

illegitimate interests. These included the interest of the affluent political class in seeking opportunities to extract corruption rents by controlling business regulations and opportunities and influencing the distribution of procurement spending.

Another illegitimate interest is that of the politically connected (and dependent) businesses that seek opportunities for privileged access to procurement resources, business transactions with the government and illegitimate (privileged) access to public resources. These new processes form the background of a substantial number of corruption transactions and also create incentives for the formation of networks of politicians, officials and business people who seek further opportunities for rent extraction.

One additional, but very important, element of this new network of relationships is the constant need to support the political class financially during elections and compensate for pre-election contributions with post-election public resource allocations.

CORRUPTION, STATE CAPTURE AND ANTI-CORRUPTION IN THE CEE

The status of efforts to counter corruption and state capture, along with progress in eliminating corruption, are directly linked to the overall social, political and economic development of societies. According to national and international assessments, anti-corruption efforts in the CEE region and elsewhere have, with some minor exceptions, been disappointing (Heeks 2011; Heimann, Foldes and Coles 2015: 4).

This dissatisfaction also relates to governments' commitments, the political will expressed on different occasions, the ability of governments to counter pro-corruption interests and control corruption among their ranks and the practical possibility of 'forcing' their societies into a 'virtuous circle' of sustainable achievements and success in combating corruption (Mungiu-Pippidi 2016).

The most specific characteristic of post-communist societies in the CEE is that after 1990 they all underwent a fundamental transformation of their economic, political and legal systems and the structure of state power (executive, legislature and judiciary). All societal systems have been transformed into their 'opposites'. The economies have been transformed from predominantly government controlled and centrally planned into market economies based on private property and a substantially limited involvement of government.

The political systems of the communist states (the monopoly of one party) have been transformed into multiparty systems with free elections. The

legislative systems have been transformed to provide for this fundamentally different environment but also incorporated, between 2004 and 2007, the legal norms of the European Union. In 2004 the countries of Central Europe became effective EU members; in 2007 Romania and Bulgaria joined the union, while Croatia became a member in 2013. Prior to becoming members of the EU, CEE countries became members of NATO. With the exception of the Baltic states, the remaining countries in the post-Soviet space remained outside both organisations.

Another important change has been the closing down of the security services of the communist period, which were crucially important to the maintenance of post-World War II communist values and governance structures. The geopolitical, military and socioeconomic transformation of these countries since the beginning of the 1990s, when they were members of the Soviet Bloc, the Warsaw Pact and the Council for Economic Cooperation, has been fundamental and radical.

It should be noted that the communist state excludes an independent civil sector (that is, one not controlled by the government and the ruling party), as freedom of association is limited to membership of organisations established by the Communist Party. In this respect, post-communist transition also involved the 'recreation' of the civil sector, including the emergence of non-governmental organisations and other forms of civil association.

Some more recent studies show that transformation in the countries concerned has proceeded at different rates and in different directions. Yakovlev (2006) delineates three groups of countries based on the depth of political and economic reform: post-Soviet space, Central Europe and intermediate groups such as Bulgaria, Romania and Russia. While the leading group of Central European countries (Poland, Czech Republic, Hungary and Slovakia) started reforms in the beginning of the 1990s and initiated fundamental changes at the outset of the process, in the intermediate group changes were delayed for between five and eight years. This lag has resulted in differences in the structure of the economy and, more notably, in the way businesses interact with the state. The bigger lag has resulted in higher levels of executive involvement and higher corruption levels.

As the evolution of Corruption Perception Indexes (CPI) shows (Table 1), in most CEE countries the corruption situation was troublesome at the beginning of the research period when data became available (1995). In 1997-1998 the CPI scores of the leading CCE countries were in the range 46-52, while countries 'lagging behind' were in the range 24-30.[2]

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2   Transparency International's CPI score ranges from 0 to 100, where 100 symbolises the more favourable situation (a corruption-free society), while 0 is associated with massive and systematic corruption at all levels.

About 20 years later (2016) the leading countries had improved by between 48 (Hungary) and 62 (Poland). In the 'lagging behind' group progress was most evident in Romania (48), more moderate in Bulgaria (41) and almost non-existent in Russia (29). Between 1995 and 2016, in terms of qualitative assessment, most countries remained or only moved slightly out of the 'systemic corruption' category.

In most countries in the region with systemic corruption problems a principal contributing factor has been the governance model and/or the modification of this governance model. According to most corruption 'formulas', during the period of transformation from totalitarian control to a market-based democratic society (1990-2016) the resources and discretion of the executive were almost exhaustive in the beginning and constraints and accountability minimal. In this respect, the majority of CCE countries initially fell into the category of high corruption and poor government and moved towards the category of medium corruption and fair government by the end of the period.

This situation has been thoroughly analysed by Shah (2006), who proposes matching anti-corruption policy designs with levels of governance and corruption. Effective anti-corruption policy designs presuppose the prioritisation of 'hard' measures – fundamental restructuring of the governance model, while, in situations characterised by fair or good governance combined with medium and low corruption, measures can be 'soft' and directed towards improvements in the quality of governance, raising public awareness and deployment of control agencies.

Table 1
Anti-corruption priorities and policy design

Incidence of corruption	Governance quality	Priorities of anti-corruption efforts
High	Poor	Rule of law, institutions of participation and accountability, land tenure reform, limit government interventions to focus on core mandate.
Medium	Fair	Decentralisation and economic policy reforms, results-oriented management and evaluation, incentives for competitive service delivery.
Low	Good	Anti-corruption agencies, stronger financial management, raising public officials' awareness, no bribery pledges.

Source: Shah 2006

Anti-corruption measures and, especially, the structuring of civil-society-based anti-corruption initiatives and the anti-corruption policies of governments show a reverse sequencing of policy designs. In the initial period the predominant policies have been 'soft', that is, they have included measures of a moral and partly administrative nature (ethical codes, hotlines, asset declarations, whistleblower protection legislation, awareness-oriented-anti-corruption campaigns and so on).

For a long time authorities in many CCE countries seemed reluctant to resort to hard measures that would substantially limit their powers and command over public resources. In Bulgaria, for example, conflict of interest legislation was adopted on the eve of the country becoming a member of the EU (2007) after external pressure and a series of conflict-of-interest scandals.

The result of this reverse sequencing of anti-corruption and governance-improvement policies has been, with minor exceptions, slow progress in fighting corruption. A substantial part of these reforms has been facilitated by civil society organisations, which have identified the problem and pushed for structural and awareness-raising anti-corruption initiatives. In addition, the anti-corruption position of civil society has been strengthened by the support it has received from EU structures and institutions, as anti-corruption has been one of the priorities on the EU agenda.

CIVIL-SOCIETY-BASED AND OTHER ANTI-CORRUPTION EFFORTS

Civil society in CEE countries is in a period of social structuring. The fact that civil society organisations were unable to exist and operate under communist rule has made it difficult for them to make a notable impact. Therefore, anti-corruption initiatives have been limited.

The first civil society publications reflecting and analysing corruption data were received with suspicion ('data and methodologies are biased') and opposition ('such a problem does not exist'). Public and political acceptance of the problem evolved gradually and was substantially influenced by the publication of Transparency International's CPI scores in 1995.

Civil society has, however, been involved in the anti-corruption debate from the very beginning. The main argument against its work in this respect has been (and continues to be) that anti-corruption discourse is a political attack on the incumbent government. Another aspect of this debate is the issue of the specific nature of the CEE region, which does not conform with the typical Weberian model of governance (impartial administration) and should be studied on its own terms (Ledeneva, Bratu and Köker 2017).

Typical civil-society-based anti-corruption initiatives in the CEE countries can be divided into two main types. The first is initiatives that seek the

unification of likeminded people who will commit to acting against corruption and advocate greater transparency, accountability and rule of law measures.

These initiatives take a moral approach to the problem, primarily seeking to extend their influence by means of pledges from politicians and citizens to strive for a corruption-free society. One typical example is the 'Reconstruction of the state' initiative in the Czech Republic (www.rekonstrukcestatu.cz/en), which seeks to speed up the adoption and implementation of anti-corruption laws by soliciting support among members of Parliament, business people, civil society and other groups by both providing information about the progress of anti-corruption efforts and tracking and providing information about the voting in Parliament.

The initiative is complemented by a substantial media-outreach effort targeting wider audiences in an attempt to further extend support for the anti-corruption movement. While this type of awareness-oriented initiative strengthens the watchdog capacity of civil society and maintains constant pressure on governments to improve, its effects and impact are limited, mainly because, in many cases, governments choose to disregard warnings. In some respects, the slow progress of the anti-corruption movement has led to frustration among the public and the increasing immunity of governments to the anti-corruption agenda. There have also been multiple cases where efforts to curb corruption have led to accusations of direct attacks on incumbent governments.

The second set of initiatives is think-tank based and aimed at developing, proposing and eventually contributing to the implementation of anti-corruption policies and measures. These policy-design and advocacy initiatives focus primarily on corruption analyses and policy-design proposals. In addition to public outreach they include forums to engage the political community (MPs, government ministers, judiciary, diplomats) and civil society experts (journalists, academics, think tanks) both in analysing corruption and in the proposed anti-corruption measures, policies and legislation. A leading example in this respect was the Bulgarian Coalition 2000[3] and its current regional extension, SELDI (Southeast Europe Leadership for Development and Integrity).[4]

The Bulgarian Coalition 2000

The Bulgarian Coalition 2000 was launched in 1998 to enhance the awareness, adoption and practical implementation of democratic values such as transparency, trust and integrity, by developing an Anti-Corruption Action Plan for Bulgaria. It included several activities such as promoting public

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3   For more details, see: www.anti-corruption.bg/index.php?id=775
4   For more details, see: http://seldi.net/home/

awareness of corruption and establishing mechanisms to support anti-corruption efforts through public education, advocacy and dissemination of information; assisting democratic institution building, the promotion of democratic values and elaborating on an anti-corruption action plan by organising panels of experts and legislators to develop amendments to the institutional arrangements and regulatory framework that help deter corruption, particularly among public officials; serving as a 'watchdog' over the reform process and focusing attention on the practical implementation of transparent and clear rules, integrity and democratic control. Essentially, Coalition 2000 could be described as a social-marketing effort based upon the following main elements:

- Creating a trustworthy anti-corruption civil society entity through consensus and coalition building. The main component of consensus building is the Policy Forum, a policy design tool which starts at expert level with the identification of problems, and culminates in a public forum which involves representatives of all relevant institutions and organisations and endorses a consensus policy document (Anti-Corruption Action Plan).
- Obtaining relevant knowledge through a series of corruption assessment panels. The principal objective of the assessment is to analyse the scope, intensity, types and sources of corrupt behaviour in the public sector. The methodology includes both quantitative and qualitative surveys. Indicators used to assess corruption will, at a later stage, be used to monitor institutional progress and to produce a Corruption Assessment Index.
- Development of an Action Plan (AP). Based on research findings and best-practice documentation, an AP is designed, incorporating mechanisms to enhance trust and transparency in different sectors of public life. Impact in this respect is maximised by involving policymakers and representatives of the business community and trade unions in the drafting process.
- Bringing about affective and behavioural change through dissemination and advocacy. The effective implementation of the AP will be supported by different mechanisms: building awareness of corruption and its various forms in Bulgarian society by using different forms of public education, public discussions and dissemination of the research findings and policy recommendations; transforming public awareness into advocacy, keeping the issue of corruption at the forefront; pressing government to implement anti-corruption strategies and reforms.

- Tracking progress through process monitoring (Corruption Monitoring System). The basic function of process monitoring is to assess the effectiveness of policy change efforts in all major areas envisioned in the AP and the functioning of the established anti-corruption institutions. The monitoring will serve also as a 'watchdog' tool over the public policy process and as a way to encourage public discussion.

Coalition 2000 has dealt with several important challenges. Initially it had to prove that its approach was feasible. This included determining who would be the most appropriate leader of such an initiative, what would be the most appropriate anti-corruption formula and what would be the most appropriate way to convince donors to support a leadership and anti-corruption programme.

It believed that the most appropriate form was a coalition of non-governmental organisations rather than a single-actor-lead initiative and that the most productive approach was to cooperate with the government rather than oppose it.

Another challenge was establishing trust, which was achieved by maximising the number of actors involved in the assessment of anti-corruption plans and results; also important in this respect was regular, scientifically-based monitoring of the prevalence of corruption. The third challenge was making an impact on government policies. Two instruments were employed in this respect: the Anti-corruption Action Plan, which assists the government in its policy efforts and the Annual Policy Forum, whose participants included a wide range of actors reporting on progress and committing to work to reduce corruption.

Since it began, Coalition 2000 has managed to advance the anti-corruption agenda of several governments and assist in the implementation of some of its proposed reforms. Examples are the introduction of the Ombudsman institution in the country (legislation was drafted by a partner of Coalition 2000 and proposed to Parliament) and the abolition of duty-free shops on borders that have been a major source of excise fraud schemes.

Coalition 2000 has also provided expert assistance to several governments in the drafting of anti-corruption plans and in monitoring the results of the implementation of these plans (CSD 2006).

SELDI

SELDI is a network that implements a set of social-innovation instruments in Southeast Europe. Its drive to advocate knowledge-based anti-corruption policies has expanded the network's presence and positioned it as a pillar

of civil society action against corruption in the region. This process began in 2000, as SELDI gradually developed a civil-society-driven public-private cooperation model tailored to the social and institutional environment of the region and designed to assess both corruption and anti-corruption. Such a combined evaluation approach allows policymakers and civil society to identify the correspondence – or, more often, the absence of it – between the intentions of anti-corruption campaigns and their outcomes in terms of reduced corruption.

SELDI, which was reinvigorated in 2012, has become the largest indigenous anti-corruption coalition in the Western Balkans, with more than 200 staff. It has established unparalleled working relationships with national governments and international anti-corruption organisations, resulting in positive achievements both in and outside the region.

SELDI is a knowledge-driven coalition focused on making a tangible impact on policy. This was made possible by the regular application of state-of-the-art methods of monitoring corruption (the Corruption Monitoring System) and the hidden economy (the Hidden Economy Index). More specifically, the network has developed instruments to assess the state-capture phenomenon (MACPI State Capture) and identify anti-corruption implementation gaps at an institutional level (MACPI). The latest SELDI policy recommendations for the SEE region include:

Effective prosecution of high-level corruption is the only way to send a strong and immediate message that corruption will not be tolerated. Success requires international support, including the involvement of law enforcement bodies in EU member states.

Establishing independent corruption and anti-corruption monitoring mechanisms at both national and regional levels in order to provide robust data and analysis and integrate both corruption diagnostics and anti-corruption policy evaluation. The mechanism should be implemented through national and/or regional civil society organisations and networks and should be independent of direct national government funding.

Critical sectors such as the energy sector, with high corruption and state-capture risks should be prioritised. Other priority measures include increasing competition in public procurement, improving the corporate governance of state-owned enterprises, transparent management of large-scale investment projects and enhancing the accountability and independence of energy regulatory authorities.

International partners, primarily the European Commission, should engage directly with civil society organisations in the region to ensure international support, wider public acceptance and enhanced international assistance.

Practically, SELDI has used the innovative approaches of Coalition 2000 and extended the inclusion of anti-corruption actors by making anti-corruption an international instrument of civil society in South East Europe. The regional aspect is important, as many countries in the region have a common state history and because of this common understanding many solutions proposed by SELDI have proved useful for multiple countries. The European Commission has assessed this model of international civil society cooperation as productive and it is considered a useful tool in the integration of South East European countries into the structures of the European Union.

Estonia: A success story

A lack of notable progress in anti-corruption efforts is not exclusively confined to CEE countries (Heeks 2011). Of course, there are exceptions. One example in the CEE region is Estonia, which has managed to achieve notable results and economic progress. Several factors account for this: the initial logic of reforms, the objectives of reforms, the pace of reforms, the political will and reform oriented thinking of most governments and the support of civil society (Mungiu-Pippidi 2016).

In an interview on anti-corruption issues and policies in Estonia former Prime Minister Mart Laar outlined the political perception of the goals of the transformations process as follows: transformation after the fall of the communist regime has been perceived (and acted upon politically) as an effort to dismantle institutions and public organisations of the communist state and replace them with pro-democratic and pro-market institutions and government structures. It has been a firm conviction of most Estonian governments that dismantling the communist governance model and replacing it with a working pro-market model combined with the ever-increasing ability of citizens to elect and control the state (government, judiciary and the legislative) will have three major impacts.

Firstly, it will reduce corruption and thereby revive a sustainable and rapidly growing economy. Secondly, it will replace political control over the recruitment of elites and management in all sectors of society (the so-called nomenclatural system) with merit- and achievement-based selection. Thirdly, it will reform legislation in all sectors in such a way as to provide citizens with the power to influence and control the government. Instrumental in the latter aspect has been the pioneering introduction of e-government, which has been further expanded to cover a growing number of activities in all relevant social sectors.

Several factors have successfully influenced the fight against corruption. Firstly, the post-communist transformation and reform of society coincided

with national independence. Secondly, reform-minded politicians have contributed to the continuous reform of Estonian society. Thirdly, support has been received from Scandinavian countries.

With regard to the CEE, the institution of market reforms and the resolve to implement them, as has been the case in Estonia, have contributed to more stable economic growth and a visible improvement in CPI rankings (Figure 1). Currently Estonia is considered one of the best-performing economies in the EU and also as an innovator and leader in the sphere of e-government.

Figure 1
CPI scores (TI) of Belgium, Estonia, Hungary and Russia (1998-2016)
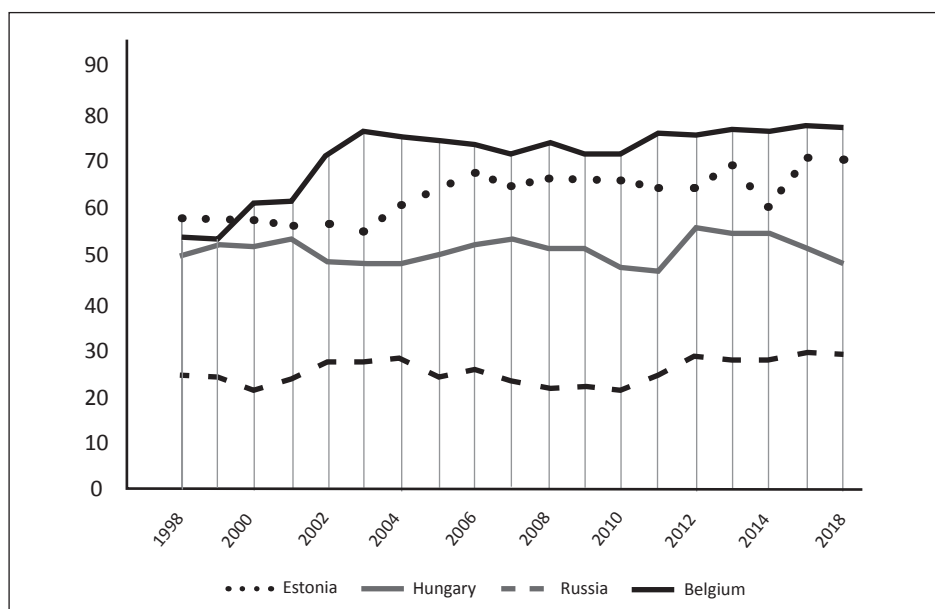
Source: Transparency International

CONCLUSION

The proposed definitions of and approach to assessing state capture and corruption are mainly based on experience and on research into corruption in Central and Eastern European societies. These societies have experienced high levels of corruption in the process of transforming from communist societies to functioning market-economy-based democracies. This process has displayed some specific features, which have contributed to state capture and systemic corruption phenomena.

Practically, this means that most forms of corruption have been observed and that different forms of state capture tend to emerge as a way to make corruption scenarios more flawless, effective and efficient. Quite evidently, progress in combating corruption and the status of corruption and state capture are directly linked to the overall social, political and economic development of societies.

The fact that more advanced societies of Western Europe face both different levels of corruption and differing forms of state capture makes it clear that the structure and development of societies affect both the levels and the forms of corruption and state capture. More importantly, economic and social development usually lead to an improvement in competition among politicians and parties, increasing the scope of public demands and spending, improving the competition among administrative departments that implement political decisions (Cartier-Bresson 1997) and resulting in better enforcement of market competition rules/laws.

Successful anti-corruption initiatives usually boil down to economic/market and legal reforms designed to empower citizens and companies in their interaction with governments. In this respect, it is more important to 'install' new or improved mechanisms that coordinate the interests of parties, thus rendering corruption meaningless, than to strengthen the prosecuting, regulative and policing mechanisms of the state, which, in many cases, generate more corruption as they increase discretion and reduce civic control.

All efforts to measure and counter state capture should consider the hidden nature of the phenomenon. For researchers, state capture appears to be a 'black box', whose existence can only be determined by its results. This applies both to national corruption/state capture mechanisms and to the multinational and/or international dimensions of the problem, especially in view of the irreversible processes of globalisation and the increasing influence of multinational corporations.

CONCLUSION

Grant Masterson

In the final 18 months of the administration of South African President Jacob Zuma, which ended with his reluctant resignation on 14 February 2018, an astonishing body of evidence accumulated in the public domain of a complicated and audacious project whose aim of looting from state funds and diverting these public resources into private bank accounts had had an impact on almost every function and level of the South African state.

South Africans have thus become very familiar with the term 'state capture' and its meaning in contemporary South Africa. In neighbouring African states, citizens (perhaps due to the extent of the coverage of this issue in South Africa) were also provoked to reflect on state capture and ask to what extent their own corruption challenges might mirror some of those in the South African state. It is now not uncommon to hear African citizens refer obliquely to state capture in their descriptions of local events, scandals and elites.

It was therefore, perhaps, surprising to discover during EISA's 12th Annual Symposium, on State Capture in Africa, that it was very difficult to pin down the assembled academics, policy practitioners and governance specialists to a simple and concise definition of the term.

Part of the challenge stems from the ubiquitous presence of corruption in the governance structures of the modern nation state. The general agreement that state capture is, and must be understood to be, distinct from corruption in the state, is reinforced by the contributors to this volume.

To refer to state capture is to suggest something more wilful than the opportunism of securing illicit financial gains, which state procurement can represent. The term refers to something more deliberate and premeditated than corruption, implying, as it does, both illicit gains and state power. It also needs to be understood as a process whereby state influence is diverted away from elected and appointed officials to private, largely unaccountable interests with a narrow, usually predatory, agenda. State capture refers, therefore, both to a form of corruption and to a perversion of governance processes within a state.

Lodge describes the phenomenon as 'meta-corruption', a distortion not only of governance processes but, far more critically, the institutions that are responsible for guarding these processes. This definition borrows heavily from the original use of the term by Hellman, Jones, Kaufmann & Schankerman (2000) (cited in several chapters in this volume), who established the term in the modern political lexicon while referencing former Soviet states undergoing transitions. Stoyanov, however, adds a useful twist in his own chapter on the issue, noting that:

> The use of the term deviant suggests that state capture is considered a deviation from the normal or ideal form of relationship among these actors. In this sense, the state-capture concept is purely normative: it is used to analyse the deviations from a certain socioeconomic model generated by corrupt relationships. This automatically implies that both the mechanisms and the results of state capture in different societies and states diverge. In addition, if a state is explicitly or obviously oligarchic or autocratic, the term state capture has no meaning, since autocracy is the norm.

This understanding of state capture limits its application to countries that subscribe to norms that envisage a dynamic relationship between the state and its citizens, but, more specifically, to the notion that the state is accountable in various ways to those citizens for its conduct. As even the most 'benevolent' autocratic regime does not presuppose that it is accountable to its citizenry, the most commonly understood form of state governance to which the state-capture term can be applied is democracy.

Thus state capture as a descriptive term presupposes democratic regimes, but clearly not all democratic states are equally susceptible to the deviancy of state capture. In highly advanced and complex economies, particularly those with certain levels of decentralised power and independent accountability mechanisms, the costs of an attempt to capture the state are so high that the rewards become negligible. In such complex societies it is therefore assumed that state capture is both too complex and too risky to be attractive to the necessary set of conspirators. This assertion is intriguingly challenged by John Stremlau in his chapter on America, the world's largest economy and a country whose federal system is presumed to mitigate against the centralisation it is often assumed is necessary for state capture to succeed.

However, to return to Stoyanov's definition, the states most susceptible to capture are those where the norms and procedures to which the state adheres are either newly formed or sufficiently indistinct to provide the necessary space for distortion without attracting undue attention. Many of these states,

described by Hellman, Jones, Kaufmann and Schankerman as transitional democracies, can be found in Africa, thus the key question EISA's 12th Annual Symposium and this book sought to answer is, is the concept of state capture useful in the modern African context?

Here again, opinions diverged along a continuum that ranged from the state-capture concept as central to understanding the weaknesses of some modern African states to its utility being extremely limited and largely unhelpful. Roger Southall argues that even in South Africa, where the wealth of evidence of a coordinated effort to subvert authority and accountability away from the constitutionally mandated institutions of the state should have enhanced the state-capture conversation, confusion and the conflation of state capture with a number of other concepts and issues have devalued the term.

In the course of editing this volume it has become evident that the way state capture in African states is analysed and described depends on which of the two broad definitions of the term the contributor has chosen to use. In instances where it is clear that a state can be shown to have been captured, the definition used by Hellman et al was preferred. This definition directly refers to manipulating policy and influencing the rules of the game in favour of narrow and private interests.

However, in many instances, this more contained definition was simply too narrow to allow the contributors to analyse symptoms of state capture. In these cases, the writers tended to prefer the broader and slightly more inclusive description set out by Transparency International. They describe state capture as a situation where perpetrators within or outside a country use corruption with the aim of directing policies, legal frameworks and the economy at large in their favour. This broader definition allowed contributors the necessary room to explore the state-capture issues more flexibly, at the cost of some conceptual focus. For reference, we have provided an Appendix to help readers understand the distinctions between the two definitions.

Anthoni van Nieuwkerk brings additional complexity to the issue through his exploration of the 'deep state' and the likelihood of such a state having been formed in various African and other countries either now or at some previous point in their history.

The notion that, irrespective of the alternations in power facilitated by periodic elections, the real power of the state remains vested in an unchanging and largely undetectable elite resonates with the goals of state capture to the extent that only the longevity and presumed motivations of the deep state diverge from the state-capture archetype. The fact that evidence of state capture is so overwhelming in some instances that a hidden hand cannot be summarily dismissed as fringe political theory highlights the overlap between the two concepts.

In order to bring some degree of resolution to the state-capture narratives explored in this book, insofar as that is possible, I suggest that the preceding chapters indicate that the concept of state capture is useful in understanding democratic consolidation in African states where three elements are present. These are:

- A normatively democratic state;
- Some degree of political centralisation; and
- A transitional institutional framework.

It should, therefore, be immediately obvious that not all African states are either vulnerable to or can be expected to show elements of state capture. Swaziland, an absolute monarchy, fails to meet the first criterion, while Mauritius exhibits neither the necessary levels of political centralisation nor the transitional framework to facilitate a state-capture project.

This is not to say that these countries are, therefore, 'immune' to state capture, as the context can change quite rapidly. The recent resignation of Mauritian President Ameenah Gurib-Fakim after she had accepted a donation from a wealthy Angolan businessman who, it seems, gained some benefit from her support, highlights the fact that corruption is an omnipresent risk to any government. However, the dispersed power structures and relatively stable governance institutions in Mauritius appear to have prevented this corruption from spreading and widening its influence within the state, at least for now.

When these institutions fail, the safety mechanism of last resort becomes the ballot, with citizens able to express directly their views about public accountability and their trust in government. Here again, countries that hold credible elections enjoy some degree of protection from predatory state captors, unless, as Akinduro and I highlight in Chapter 4, electoral institutions and processes have, themselves, been captured.

Once these institutions have fallen to the state captor(s), winning back the government becomes exponentially more problematic for a country's citizens. Electoral capture in transitional democracies often results in these democracies sliding back into quasi-autocratic or one-party rule, with inconsistent and self-serving application of the rule of law a common feature. Several African states where the electorate has little hope that the ballot can effect an alternation in power despite stagnant economic and social development highlight this dire scenario.

Perhaps the most interesting element of the state capture analysis is the concept of a state in transition. Many African states where periodic elections have become the norm and peaceful alternation of political power is becoming

increasingly unremarkable have had multiparty electoral systems for less than 30 years. While this is a relatively short period compared to the length of tenure of multipartyism in mature democracies it is enough time for a state to consolidate its norms and standards.

As Meirotti and I argue in *Checks and Balances: African constitutions and democracy in the 21st century* (2017), one reason why these transitions are prolonged is the constant renegotiation of the essential norms. In the absence of consensus about the normative framework for a democracy, nation states often stagnate in transition, with the necessary consensus building occurring sporadically, and often opportunistically.

One subject about which there is a strong degree of consensus is the impact of state capture on democratic consolidation. The impact is considered to be almost entirely negative from the viewpoint of the citizen's enjoyment of rights and benefits provided by the state. One of the near universal principles of electoral democracies is direct accountability of the elected and public official to the citizen. When the state is no longer the centre of decision making, the accountability of the elected official to the electorate is subverted and government institutions begin to corrode.

Perhaps the single most significant moment in South Africa's state-capture revelations was the admission by Gwede Mantashe, then secretary general of the ruling African National Congress, that the list of names announced by then President Jacob Zuma as appointees in a Cabinet reshuffle 'came from somewhere else; we were not consulted, we were informed'. When the political institutions given the electoral mandate to govern are 'informed' of significant decisions, the extent to which power has shifted away from accountable institutions is clearly revealed.

One final topic about which most of the contributors to this volume agree is ways of counteracting the creeping blight of state capture within a society. Stoyanov, examining successful efforts to push back against state capture in Eastern Europe, highlights two key elements:

- Legal reforms which empower private citizens and corporates in their interactions with government; and
- Active and sustained civic activism aimed at combating state capture and corruption within the state.

Lodge concurs, arguing for both legal reforms and high levels of civic mobilisation to counteract the impunity of state captors. In the absence of legal reforms civic mobilisation is often suppressed, while legal reforms without an active citizenry clamouring for these laws to be put into effect are equally unlikely to dislodge state-capture networks from within the state.

Thus this book and we come full circle, from definition to solution. Because state capture is both a form of corruption and a failure of governance, the solution to the state-capture problem lies in the legal institutions designed to combat corruption and an active citizenry that demands good governance. In the words of Abraham Lincoln: 'You have a democracy, if you can defend it.'

Applying the concept of state capture in an African context

State capture, as opposed to corruption and other abuses of power, occurs in fairly specific contexts. The table below, which is intended as a checklist against which possible case studies of state capture can be considered, outlines the timing and the political, social and economic context as well as the types of actors involved. Any state that is studied should demonstrate all the characteristics outlined below.

TIMING	
Transition	**Is the state in a period of transition?** States undergoing wholesale transition – a fundamental transformation of their economic, political and legal systems and structure of power – are most vulnerable to state capture. Transition typically goes beyond a change in government instituted by means of an election or the revision of a constitution. Examples would be the shift from an authoritarian political system with a centralised economy to a multiparty democracy and a liberal market economy. A fundamental shift in the established normative values within a state provides an opportunity for private interests (often corporations) to shape the laws, policies and regulations of the state to their own advantage.
CONTEXT	
Democratic state	**Are the values of the state largely informed by democratic principles?** States that are in the process of making the transition to, specifically, a democratic system of governance are most vulnerable to capture. The transitional state should have a set of accepted norms that govern the relationships among collective actors, including the institutions of the state, the business sector and the political class. Undue influence of business groups over rules and regulations governing that sector would constitute a deviation from these norms. Holding regular elections without having made an effort to consolidate substantive democracy is insufficient to constitute a democracy. The ideal system is a liberal social order combined with a neo-liberal economic model.

Free market economy	**Does the country have a free market economy?** During the period of transition the economy is transformed from one that is predominantly government controlled and centrally planned into a market economy based on private property. During this transformation the involvement of government is substantially limited. States where wealth is concentrated in a few key productive assets are more vulnerable to capture.
Efficient state apparatus	**Does the state apparatus function effectively?** The country should have a reasonably well-developed state apparatus with a relatively low incidence of petty corruption. States with high levels of corruption at all levels are more likely to be categorised as kleptocracies, Mafia states or failed states.
Weak institutional framework	**Are public oversight institutions able to hold government to account?** Public oversight institutions in transitional states are generally under developed and the protection of citizen and media freedoms is relatively weak, enabling abuses of power by the state. Countries in which the civic space is not developing and where the state continues to use excessive force to supress civil groups would not, ideally, be included in this checklist.
Global integration	**Do international corporations exert undue influence over the economy?** The current global context in which business interests are increasingly freed from national fiscal constraints adds a complexity to state-business relationships. The economic power which large multinational corporations can leverage enables them to wield considerable influence, particularly over small and medium-sized economies.
ACTORS	
Business and/or private interests	**Do private firms/individuals manipulate emerging policy in the state to their advantage?** A limited number of powerful business interests use their influence to manipulate policy to their advantage and to block any policy reforms that might eliminate these advantages. This practice should be distinguished from lobbying. Is the result of the manipulation of policy the diversion of state resources away from the public good?

Captured state institutions and/or individuals	**Are state institutions functioning for the public good?** As captors are concerned with the formulation or interpretation of laws, rules or regulations, the legislature, the executive, the judiciary and regulatory institutions are commonly targeted. Within the executive arm of government, critical ministries such as finance, public enterprises and natural resources are particularly appealing to illicit private interests. Dominant-party states in which the lines between state and party are blurred are particularly vulnerable to capture. High levels of executive involvement in the economy are common. Entrenched political elites forge connections with local and foreign businesses. In such environments it is not uncommon for the political elite to use populist language (ethnic and religious) regularly as a smokescreen to cover abuses of state power and resources.
Emerging civil society	**Does the civil sector have sufficient resources to mobilise against agents of capture?** Non-governmental organisations and other forms of civil association are relatively underdeveloped. These groups are not sufficiently organised and lack adequate resources to mobilise effectively against agents of capture.

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The term state capture was first used to describe a pervasive form of meta-corruption in former Soviet bloc states after the Cold War. In this edited volume, leading voices on democracy and governance in Africa explore the applicability of the idea to the African context and ask the question: 'How "captured" are African states in 2018?'

Despite the fact that regular elections have become the norm on the continent, the attainment and consolidation of substantive democracy, including socioeconomic transformation and social justice, remain elusive for many African democracies, even some of those viewed as relatively mature.

One of the key prerequisites for the consolidation of democracy is that there should be established 'rules of the game'. State capture undermines these rules by eroding democratic processes and state institutions, thus depriving citizens of the rights and benefits that should be provided by the state. This leads to a system in which power is systematically diverted from citizens, unravelling democratic gains and socioeconomic transformation.

The contributors to this volume explore the concept of state capture and its place in democratic discourse in Africa, analysing examples ranging from South Africa to Madagascar, the United States to the former Soviet bloc, in an effort to contribute meaningfully to the debate about the consolidation of transitional democracies.