

perspectives

Issue 1
August 2019

POLITICAL ANALYSIS AND COMMENTARY

AFRICA

Robbin' the Hood:

Inquiries into State Capture



This edition of **Perspectives Africa** is published jointly by the offices of the Heinrich-Böll-Stiftung in sub-Saharan Africa.



Heinrich-Böll-Stiftung

The Heinrich Böll Foundation is a publicly funded institution that is affiliated with but intellectually independent from the German Green party. From our headquarters in Berlin and over 30 overseas offices, we promote civic participation in Germany, as well as in more than 60 countries worldwide. Our work in Africa concentrates on promoting civil society, democratic structures, gender democracy and global justice. Together with our partners, we work toward conflict prevention and search for solutions to the challenges of environmental degradation and the depletion of resources. To achieve these goals, we rely on disseminating information, creating a deeper understanding between actors in Africa and Europe, and supporting global dialogue.

Contents

- 4** Editorial
- 6** Could a Different Version of State Capture Be a Good Idea in South Africa?
Tracy Ledger
- 11** Interview
How to Steal a City
Crispian Olver
- 17** Greasing the Wheels of State Capture: Corporations, Secrecy and Profit
Mamello Mosiana and Michael Marchant
- 24** It Was Not Just State Capture, But the Conquest of South Africa's Soul
Niren Tolsi
- 27** Interview
State Capture: On Kenya's Inability to Fight Corruption
Gladwell Otieno
- 35** Interview
Of Cartels, Collusion and Captive Consumers: On the State of Kenya's Energy Sector
Jerotich Seii
- 40** Discretionary Awards of Oil Blocks in Nigeria: A State Capture Culture Passed Down from the Military Government
Mark Amaza
- 45** Interview
Presidential Families & Co. in Senegal: A State of Capture in the Making?
El Hadji Malick Sy Camara

Editorial

The term “state capture” is enjoying a renaissance. In the late 1990s, it was coined by World Bank analysts to characterise the transitional democracies from the former Soviet Union. Today in South Africa, “state capture” is used to characterise the nine-year presidency (2009–2018) of Jacob Zuma. It has been an important rallying point in public discourse and has also focused the efforts of multiple stakeholders to discover the extent of corruption and to hold Zuma and his collaborators accountable. In 2018, following the recommendation of former Public Protector Thuli Madonsela, President Cyril Ramaphosa appointed Deputy Chief Justice Raymond Zondo to lead a judicial inquiry “into allegations of state capture, corruption and fraud in the public sector, including organs of state”.

Zuma is said to have been “captured” by the Gupta family, three brothers who reportedly fixed the appointments of cabinet ministers and board members of state-owned companies, who then channelled lucrative contracts their way. As the Zondo Commission grinds through week after week of excruciating testimony, ordinary South Africans are losing their capacity to be outraged. Indeed, the spectacle of grand villains and their scandalous “shenanigans” can overshadow important questions about the capture of state institutions – including intelligence, prosecution and revenue-collection authorities – and the consequences over time.

What exactly is state capture? Even in South Africa, it’s hard to pin down. Following the World Bank’s example, academic Tom Lodge defines it in a narrow technical sense as “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”. Colloquially, it takes on a broader sense, as the subversion of state institutions to benefit powerful interest groups while compromising the state’s ability to realise its constitutional social and economic commitments. Consequently, competing ideological and political actors can accuse each another of state capture. Those in Zuma’s camp argue that the former president’s tenure was actu-

ally a disruption of the historical “capture” of the South African state by “white monopoly capital”, and was done in the name of “radical economic transformation”.

This edition of *Perspectives* tackles questions of state capture, and how the concept can contribute to understanding and strengthening democracies across Africa. Our contributors also open the possibilities that emerge when “state capture” is released from particular institutional settings and national boundaries.

In the opening article, Tracy Ledger provocatively asks whether a different version of state capture could be a good idea in South Africa. She argues that the allocation of public resources is never a neutral affair and motivates for a bias towards social justice and economic equity. Here, the state-capture framework draws attention to the nature of the democratic state, its powers and its relationship with private interests and dominant groups, as well as to the need to understand and utilise these to serve the people, particularly those who are most marginalised.

From Kenya, Gladwell Otieno explains how the state-capture lens helps to clarify why multiple efforts at reform have yielded few real gains in accountability. In her estimation, “state capture” enables a more systemic analysis of the strategies of corrupt elites, and consequently shifts our understanding and the terrain for potential responses.

Such systemic analysis would also shine light on Nigeria’s oil industry, as described by Mark Amanza. In this case, as in South Africa, the veil of “indigenisation” was used to enrich the connected few, many of whom then cynically sold their shares to foreign oil companies.

Likewise, El Hadji Malick Sy Camara draws attention to the complex and symbiotic relationships between Senegalese political elites, state agency officials and private media that enable grand corruption and consolidate their political power, even as they present themselves as champions of the fight against corruption.

Other contributions address the long tentacles of state capture in both execution



and impact. Crispian Olver describes the web of corruption that captured the city of Port Elizabeth, demonstrating that state capture in South Africa is a much more decentralised phenomenon than most believe. Systemic features, including unregulated party political funding, allow patterns of capture to emerge at varied locations and levels of state power.

Niren Tolsi tells of South Africans who tried to do the right thing for themselves and their communities but eventually gave up and gave in to the cutthroat culture of business and politics. The attitudes and practices that were entrenched in the Zuma era killed the aspirations of many decent business people and civil servants.

From Kenya, Jerotich Seii testifies to the ruinous impact that the capture of Kenya's electricity sector has had on the general public. Ironically, Kenya was held up as a positive example during the South African debate on liberalisation in the energy sector. According to Seii, however, the sector has been captured by cartels of private and public actors who shape policy, rig tender processes, and collude to ensure their continuing dominance and impunity.

Critically, as emphasised here by Mamello Mosiana and Michael Merchant, any analysis of state capture is incomplete if it fails to understand how it is enabled by private sector institutions. In particular, banks, lawyers and accounting firms provide the

financial infrastructure to divert, launder and conceal dirty money. While the World Bank's analysis of state capture focussed on national economic structures and political transitions, this piece exposes the fundamentally international nature of the enabling infrastructure, which is often based in the leading developed countries. This important truth often disappears from analyses of state capture, thereby concealing important corrective actions that must be taken. In July 2019, for example, activists staged a protest at the German consulate in Cape Town to draw attention to the German rail technology company Vossloh AG, whose subsidiary is alleged to have fraudulently secured a tender worth EUR200 million.

In these expanded forms, the concept of state capture grounds a more systemic analysis that takes in the local and international actors, networks and strategies that conspire to loot and immobilise states, thereby creating devastating consequences for people, economies and natural environments. We hope that this edition will work towards the emergence of thinking and approaches that will prove effective against the Hydra of state capture.

Jochen Luckscheiter
Programme Manager

Keren Ben-Zeev
Deputy Director

#UniteBehind members protest outside the German consulate in Cape Town.

© Ashraf Hendricks for GroundUp

Could a Different Version of State Capture Be a Good Idea in South Africa?

Tracy Ledger

Background Note

In 2016, various allegations were made by opposition politicians and the media of a close and corrupt relationship between then President Jacob Zuma and the Gupta family from India (several of whom had had their applications to become South African citizens fast-tracked). Initial allegations that the Gupta family had “captured” the state centred specifically around rumours that they were instrumental in key decisions concerning the appointment of cabinet ministers, senior officials, and board members at state-owned enterprises. In June 2017, a hard drive containing some 200 000 emails was revealed by two whistle-blowers. The “GuptaLeaks” detailed extensive evidence of the Guptas’ influence over a wide range of state entities and officials. In 2018, a judicial commission of inquiry into allegations of state capture was established under the leadership of Deputy Chief Justice Raymond Zondo. It is still in progress at the time of writing.

State capture has been at or near the top of the news agenda in South Africa for the past two years. A seemingly endless cast of characters has presented itself before the Zondo Commission to publicly confess their sins, or those of other people. An enormous web of corruption across almost every part of the state has been exposed, including a number of previously unknown schemes, such as those operated in the prisons by a company formerly known as Bosasa, led by CEO Gavin Watson, who has since been referred to as a “kingpin of bribes and corruption”.¹ Until these latter revelations, the Gupta family was the number one target of public anger in respect of state capture, but there are now several contenders for that dubious title. There appears to be no end to the tales of theft and malfeasance facilitated by handing over the authority for key decision-making and resource allocation to a small group of the politically well-connected.

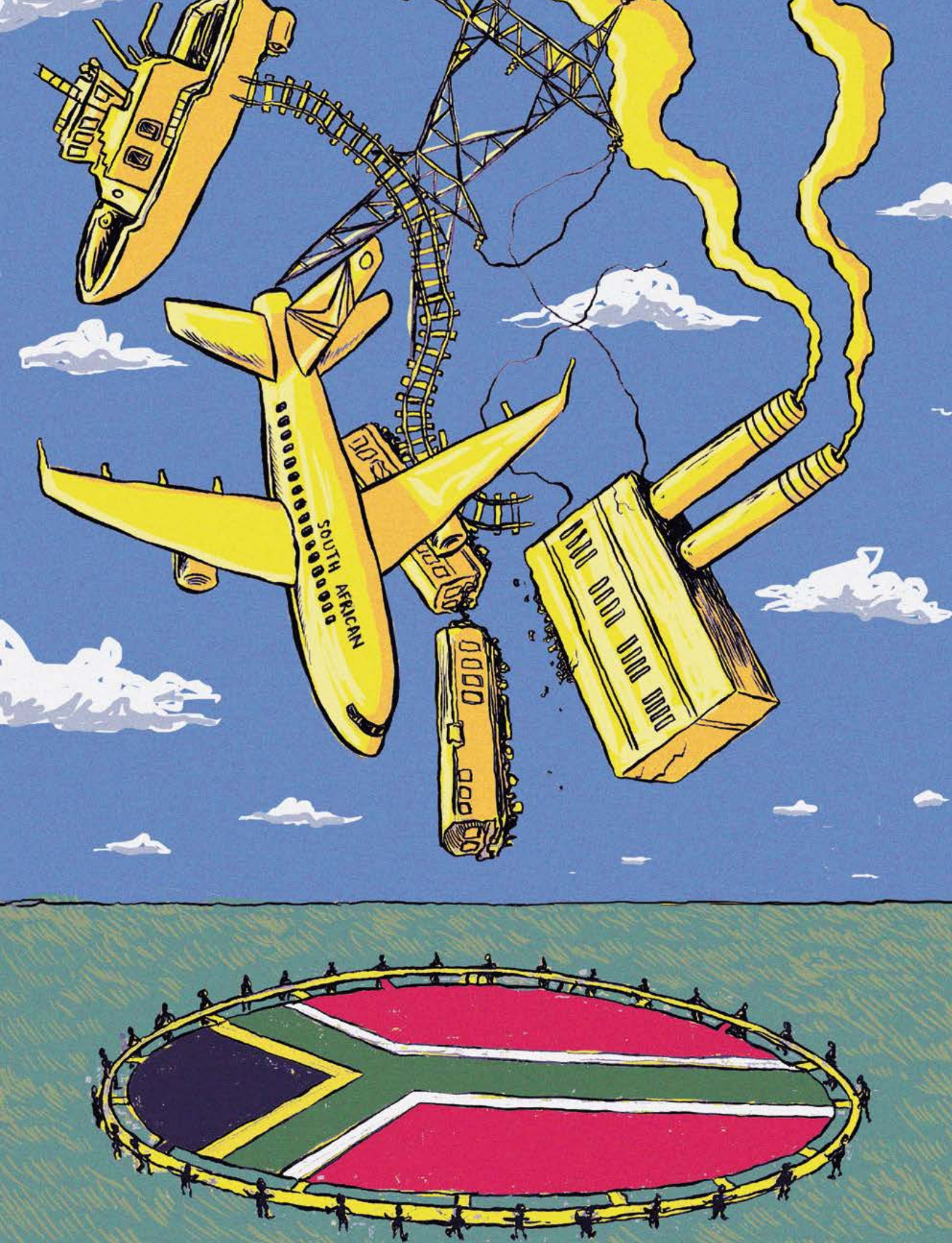
For many years before these revelations, a sense of unease had been spreading in

civil society about the apparently high levels of corruption, misuse of public funds and even outright theft across the public sector. Reports by the auditor-general indicated rising levels of irregular expenditure, much of it attributable to procurement irregularities. Although there were clearly problems with governance and accountability around public-sector procurement, some of the criticism had a distinctly racial tone: “they” clearly could not be trusted to run the country properly, and “they” were more interested in enriching themselves than in acting for the public good.

The ensuing debate around corruption – and the establishment of focused anti-corruption civil society organisations – largely adopted a very particular and narrow analysis of the drivers of corruption, and thus its recommended remedies. This approach, based on an individualistic rational-choice framework, views corruption in the public sector (and at this point, the public sector was seen as the main site of the problem,



Tracy Ledger is a South African researcher affiliated to the Public Affairs Research Institute at the University of the Witwatersrand, Johannesburg. Her main area of research is institutional failure in the public sector, with a focus on local government.



State Owned Enterprises (SOEs) in free fall.

© Carlos Amato for PARI.

with little attention paid to the role of corporate South Africa) as driven by self-interested and greedy individuals, motivated entirely by personal gain. In many respects (albeit often unintentionally), these narratives of greedy individuals supported the position that black South Africans were inherently unfit to govern, and gave rise to nostalgic fantasies of a pre-1994 corruption-free South Africa.

Defining State Capture

Although “state capture” has become a common term in public narratives of corruption and general maladministration in contemporary South Africa, its definition varies. In most cases, it provides a shorthand for the perceived general malaise in the ruling African National Congress (ANC) and a sell-out by a small elite.

Although “state capture” has become a common term in public narratives of corruption and general maladministration in contemporary South Africa, its definition varies.

In the work of the Public Affairs Research Institute (PARI), the term denotes a particular *political* project designed to divert resources – mostly from state-owned enterprises (SOEs) via their extensive procurement budgets – to a designated (relatively small) group of beneficiaries. This was effected by the creation of a “shadow state”, a network of strategically placed individuals in key locations of state resources (such as the SOEs) and power (such as the National Prosecuting Authority, the State Security Agency and national ministries) within the constitutional state, and the development of a symbiotic rent-seeking relationship between this shadow state and the constitutional state.

In this conceptualisation, the political nature of the state-capture project centres around a rhetorical commitment to radical economic transformation and an accompanying sentiment that current governance and regulatory institutions – although supposedly focused on transformation through programmes such as broad-based black economic empowerment and preferential public-sector procurement – are

in fact an impediment to “real” economic transformation. The persistence of high levels of inequality in South Africa since 1994 and the very small number of substantial black-owned businesses could be cited as evidence of the failure of these programmes. In this version, legislated rules for public-sector procurement are both a barrier to a more equitable economy, and difficult to change, given the political power of the National Treasury. Thus, state capture becomes a necessary transformational political project to overcome (or work around) these barriers.

The National Treasury, which holds most of the authority in this legislation, has traditionally taken a very conservative approach to fiscal management, and would strongly resist any attempt to radically revise it. There is also a widely-held view in South Africa that it is some kind of “last bastion” against corruption and the theft of public resources (not least because of Jacob Zuma’s attempts to place persons who were approved by the Gupta family as minister and deputy minister of finance), and it thus holds considerable power in the national narrative as to what is considered good governance.

Of course this vision – that state capture is fundamentally directed to economic transformation and redress for the majority – is not what has transpired in reality. The outcomes have been profoundly anti-poor, in terms of both the beneficiaries (a very small group, many of whom are not black or South African) and the financial impact, which has greatly reduced the pool of public resources available for other pro-poor programmes. As a result, the idea that state capture could be motivated by sincere altruism is largely discredited.

State-led Transformation

But it is important to remember that this has not always been the case: a clear component of the ANC’s original policy for governing a post-apartheid South Africa was that control over every part of the state was a necessary precondition for the fundamental transformation of society and the economy. It was necessary because, up until that point, the state had been focused on exactly the opposite, and the senior civil service at that time was predominantly made up of white South Africans whose key responsibilities had been the enforcement of apartheid legislation. They could not be trusted to deliver

the new transformation agenda without close control. This control would be exercised for the specific purpose of ensuring that state resources *were* diverted for a particular political purpose. This need for control over decision-making and resource allocation was the rationale behind the ANC policy of cadre deployment to state institutions – political appointees to ensure that bureaucrats carried out this programme and exercised the requisite bias.

This overt policy bias was not, in turn, something new in South Africa. Post-apartheid transformation was almost inevitably framed in opposition to the political and economic oppression of apartheid. Although most of us make sense of our present and imagine our future with reference to the past, the view of 1994 as a watershed – representing a definitive break with the past and the start of something fundamentally new – fails to take full account of temporal continuity and all the ways in which history conditions and limits the present.

Three key features of the post-1948 apartheid state in South Africa were the deployment of the “right” people to key state institutions to oversee the use of state resources for the “correct” purposes (i.e. the enforcement of grand apartheid); the diversion of significant state resources to support elite interests; and the existence of an organisation similar to a shadow state (the Afrikaner Broederbond), through which a relatively small group of people exercised “true” control over the constitutional state. A deeply political agenda informed the state’s views on how public resources should be directed and who should benefit from those resources; there was no neutrality in how those decisions were made. This went much further than simply excluding the black majority from the benefits of government spending in infrastructure, education and health. A number of companies – such as the predecessors of the current BHP Billiton, Sanlam and Absa Bank – were established with the specific purpose of countering the historical exclusion of Afrikaners from the non-agricultural economy. Job reservation in SOEs was the main tool for addressing unemployment and poverty among low-skilled poor whites, who were predominantly Afrikaners. Additionally, a large number of higher-skilled professions were reserved only for white South Africans. Land ownership was also deeply skewed in favour of white South Africans.

In recent years, there has been a growing undercurrent of discontent with the state’s inability to drive meaningful transformation, particularly economic transformation. PARI’s work has repeatedly highlighted the existence of a view that procurement regulation – the type of regulation that outsiders would label “good governance” – was undermining the ANC’s transformation agenda and, as a result, it was the responsibility of elected officials to set that right. A significant percentage of citizens strongly believe that the role of “their” government is to exercise the same bias on their behalf that the apartheid government exercised in favour of white South Africans, and which was the fundamental reason for the relatively high income-status of almost all white South Africans. After all, they reason, how can we be expected to compete with white-owned companies that have a 100-year advantage for government business if there is no overt bias? Few of these people would object to the political objective of diverting state-owned resources in the service of benefitting the historically disadvantaged and increasing their beneficial participation in the economy. A pro-poor version of state capture is, after all, meant to be at the heart of the ruling party’s transformation agenda. In these narratives, the main “problem” with the current version of state capture is not the idea of diverting state resources to benefit a particular group, but rather with the profile of the beneficiaries (a small elite rather than the broader population of black South Africans) and the knock-on detrimental effect on the poor.

Although most of us make sense of our present and imagine our future with reference to the past, the view of 1994 as a watershed – representing a definitive break with the past and the start of something fundamentally new – fails to take full account of temporal continuity and all the ways in which history conditions and limits the present.

One of the more popular responses to the current revelations around state capture is a growing call for a completely neutral civil service (which would include all officials employed by the state across all three spheres of government and in the state-

owned enterprises), free of any political bias or influence; a group of people whose only motivation in making resource-allocation decisions would be operational efficiency. These proposals fail to understand that the allocation of scarce resources among competing ends (a fundamental decision that the state is required to make) is *never* neutral in its impact, although certain elite groups have successfully presented their particular interests as either neutral or analogous to the common good. Allocating

resources to one end requires that they are not allocated to another.

On what basis should we make those decisions, if not a subjective assessment of who deserves to be prioritised? Surely, a post-apartheid South Africa that aims to be profoundly transformative in its actions requires a pro-poor version of “state capture”, where the state’s allocation of resources *is* profoundly biased in favour of social justice and economic equity. ■■■

1 Jeanette Chabalala, “State capture inquiry: Bosasa CEO emerges as ‘kingpin of bribes’, ‘corruption’”, News24, 17 January 2019. See: www.news24.com/SouthAfrica/News/state-capture-inquiry-bosasa-ceo-emerges-as-kingpin-of-bribes-corruption-20190117.

Bosasa changed its name to African Global Operations (AGO) in June 2017. In February 2019 – after South African banks announced that they would no longer operate accounts for the company – African Global announced it was going into voluntary liquidation, along with all its subsidiaries. Less than a month later, the company approached the High Court in Johannesburg to have the liquidation decision overturned, claiming that they had received bad legal advice. On March 14, the court agreed and ruled that the liquidators be dismissed. The next day, the liquidators were granted leave to appeal to the Supreme Court of Appeal (SCA), thus suspending the High Court ruling. Pending the SCA outcome, criminal corruption proceedings against Bosasa executives have been postponed until July (www.news24.com).

How to Steal a City

Crispian Olver

Interview

Perspectives spoke to Crispian Olver, a former government official and author of *How to Steal a City: The Battle for Nelson Mandela Bay – An Inside Account*, to help make sense of the state-capture phenomenon in South Africa. Navigating the intersections of politics, governance and business while trying to “clean up” the Nelson Mandela Bay Metropolitan Municipality, which covers the city of Port Elizabeth, Olver provides striking insight into state capture at the local level.

Perspectives: What was the political context in which you were assigned to help “fix” the Nelson Mandela Bay Metropolitan Municipality?

Olver: The politics were quite important – because to undertake a major clean-up you need to have the political commitment and backing to do it.

The ANC [African National Congress] had known for many years that there was a problem in Nelson Mandela Bay. There had been stories of corruption taking place within the context of deep political factionalism within the ANC, and there were a number of media exposés around funds that were being looted. Even the municipality itself had done a whole string of forensic investigations. But what really woke the party up were the national and provincial election results for 2014.

Although 2014 was not a local government election, they could see the results for the metropolitan area. For the first time, party support had dipped down to around 50 percent in a historical context where they had been winning 70 to 80 percent of the vote. The metro used to be this dyed-in-the-wool ANC stronghold with deep historical meaning to the party.

That’s when the party decided to undertake a major intervention, one that involved cleaning up the internal party structures as well as the municipality. On the back of the intervention, they suspended the regional executive committee of the ANC and they appointed a caretaker structure. Then they also moved to replace the mayor and the chief whip and a number of key people on the mayoral committee. In addition, the then minister of cooperative governance and traditional affairs, Pravin Gordhan, brought me in to lead the administrative process of managing the clean-up, doing all the investigations and firing the staff. So, for almost 19 months, I was the point man – the axeman.

What kind of state did you find the municipality in when you arrived in 2015?

It took me a while to develop a full picture. My first three months were really about building the intelligence structures to gain that full pic-



Crispian Olver is a public policy expert and social activist with a particular interest in local government and urban governance. He spent a decade in government under Nelson Mandela and Thabo Mbeki (1994–2005), ending up as director-general of the department of environmental affairs and tourism. He crafted most of the current local-government legislation in South Africa and was responsible for the process of setting up the post-’94 local government system. For the last few years, he has been working on turning around distressed municipalities, which has brought him up close to the mechanics by which municipalities are governed and how good governance can be eroded.

ture. I deliberately set out to build links inside the administration, so I'd try and get people that I could trust in the different line departments and in treasury, etc. Then I built up links outside of the municipality – businesspeople, NGO activists. There were some activists in the Ratepayers Association. I even spoke to members of AfriForum [an interest group representing white Afrikaans-speaking South Africans] who had very useful intelligence which they had been receiving from disgruntled old officials in the administration.

The picture that emerged was that of a clique – a criminal clique – that had captured the party and the administration. It was run by ANC regional secretary Zandisile Qupe, who was working in cahoots with a morally devious businessman called Fareed Fakir. Fakir was essentially the banker to the faction. He would provide all of the funds needed for the faction to maintain its power base, with a lot of the money being used to pass down the patronage system. I asked him what it was costing him to run his operation and he said he was having to dish out about R10 million a month.

In capturing the administration, they had focused on three areas. They had effective political control in the council because they controlled the chief whip and had a critical mass of councillors on their side. They also had the mayor under their thumb. And they had a

majority on the mayoral committee. In other words, they controlled the political sphere in the administration. Then, in the administrative core, they controlled the city manager. They had the director in the city manager's office, the head of corporate services, supply chain, legal services and finance. So, they could move a contract quickly – through procurement and supply chain, up through legal services, into the city manager's office,

get it signed, then down to the chief financial officer and get payment effected. And they had people in all the different line departments who were not necessarily on their payroll. Some of them were "independent entrepreneurs", but they were working with the syndicate. Every department had a scheme running. Human settlements – they were selling places on the housing list. They also worked with housing contractors. Sports and recreation – they were laundering money through the stadium. Finance was obviously where a lot of the stuff ended up, but there were also some schemes like the property rating systems. They were selling discounts to businesses on their rates bill in exchange for a bribe.

There are huge disincentives for whistleblowers and very few incentives, other than doing the right thing. Because, if you're a whistleblower, you're always at risk of being found out.

How did this clique assert its power?

It's carrots and sticks. The clique would have numbered at least ten people. This was sort of the command centre of the so-called "Stalini faction" within the ANC. And their control was based on reward, fear and intimidation. The patronage system reached deep down into the party branches that were aligned with them – union members, Communist Party members. In terms of corruption schemes, it was fairly decentralised. So, there are a lot of people out there acting on behalf of the faction and raising money and taking something for themselves. But ultimate decision-making did rest with this core command. ANC ward councillors in Nelson Mandela Bay had a fair amount of patronage to hand out – not only hard cash but also jobs in the Extended Public Works Programme contracts and the like.

The sticks were big sticks. There was a string of enforcers in the



municipality who were not averse to death threats or to killing people. A few months before I arrived, the human settlements MMC [member of the mayoral committee] had been about to expose a whole corruption syndicate around housing. He'd built a dossier. He took it to the mayoral committee, and he got a decision to act against the top officials in the human settlements department. Two days later, he was executed.

After capture.

© Carlos Amato for PARI

How important was the role of whistleblowers in your work?

The whistleblowers were integral to the success of the clean-up. It's extremely difficult to get access to the relevant information without them because they are the most vital link in the whole process. It's obviously extremely difficult for them to be whistleblowers because any of their colleagues are liable to intimidate them. And, as I pointed out, there's a huge enforcement capacity attached to the syndicate, which can result in them not just losing their jobs but possibly being killed and their families gone after. So, there are huge disincentives for whistleblowers and very few incentives, other than doing the right thing. Because, if you're a whistleblower, you're always at risk of being found out. And if the case is going to go forward, you're going to be called to testify.

How best can they be protected?

The first thing that I did with all my whistleblowers was guarantee their anonymity. You've got to protect them at all costs. You must never do anything without their consent because, first and foremost, they needed to trust me to act responsibly. Secondly, I had to build my reputation as someone who was going to take what they were saying seriously and be able to act on it. The real thing that unlocked most of the whistleblowers was when they could see us moving, taking action and being serious. It's when the intervention really gets going that the rest of the whistleblowers will start to flock and give you information.

That sense of momentum is very important and a little bit of a smoke-and-mirrors thing. We'd stage-manage a lot of our early interventions to create impact and build confidence in the commitment behind the intervention.

How important are laws that protect whistleblowers?

Legislation that protects whistleblowers is important but has its real limitations in practice. I think far more important is the relationship between whistleblower and investigator. I know there are some legal provisions that say, if someone is a genuine whistleblower in terms of the relevant act, you can't take action against them as a staff member. But once a manager wants to take action against you, they're going to find some pretext. I have to say that I'm not fully convinced about legal mechanisms for protecting whistleblowers.

In what ways did state capture impact on service delivery in Nelson Mandela Bay?

The most prominent impact was how services and housing to ordinary citizens in the city broke down. There was this huge housing-delivery programme but, because they were skimming off the housing contracts by cutting corners during construction, the houses were falling apart within a year or two. They'd been skimping on the bulk infrastructure, too. Sewers blocked up and roads and houses would flood because of inadequate stormwater drainage. Due to very little maintenance, the infrastructure that had been put in was breaking down all the time. That encourages a level of informality and even criminality, with communities starting to do their own things. For example, connecting themselves to the electricity because no-one trusts the municipality anymore. It creates a vicious cycle because the municipality loses revenue due to lower electricity sales, so it stops maintaining electricity infrastructure. The losers at the end of the day are the urban poor because the urban rich just progressively buy out of the system.

What were the political consequences?

The political consequence was that traditional ANC supporters either didn't vote or voted for the opposition in the 2016 local government election. This meant that, between 2014 and 2016, the ANC dropped another 10 percent. They were down to 41 percent by 2016. The Democratic Alliance became the largest party, but without having an outright majority.

How has your understanding of "the state of capture" in South Africa changed following your arrival in the metro?

What Nelson Mandela Bay taught me was how this phenomenon of state capture in South Africa is much more decentralised than we had been led to believe before. The people I was investigating in Nelson Mandela Bay were not part of the Jacob Zuma faction that, together with the business family of the Guptas, had asserted its control at national level. In fact, they were linked into other factions in the ANC. Suddenly, I realised that we're dealing with a widespread systemic phenomenon which crosses party factions – and indeed it crosses political parties as well. There were a number of other parties in Nelson Mandela Bay that were involved in the corruption, including the United Democratic Movement and some of the other smaller parties. They were actively collaborating in Council. And that's when I under-

stood that the state capture phenomenon is much more widespread than I'd ever realised.

What are the systemic features that allowed this to happen?

To me, there are at least three systemic features. The one is that, when we started on this constitutional journey, we never really thought about how political parties were meant to fund themselves. As a country, we created a completely unregulated party-funding system. So, there is no obligation for parties to reveal who funds them and no limitation on the amount of hard cash they can receive locally or from overseas. And none of these donors are philanthropic. They're all looking for some form of advantage. They will say they're having a bit of difficulty getting this contract through the system, which they think they've legitimately won – and they want you to intervene. The unwary politician gets drawn deeper and deeper and suddenly you're intervening to push a questionable contract through.

The second feature has to do with the slightly “morally agnostic” corporate culture in South Africa. I don't want to say that all businesses are amoral but there's a large well-established corporate culture in South Africa that believes the deal is paramount. Whatever it takes to do a deal must be done. That certainly applies to a lot of the property developers.

The third systemic feature is the way that we've conceptualised public administration in relation to politics. We were trying to transform an apartheid state bureaucracy and we believed that the vehicle for that transformation

was political control. The state put all the power in the hands of the politicians and, as a result, it doesn't protect senior civil servants who stand up against those politicians. All of our senior civil servants are on fixed-term contracts. At the stroke of a pen, a minister can just fire a director-general and, at the most, they have to pay them out for

five years. In municipalities, in that five-year cycle, there's a constant churn of senior officials who are just not being retained. This makes all your officials highly vulnerable. Plus, you've got councillors basically running the appointment processes of senior officials. We've developed an overbearing political set of interventions into the administration and what I would call an unhealthy political-administrative interface. In short, we've unnecessarily politicised the upper layers of our administration and made it very vulnerable to political whims.

But you also have to consider the broader political context. We talk about corruption and state capture in the modern era, but let's not forget that the basis of wealth accumulation in the apartheid state was through rent accumulation on a vast and epic scale, which was justified by a racist and patriarchal ideology and defended by this huge military apparatus. So, we came from – I don't think “state capture” would be the right term – but a shadow state in which the affairs of the state were run from this shadowy intelligence structure, and behind that intelligence structure this completely faceless and anonymous

The third systemic feature is the way that we've conceptualised public administration in relation to politics. We were trying to transform an apartheid state bureaucracy and we believed that the vehicle for that transformation was political control. The state put all the power in the hands of the politicians and, as a result, it doesn't protect senior civil servants who stand up against those politicians.

bureaucracy called the Broederbond. It was a morally repugnant and corrupt system. The state worked through all of these proxies, including black local authorities and the corrupt “black-led” homeland administrations. I don’t think you can use that apartheid extractive system as an excuse, but I think we need to be aware of where we come from.

What legal, political and societal changes are required to limit state-capture-type rent-seeking?

I believe that transparency and opening up these processes to public scrutiny has a healing effect – not least because it lets the people on the ground make up their own minds. The big reform, which is now law – although we still have to engage in its implementation – is making all party-funding public. It is going to be a very difficult transition for most of our political parties and I think it needs to be implemented cautiously. At least initially, the focus should not be on trying to expose how bad parties are. Let’s build it incrementally. It’s not going to happen in year one.

Following years of hollowing out under the Zuma administration, reclaiming our criminal justice system – particularly the National Prosecuting Authority – the intelligence services, and the revenue services

is critical – not just for national state capture, but also because this is the machinery for ensuring consequences at a local level.

I also think there needs to be some real legal changes. We have to amend the Municipal Structures and Systems Act. This model of executive mayors seriously needs to be reconsidered. I would like us to go back to the old collegial executive-committee model. We also must do away with fixed-

term appointments in municipalities. We should set up an independent local-government public-service commission which scrutinises and even takes charge of the appointment of senior managers.

On the more positive side, we do have a marketplace for political ideas that is effective. The 2016 local government elections that resulted in the ANC losing power in a number of key metros showed that we can have transitions of power that do not result in violence. The electorate was able to make some real choices. Although I’m a little bit worried about how the resulting coalition governments have been functioning, I think that good, proper democratic competition is important.

But it’s not just all about the state. It’s the moral economy that operates within the business community. I know these businesses get really desperate. These development projects get delayed and delayed and any further delays can make them go under. In the end, they would be willing to pay any sort of bribe. Hence, we need to free up the development process so it’s not so vulnerable to the discretion of officials.

In the end, I think the real question is: how can we make transformation happen that empowers everyone and not just a narrow elite by questionable means? ■■■

I believe that transparency and opening up these processes to public scrutiny has a healing effect – not least because it lets the people on the ground make up their own minds.

Greasing the Wheels of State Capture: Corporations, Secrecy and Profit

Mamello Mosiana and Michael Marchant

Any analysis of state capture is incomplete if it fails to grapple with the network of private actors that facilitates unethical, corrupt and other criminal economic activity. A narrow focus on the structural and institutional weaknesses in the ruling African National Congress (ANC) and the South African state risks ignoring equally institutional and systemic problems in the global financial sector that enable corrupt elements to spirit away ill-gotten wealth.

In all cases, those who benefit from looting the state rely on two things. The first is a global financial architecture that permits secrecy, hidden ownership and the rapid movement of money across borders. The second is an army of professionals – bankers, lawyers and accounting consultants – to assist in setting up structures (both legal and illegal) that enable illicit activity while, at the same time, overlooking their legal responsibilities to identify and stop such activities. In the case of state capture in South Africa, banks and auditing firms were used to enable grand theft, putting profit ahead of their legal and ethical responsibilities.

Introducing the Enablers: A Global Mechanism for Hiding Hot Cash

The first thing to understand about how private actors use the mechanisms of global finance to extract and hide the proceeds of grand corruption is that this is not an exceptional use of these systems. Rather, it is the

rule for a secretive sector that has devastating effects on state institutions and their capacity to deliver services.

“Illicit financial flows” (IFFs) are broadly defined as “a range of strategies or methods of moving financial capital out of a country in a way that is against domestic or international law”¹. If you explore what enables illicit financial flows, and who profits from them, you will find a global financial system where corruption by public actors and criminal networks is aided by the private sector. Making use of both legal and illegal means, IFFs entrench poverty and inequality by diverting billions in tax money from social spending and depriving countries of domestic investment and fairer wages. Banks, law firms and accounting firms have been crucial enabling partners in any state-capture network. They allow state actors, criminal and/or terrorist organisations, and large multinational corporations to maintain and exploit a system based on secrecy and the easy flow of money. It is important to understand how this system works. If we do not, we will not be able to dismantle it.

Front companies

Front companies (also known as letterbox or shell companies) have no active business operations or staff, and effectively only exist on paper. Their only physical presence may be a mailing address and their directors are merely placeholders to obscure the real owners who benefit from the company.³ Shell companies are often created to avoid monitoring and regulation systems, and particularly to minimise taxes for companies in the countries where they operate and from where they draw profit.⁴



Mamello Mosiana is a communications and advocacy intern at Open Secrets. She is also a PhD candidate in Political Studies at the University of Cape Town (UCT). Mamello holds an MPhil in Justice and Transformation from UCT as well as an MSc in Security, Leadership and Society from King’s College London. She has worked on research focusing on transitional justice for the Institute for Justice and Reconciliation and the International Center for Transitional Justice.

Front companies are allowed to thrive in so-called “tax havens” (also known as “secrecy jurisdictions”) that offer financial secrecy and immunity from local laws, rules and taxes.⁵ These secrecy jurisdictions are controlled predominantly by the most powerful countries in the global North. Almost half of all international bank assets are held in tax havens concentrated in the City of London, British Crown dependencies and countries with historical links to the UK, such as Hong Kong and Dubai. Other important secrecy jurisdictions are found in European countries like Switzerland, Monaco and Luxembourg, as well as United States-controlled territories such as the Virgin Islands and several US states.⁶ Closer to home, Mauritius is an increasingly important provider of secrecy to companies operating in India and several African countries, including South Africa.⁷

State capture is not a new phenomenon in South Africa. Corporations and individuals have a history of profiting from colonialism and apartheid. Since the 1970s, a secretive financial network of shell companies and private banks was essential to the maintenance of the apartheid regime by facilitating the violation of UN embargoes.

Banks

Front companies need bank accounts to move money around. Those seeking to hide the origin and movement of funds use illegal techniques such as “layering” (moving assets through multiple accounts to make them untraceable) and “smurfing” (breaking up large amounts into much smaller transactions).⁸ The front company becomes the conduit for the illicit funds to be “washed” through the legitimate banking system. The banks are legally required to institute anti-money-laundering systems, but evidence shows that many have poor or insufficient checks in place to track illicit transactions, while others are open to profiting from them.

The situation is far from improving: 2018 proved to be a prolific year for money-laundering scandals involving big banks such as Goldman Sachs (US), Union Bank of Switzerland, Rabobank (Netherlands) and

US Bancorp, which all faced litigation and fines for failing to report suspicious transactions.⁹ For the first time, the non-profit Organised Crime and Corruption Reporting Project (OCCRP) named a bank instead of a politician as “the most corrupt actor” in 2018. After considering nominations from around the world, the panel selected Danske Bank for having laundered €230 billion through its Estonian branch between 2007 and 2015.¹⁰ Much of the money had dubious or corrupt origins in Russia and elsewhere in Eastern Europe. Other banks and financial-sector firms, such as Swedbank and Ernst & Young (EY), have been implicated since the Danske Bank scandal broke.¹¹

Accounting firms

Legal and accounting professionals fulfil an essential role in supporting the financial architecture described above. With banks, accounting firms often act as “formation agents” who can “quickly create, maintain, and dissolve offshore companies as needed”¹². The use of deliberately neutral language like “tax efficiency” masks their efforts to help companies use secrecy jurisdictions to avoid paying taxes. In 2014, a whistle-blower from PricewaterhouseCoopers (PwC) revealed that, through the use of shell companies and creative loan agreements, PwC secured around 548 secret deals in Luxembourg. These deals ensured that over 300 multinational clients could reduce their effective tax bill below 1 percent.¹³ As auditors, accounting firms are expected to check financial records and report irregularities. If they are also playing the role of tax consultants, this can present a conflict of interest – a risk that is increased when accounting firms make eight times more from consulting fees than they do from auditing.¹⁴

In the Danske Bank money-laundering scandal, Ernst and Young is under investigation in Denmark because, despite having “audited” the bank in 2014, it failed to flag grossly irregular activities.¹⁵ Thus, as in the banking sector, it is often the biggest professional firms (PwC, EY, KPMG and Deloitte) that help to weave the web of global financial-sector misconduct. This web maintains itself because senior executives of accounting firms help to write financial-sector laws for national governments, regulatory boards and bodies such as the OECD.¹⁶



Michael Marchant works as a researcher at Open Secrets, focusing on investigations and advocacy. He is simultaneously completing his LLB at the University of South Africa. Michael holds an MSc in International Development from the University of Edinburgh, as well as an Honours degree in Philosophy, Politics and Economics from the University of Cape Town. He was the lead researcher on *Hennie van Vuuren’s Apartheid Guns and Money: A Tale of Profit* (Auckland Park: Jacana, 2017).

DIRTY MONEY

The language of money laundering and secret money flows can be confusing. Here are some of the most common techniques used that appear consistently in the evidence about state capture:



Smurfing Breaking up large amounts into much smaller transactions.

Layering Moving money through multiple accounts to obscure the origin and trail.

Roundtripping Moving money through a series of transactions, usually between related entities often with the same ownership, to boost revenue (or create the appearance of revenue) without any genuine commercial activity by that entity.

Loan Backs One company makes a fixed deposit with cash from one transaction, and then a second related company takes a 'loan against fixed deposit' to access these funds. In the case of the Guptas, this was used to move money between related firms but without a clear trail, often across international borders.

Source: *Open Secrets*

South Africa: A Laboratory for State Capture

State capture is not a new phenomenon in South Africa. Corporations and individuals have a history of profiting from colonialism and apartheid. Since the 1970s, a secretive financial network of shell companies and private banks was essential to the maintenance of the apartheid regime by facilitating the violation of UN embargoes.¹⁷ Along with the commercial banks that bankrolled the apartheid state, those who helped establish this secretive network profited from a crime against humanity.

The modus operandi of apartheid's spies and middlemen is echoed in contemporary scandals. The "GuptaLeaks", a trove of emails between participants in the state-capture network, has revealed similar patterns of a state captured by private interests. The Gupta network sought to profit by corrupting large-scale procurement at state-owned enterprises, but the bribes, kickbacks and other profits rarely stayed in South Africa. Shell companies and

bank accounts were used to siphon off the money while auditors looked the other way or helped legitimise illicit transactions.

The Gupta network appears to have registered multiple shell companies in secrecy jurisdictions like Dubai and Hong Kong. According to the Financial Secrecy Index, Dubai "stands out above many other jurisdictions in terms of its lack of interest in transparency, and the laxity with which its offshore sector is supervised and regulated".¹⁸ Unsurprisingly, many of the registered offices of these companies were often vacant and had no active business, appearing to exist only on paper.¹⁹

Various banks and auditing firms played roles in this financial network. The Indian state-owned Bank of Baroda, which had a Johannesburg branch until 2018, was involved in clearing multiple suspicious transactions, even some that the bank's own employees had flagged.²⁰ Between 2007 and 2017, according to the OCCRP, about R4.5 billion (over USD 300 million) moved between more than 20 Gupta-linked front companies that held accounts at Baroda.²¹

A technique known as “round-tripping” – “moving money through a series of transactions, usually between related entities often with the same ownership, to boost revenue (or create the appearance of revenue) without any genuine commercial activity by that entity”²² – was used to obscure the original source of income, and to make money flows from corrupt activities harder to track.

As a foreign bank, the Bank of Baroda needed a South African banking sponsor to provide the architecture for its operations. The evidence suggests that South African giant Nedbank played this role. This relationship conveniently allowed both banks to avoid responsibility for identifying and reporting suspicious transactions as each claimed to not have enough access to information to perform the required checks.²³ As indicated above, billions of rands were moved between and through accounts at the Bank of Baroda, but Nedbank chose to retain Baroda as a client long after it should have been aware of suspicious transactions.

With banks looking the other way, the final checkpoint should have been the audit firms that had a first-hand look at the financial records of Gupta-linked firms. However, the same culprits that have facilitated tax-avoidance and money-laundering internationally appear again in South Africa.

Moreover, having closed its own Gupta-linked accounts in 2016, ostensibly because of the risk that they were being used for illicit activity, Nedbank waited another two years before cutting ties with Baroda.²⁴

With banks looking the other way, the final checkpoint should have been the audit firms that had a first-hand look at the financial records of Gupta-linked firms. However, the same culprits that have facilitated tax-avoidance and money-laundering internationally appear again in South Africa. KPMG, in particular, is said to have “audited” multiple Gupta-linked companies and failed to identify any illicit activity. This included the firm Linkway Trading Pty Ltd, a company alleged to have been used to divert millions in public funds from the Free State province. For example, funds earmarked for rural development were used to pay for an extravagant wedding at Sun

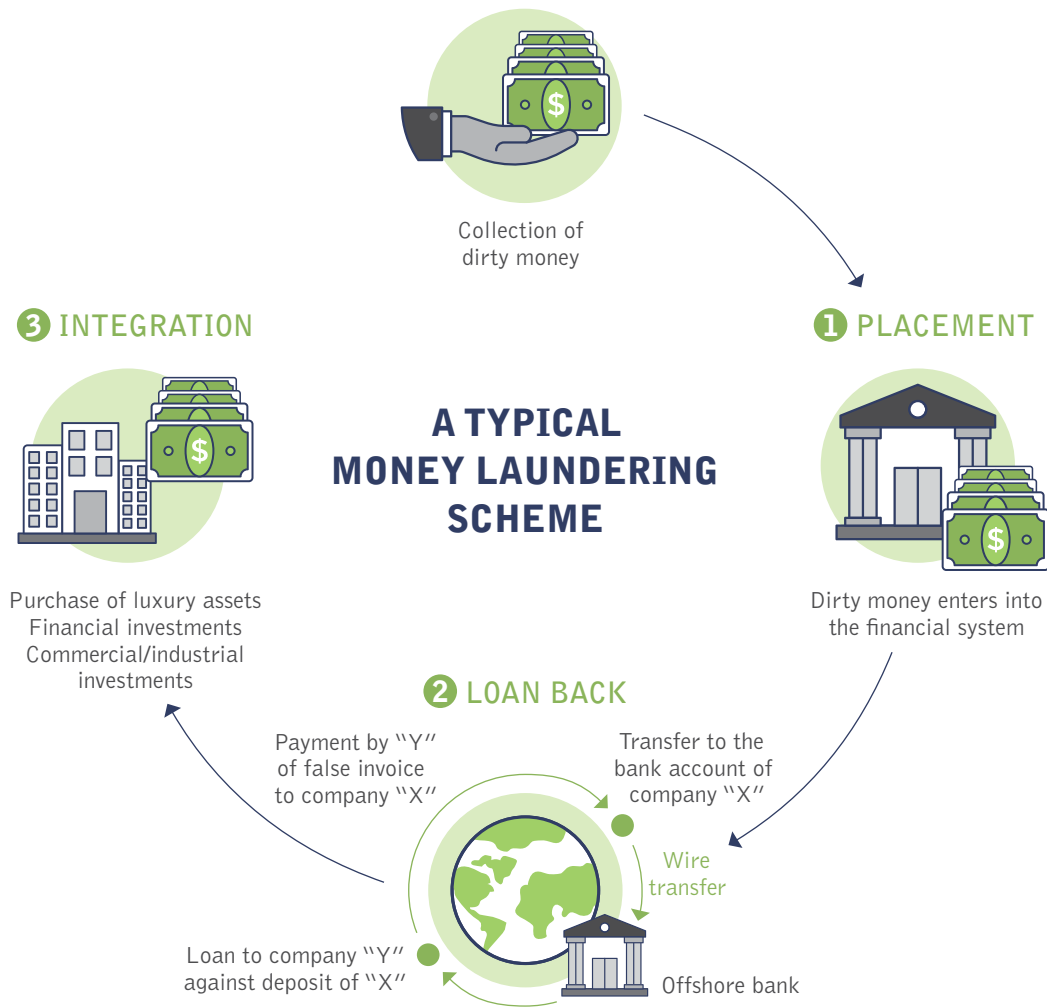
City, a luxury South African resort.²⁵ Several KPMG managers of Gupta accounts were found to have failed to disclose their conflicts of interest and identify “the substance of significant unusual transactions”.²⁶ One of the KPMG auditors on the Linkway Trading account has now been struck from the register by the Independent Regulatory Board for Auditors for what they describe as “egregious dishonesty” when reporting on Linkway’s finances.²⁷

All Aboard! The Enablers Who Helped Derail Transnet

Transnet, one of South Africa’s largest state-owned enterprises, is responsible for the country’s extensive rail infrastructure. As a prized jewel for the state-capture network and an important target for Gupta-linked companies, Transnet provides an informative case study of how the Gupta networks relied extensively on secretive shell companies and multiple bank accounts across the world to pull off their heist.

Transnet’s 2014 contract with China South Rail (CSR) for the purchase of 359 locomotives was worth USD1.5 billion, and a staggering 21 percent of that was set aside for advisory fees to be paid to Salim Essa, a known Gupta associate, purportedly acting as CSR’s “black economic empowerment” advisor.²⁸ Although the trains were delivered late and did not work when they arrived, this meant that Transnet footed the bill for nearly USD300 million in commissions that appear to be kickbacks. As is common practice in corruption networks, the payments were made to offshore companies in secrecy jurisdictions and routed through numerous accounts, making the money more difficult to track.

Despite the attempts to muddle the money trails, an OCCRP investigation identified over USD100 million paid into accounts of two companies linked to Salim Essa: Tequesta and Regiments Asia. Both firms were registered in Hong Kong on exactly the same day, with the same address, and both started to receive multiple large money inflows.²⁹ Hong Kong (like Dubai) offers a wide range of offshore services, ranging from tax avoidance to the provision of opaque companies that can be used for tax evasion and other crimes. Furthermore, there is no public record of beneficial ownership in Hong Kong.³⁰ According to the



Source: Authors / Transparency International Latvia

2018 Financial Secrecy Index, Hong Kong is the fourth most secretive jurisdiction in the world.³¹

Both Tequesta and Regiments Asia held accounts with the multinational banking-and-financial-services giant HSBC. A 2017 study reported that the company, which holds “at least 828 corporate entities in 71 countries”³², itself takes advantage of the world of offshore financial secrecy to maximise its profits. Using standard money-laundering tricks, payments from CSR to Tequesta and Regiments Asia travelled from their HSBC accounts through a range of banks from South Africa to Dubai and the United States.³³ HSBC should have applied the necessary due diligence to “know their customer” before allowing Salim Essa to establish bank accounts and then immediately use them to channel over USD100 million to shell companies with no visible employees or operations.

Either the banks and authorities did not pick up on this noticeably suspicious activity or, if they did, they failed to act and stop

it. It is clear that the financial architecture provided by banks in secrecy jurisdictions continues to be used by those involved in corruption and organised crime, providing them a free pass to move and preserve their loot.

The Cost of No Accountability

As South Africa seeks to uncover both the origins and mechanisms of state capture and to pursue accountability and restitution, it cannot ignore the private-sector enablers that were central to the networks of corruption. If there is no accountability for their role and if the infrastructure they have established is left intact, new networks will form to engage in similar illegal activities. South Africa’s failure to grapple with the private actors who were complicit in the crime of apartheid is a testament to the consequences of impunity. As discussed here, state capture is not the act of a few

THE COST OF STATE CAPTURE

The legacy of a long history of state capture is seen in high levels of unemployment, poverty and inequality in South Africa. The last decade has done nothing to address these challenges and in many cases the country has slipped backwards.

POVERTY
2.8 million
more people in poverty
from 2011 to 2015

More than half of South Africans were poor in 2015, with the poverty headcount increasing to 55,5% from 53,2% in 2011

Had the South African economy kept pace with other emerging markets between 2007 and 2017, the South African economy could have created between 500,000 & 2.5 million more jobs. According to Statistics SA, South Africa lost 69,000 jobs in the 2nd quarter of 2018.

UNEMPLOYMENT
2.5 million
lost jobs

South Africa is renowned for high income inequality. However, wealth inequality is even more stark. Tax data suggests that 10% of the richest South Africans own at least 90% of all the country's assets.

INEQUALITY

Source: Open Secrets

rogues: where secrecy and profit prevail at the expense of accountability and justice, it is both systemic and structural. It is imperative that the Zondo Commission of Inquiry into Allegations of State Capture, along with any subsequent criminal litigation, calls pri-

vate-sector actors to account for their role in an audacious heist of public resources. It was not the first such attack – and without far-reaching accountability coupled with systemic and structural change, it will not be the last. ■■■

-
- 1 Open Secrets, *The Bankers: Corporations and Economic Crime Report Vol. 1*, 2019, 26. See: www.opensecrets.org.za/site/wp-content/uploads/Final-ReportOpenSecrets_Bankers_Reduced.pdf.
 - 2 Ibid.
 - 3 Alexander Weber, Boris Groendahl and Nicholas Comfort, "Money to Launder: Here's How (Hint: Find a Bank)", *Bloomberg*, 9 March 2019. See: www.bloomberg.com/news/articles/2019-03-09/money-to-launder-here-s-how-hint-find-a-bank-quicktake.
 - 4 Open Secrets, 28.
 - 5 Robert J Burrowes, "Elite Banking at Your Expense: How Secret Tax Havens are Used to Steal Your Money", *Countercurrents*, 6 March 2019. See: countercurrents.org/2019/03/06/elite-banking-at-your-expense-how-secretive-tax-havens-are-used-to-steal-your-money/.
 - 6 Ibid.
 - 7 Petr Jansky, Markus Meinzer and Miroslav Palansky, "Is Panama Really Your Tax Haven? Secrecy Jurisdictions and the Countries They Harm", IES Working Papers 23/2018, Institute of Economic Studies, Charles University (Prague), 2018. See: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3267366.
 - 8 Open Secrets, 28.
 - 9 Daniel Neale, "Taking Stock of 2018's Money Laundering Scandals: When is Enough Enough? (Part 2)", *Global Financial Integrity*, 9 January 2019. See: www.gfintegrity.org/taking-stock-of-2018-part-2.
 - 10 Organized Crime and Corruption Reporting Project (OCCRP), "Danske Bank: 2018 Actor of the Year in Organised Crime and Corruption", 2018. See: www.occrp.org/en/poy/2018.
 - 11 Kristin Broughton, "Swedbank Ditches EY as External Auditor Amid Reports of Danske Bank Ties", *Wall Street Journal*, 26 February 2019. See: www.wsj.com/articles/swedbank-drops-ey-as-external-auditor-amid-reports-of-danske-bank-ties-11551218963.
 - 12 Paul Radu, "Vast Offshore Network Moved Billions with Help From Major Russian Bank", *OCCRP*, 4 March 2019. See: www.occrp.org/en/troika/laundromat/vast-offshore-network-moved-billions-with-help-from-major-russian-bank.
 - 13 Open Secrets, 29.
 - 14 Ibid.
 - 15 Broughton.
 - 16 Open Secrets, 29–30.
 - 17 Hennie van Vuuren, *Apartheid Guns and Money: A Tale of Profit*, Jacana: Cape Town, 2017.
 - 18 Angelique Serrao and Pieter-Louis Myburgh, "Dubai: The Gupta's City of Shells", *GuptaLeaks*, 27 October 2017. See: www.gupta-leaks.com/atul-gupta/dubai-the-guptas-city-of-shells.
 - 19 Ibid.
 - 20 Open Secrets, 23.
 - 21 Khadija Sharife and Josy Joseph, "India's Bank of Baroda Played a Key Role in South Africa's Gupta Scandal", *OCCRP*, 27 February 2018. See: www.occrp.org/en/investigations/7696-india-s-bank-of-baroda-played-a-key-role-in-south-africa-s-gupta-scandal.
 - 22 Open Secrets, 22.
 - 23 Sharife and Joseph.
 - 24 Open Secrets, 25.
 - 25 Mathew le Cordeur, "KPMG SA CEO, 7 Others Quit on #GuptaLeaks, SARS Rogue Unit Fallout", *News24*, 15 September 2017. See: www.fin24.com/Companies/Financial-Services/kpmg-sa-ceo-7-others-quit-on-guptaleaks-fallout-20170915.
 - 26 Ibid.
 - 27 Marelise van der Merwe, "Gupta-linked ex-KPMG Auditor Struck from IRBA Register for 'Egregious Dishonesty'", *Fin24*, 28 March 2019. See: www.fin24.com/Companies/gupta-linked-ex-kpmg-auditor-struck-from-irba-register-for-egregious-dishonesty-20190328.
 - 28 Khadija Sharife, "Guptas, Big Banks Linked to South African–Chinese Locomotive Deal", *OCCRP*, 15 November 2017. See: www.occrp.org/en/investigations/7257-guptas-big-banks-linked-to-south-african-chinese-locomotive-deal.
 - 29 Ibid.
 - 30 "Beneficial ownership... refers to anyone who enjoys the benefits of ownership of a security or property, without being on the record as being the owner." Wikipedia, "Beneficial Ownership", 17 March 2019.
 - 31 Tax Justice Network, "Narrative Report on Hong Kong", *Financial Secrecy Index*, 2018. See: <https://www.financialsecrecyindex.com/PDF/HongKong.pdf>.
 - 32 Javier Garcia-Bernardo, Jan Fichtner, Frank W Takes and Eelke M Heemskerk, "Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network", *Nature*, 24 July 2017. See: www.nature.com/articles/s41598-017-06322-9.
 - 33 Khadija Sharife, "Guptas, Big Banks Linked to South African–Chinese Locomotive Deal", *OCCRP*, 15 November 2017. See: <https://www.occrp.org/en/investigations/7257-guptas-big-banks-linked-to-south-african-chinese-locomotive-deal>.

It Was Not Just State Capture, But the Conquest of South Africa's Soul

Niren Tolsi

Mandla¹ is a decent South African. He cares about his mother and aunt, likewise the community in which he lives.

Mandla wanted to talk. About his dreams and his increasing disillusionment that they would never become reality. About the government and how it was stymying his chances because he was neither politically connected nor willing to pay a bribe. He chattered indignantly about how the post-apartheid institutions set up to champion entrepreneurial spirits like his were corrupted. He ranted about the crony-connected company that had left an incomplete project in his ward despite allegedly sinking millions from the municipal budget.

Then Mandla stopped talking.

He stopped responding to WhatsApp messages or answering his phone.

He stopped blowing the whistle.

Word on his township streets was that he had finally given up, and given in. In exchange for a bit of business for his failing company, Mandla had agreed to shut up. He wanted something better than the zinc ceiling of a one-room shack, which he had begun to realise he would never break through.

After years of resisting, Mandla had finally felt too helpless to do anything but to join the kleptocrats, the corrupted, the rent-seekers and the self-interested. To borrow the language of *The Beautiful Ones Are Not Yet Born*, Ai Kewi Armah's 1968 novel of post-colonial Ghana, he had smelt the "shit" of a system that had become corrupted with "obscene haste".

Over the past two years, while writing about Accounting for Basic Services (ABS), a civil

society project which sought to deepen participatory democracy in six wards around the country, I have met several Mandlas.

Locals followed all the steps of engagement that are allowed for by the rule of law and our democratic framework, all these things that go on between themselves and municipalities and councillors before the fires of protest are set alight.

Their engagements had mixed results, and incremental gains in several cases. These included the rectification of a dodgy stadium upgrade in the Eastern Cape and an agreement to provide electricity for an informal settlement in Mpumalanga.

Yet, for some residents, this is too little and too late.

Every day, there are more Mandlas in South Africa. People who have spent the best part, if not all, of the country's life as a democracy seeking to build something before finally succumbing to the moral failure all around them. Citizens who have looked at every level of society – at presidents, police, business people, teachers, lawyers, councillors, the unemployed – and have been overwhelmed by the crushing sense that the only way up is by stepping on the throat of another. Rather than on the shoulders of the giants who came before.

Ordinary people are left with the despair that the only way to cross the ever-increasing gap between poverty and wealth is to join those at the trough. What was institutionalised during Jacob Zuma's presidency was not just state capture, but the conquest of South Africa's soul.

This mentality was slowly building before former president Jacob Zuma's tenure, dur-



Niren Tolsi is a freelance journalist and co-founding editor of *The Con*, an online literary and long-form publication produced in Johannesburg. He believes journalism is always in need of a defibrillator. His areas of interest include citizen mobilisation and protest, state violence, constitutional law, social justice, test cricket, football, and satire.



ing the administrations of former presidents Nelson Mandela, Thabo Mbeki and Kgalema Motlanthe. But it was profoundly entrenched during the nine ruinous years he was in charge.

Zuma's project to establish and maintain power within the ANC ensured the conflation of state and party to new levels of avarice and unaccountability.

It built networks of ethno-kleptocracy, derided "clever blacks" and constitutionalists, promoted mediocrity and ineptitude, and eviscerated almost all state institutions of independence and independent-minded patriots.

It had little place for excellence or independence of mind and dissent. Big constitutional ideas were replaced by Big Men. Political intolerance and personal interest led to violence and deaths.

This was most obvious in a ward in Pietermaritzburg, in Zuma's home province of KwaZulu-Natal, where ABS was involved. Zuma's extended family and network controlled the ANC at branch and regional level. The Moses Mabhida ANC region, which includes Pietermaritzburg, was one of the most vocal pro-Zuma areas in the country, as were the city's councillors and municipal officials.

Local politicians were riled by an unattributed quote from a resident who was critical of how they promoted patronage systems rather than democratic ideals. It led to another resident, who had merely been pictured in the story, being moved to a safe house after receiving death threats.

A tender gone wrong. The grassless sports field and broken rugby posts in Glenmore, rural Eastern Cape.

© Madelene Cronje

As the Commission of Inquiry into State Capture chaired by Deputy Chief Justice Raymond Zondo attempts to unravel the familial networks at the top of the corruption foodchain – Zumas, Guptas, et cetera – the actions of people like Mandla clearly show that this rot seeps through every aspect of our society.

As the Commission of Inquiry into State Capture chaired by Deputy Chief Justice Raymond Zondo attempts to unravel the familial networks at the top of the corruption foodchain – Zumas, Guptas, *et cetera* – the actions of people like Mandla clearly show that this rot seeps through every aspect of our society.

Local government – the most basic interface between citizens and the state – is

broken. Successive auditor-general reports confirm this. In the 2016/17 financial year, only 33 of 257 municipalities obtained clean audits. In 2017/18, this already disastrous figure dropped to 18.²

Municipalities are eroded of the skilled people who can make them function and filled instead with gangsters and pillagers. This symptom of the Zuma administration was confirmed when Auditor-General Kimi Makwetu wrote to parliament in 2018. The letter detailed how his staff received death threats and were held hostage and otherwise intimidated at various municipalities across the country, to stop them from doing their jobs.³

South Africans are living an echo of what Armah wrote fifty years ago in Ghana:

True, I used to see a lot of hope. I saw men tear down the veils behind which the truth had been hidden. But then the same men, when they have power in their hands at last, began to find the veils useful. They made many more. Life has not changed. Only some people have been growing, becoming different, that is all. After a youth spent fighting the white man, why should not the president discover as he grows older that his real desire has been to be like the white governor himself, to live above all the blackness in the big old slave castle? ■■■

1 Not his real name.

2 Auditor-general flags lack of accountability as the major cause of poor local government audit results, Auditor-General South Africa, 26 June 2019, p.4. See: <https://www.agsa.co.za/Portals/0/Reports/MFMA/2019.06.25/2019%20MFMA%20Media%20Release.pdf>.

3 Auditor-general Kimi Makwetu's personnel terrorised at municipalities, *Business Day*, 22 October 2018. See: <https://www.businesslive.co.za/bd/national/2018-10-22-auditor-general-kimi-makwetus-personnel-terrorised-at-municipalities/>.

State Capture:

On Kenya's Inability to Fight Corruption

Gladwell Otieno

Interview

Since the launch of Transparency International (TI)'s Corruption Perceptions Index in 1995, Kenya has invariably foundered in the bottom third of the countries surveyed. TI-Kenya's Bribery Index reports widespread bribery; some institutions, including the police, land registries and county licensing services are notoriously predatory. In Kenya, and globally, corruption undermines the state by weakening public institutions, eroding both their effectiveness and their resilience. In addition, and more insidiously, it corrodes the social norms and values that hold communities together, deepens inequalities and drives conflict.

In May last year, the Africa Centre for Open Governance (AfriCOG) published *State Capture – Inside Kenya's Inability to Fight Corruption*, a report that hit the country like a meteor. *Perspectives* spoke to Gladwell Otieno, AfriCOG's director and long-time anti-corruption campaigner, about what motivated them to take a fresh view in the analysis of corruption, and what this means for civil-society action.

Perspectives: For more than twenty years, you have campaigned within civil society against the interests of corrupt elites, but now you believe this struggle needs new vigour and energy. Why so?

Otieno: Though we have been campaigning against corruption for so long, together with colleagues in civil society, we really do not have very much to show in terms of real impact. There have been times in which we have scored small temporary successes – made particular corruption projects somewhat more difficult to achieve, forced individual operatives to be a little more creative in their adopted methods – but, on the whole, corruption has continued unabated, flourished and entrenched itself.

We put an enormous amount of effort into applying the conventional solutions, setting up new institutions, passing and strengthening laws, changing procedures, trying to influence policymakers and politicians, and yet these did not work. In our policy work, when applying conventional solutions, we did often find ourselves “suspending disbelief”. There was a level of cognitive dissonance involved in working with people whom we knew to be corrupt, trying to prevail on them to change the way they did business. We felt much more comfortable and authentic in the watchdog role, in identifying and investigating problems and naming and shaming those responsible. But in a situation of widespread venality, there is no shame, so that approach was also ultimately sterile.

The report argues that the government embraces the *appearance* of reform rather than the *fact* of reform because deep reforms would



Gladwell Otieno is the founder and Executive Director of the Africa Centre for Open Governance (AfriCOG), an anti-corruption civil society organisation based in Nairobi. She was the Executive Director of Transparency International - Kenya and has also worked for Transparency International in Berlin, Germany.

loosen the ruling elite's grip on power and so severely subvert politics as played in Kenya. The state-capture lens allowed us to make a more fundamental critique of why we were failing and why the conventional menu of tools and approaches were of limited use, and opened the door to linking our political struggles for a deeper and more meaningful democracy with our struggles against corruption.

What has this report done to reignite the debate for meaningful accountability in Kenya?

I believe this report gave the public, for the first time, a cogent and convincing analytical framework with which to understand why repeated anti-corruption campaigns have sputtered out with no notable successes while corruption skyrocketed. The media have been flooded with so many stories of blatant and egregious corruption that Kenyans seem overwhelmed and numbed. The state-capture analysis, which borrows from the South African debate and other experiences elsewhere, allows people to go beyond impotent anger or barroom anecdotes to a clearer understanding of the problem, and hopefully from that to meaningful action. It shifts the debate from discussions on the conventional reforms and periodic crackdowns that only seem to produce "movement without motion" to a focus on the need to address the systemic nature of state capture which subverts our decades-long efforts to democratise politics and which has plunged the majority of Kenyans into a state of ever-worsening immiseration.

Rather than focusing on techniques and tools that would doubtless have a greater chance of being effective in a more accountable jurisdiction, the report ultimately encourages Kenyans to engage in a struggle for deeper democracy to undo state capture and its effects.

Rather than focusing on techniques and tools that would doubtless have a greater chance of being effective in a more accountable jurisdiction, the report ultimately encourages Kenyans to engage in a struggle for deeper democracy to undo state capture and its effects.

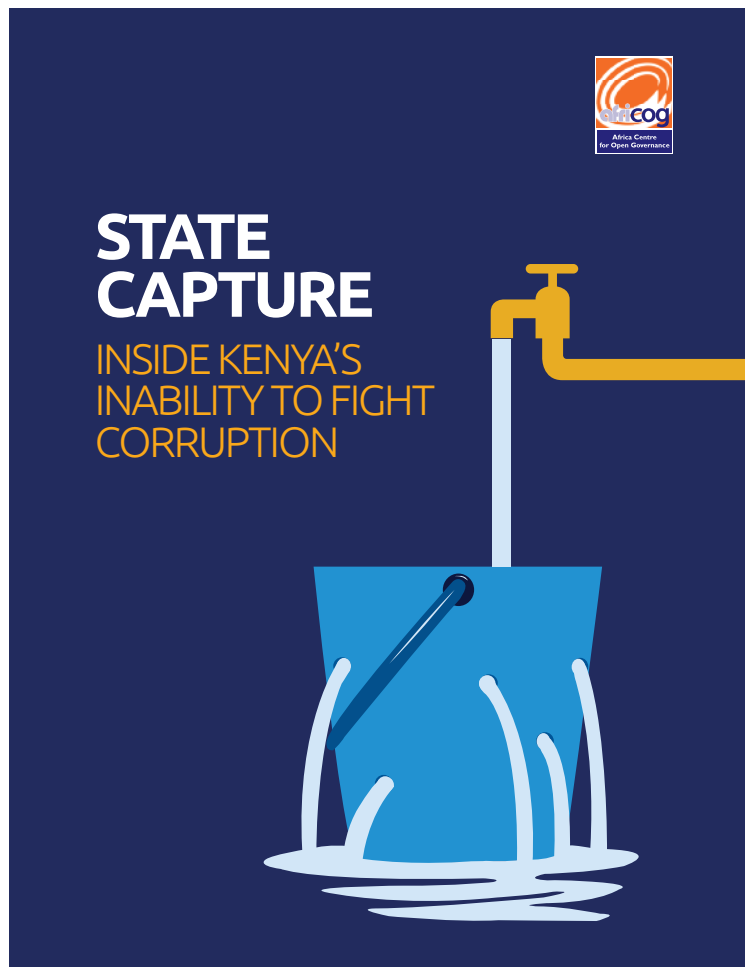
Also, our analysis of the techniques of state capture, including capture of the electoral management body, drives home to Kenyans the lessons that were becoming increasingly clear after the last elections: it is not enough to elect corrupt politicians and then hope that they will "do the right thing". As the report says: "To be able to transition capture across elections, from one regime to another, as Kenya did in 2002 and again in 2013 and 2017, involves repurposing politics

so as to limit the political agency of citizens... [T]he procedural elements of democracy are used to hollow out its substantive commitments while keeping the diplomatic respectability that is conferred by regular elections". Voters line up for hours, cast their votes with greater or lesser difficulties, international observers visit polling stations and remark on voters' commitment to democracy and state that the election results credibly reflect the voters' will and all is for the best in the best of all possible worlds.

But surely one could argue that state capture is nothing new in Kenya and is as old as the idea of "it's my turn to eat"?

Our analysis traces the evolution of corruption in Kenya. Corruption in Kenya has been closely allied with politics since independence and before. What started out as the politically-connected opportunistically "rigging the system" to benefit themselves, their relatives and their cronies has morphed into "state capture".

Rather than simply abusing access to power and information or



© AfriCOG

breaking the law and regulations for private gain, state capture implies a repurposing of legal processes and institutions to continue to reproduce results beneficial to the corrupt. As the report says: “The success of state capture rests on the ability of a small group of powerful and rich operatives to take over and pervert the institutions of democracy, while keeping the façade of a functioning democracy. Thus, oversight institutions are weakened; law enforcement is partisan and in the pockets of politicians; civic space is asphyxiated; free elections are frustrated and typically won by the most violent and most corrupt... Arrests and indictments are often precursors of inaction, not proof of official will to fight corruption”. State capture allows regular elections to be held, which never bring about change.

As the 2017 South African *Betrayal of the Promise* report into state capture points out, state capture is not just “a vehicle for looting. Institutions are captured for a purpose beyond looting. They are repurposed for looting as well as consolidating political power to ensure longer-term survival, the maintenance of a political coalition and its validation by an ideology that masks private enrichment by reference to public benefit”.

This analytical shift is necessary because it disabuses us of the notion that a captured system can be cleaned up or reformed in the public interest. The John Githongo case – which gave birth to the “it’s our turn to eat” trope used here – made that clear. Githongo, an economic journalist and activist, led the local Transparency International chapter in Kenya. When Mwai Kibaki became president, he became the president’s personal advisor, his permanent secretary for governance and anti-corruption. Here, John stumbled over the Anglo Leasing scandal, named after the shell company that was involved in a series

of lucrative procurement contracts in the security sector. His efforts to resolve it increasingly pitted him against top political operatives in the new government who were repurposing an old corruption vehicle for their own ends. It also became clear that his principal was deeply in on the deal, despite him hiding behind a façade of befuddled ill health. Isolated and endangered, Githongo fled into exile. Ironically, the current president – then leader of the opposition – travelled to depose him while in exile and publicised the results of his testimony to expose the Kibaki government. To close the vicious circle, Githongo was this year subjected to punitive libel damages awarded to former internal-security minister Chris Murungaru, who had been seen as a major perpetrator and benefactor of Anglo Leasing and had been removed from office in the wake of the exposure of the scandal. He is appealing that decision.

If indeed state capture benefits the elite, then why do they turn around and fight the corruption that they are a part of? Can their actions really be construed as anti-corruption initiatives or simply as political management strategies?

Just as we ask in our report: “Why do the emblematic cases of corruption... never get resolved even though they never really die? They are not meant to be resolved: to resolve them would undo the implicit transition bargain of Kenyan politics that successors will not harm the interests of their predecessors. And yet, these emblematic cases cannot really be allowed to die because that would expose the capture racket. Therefore, such cases are kept interminably in the public eye, partly as evidence that ‘action is live’ and partly as a fig leaf to keep the machinery of larceny functioning under cover”.

Mwai Kibaki came to power in 2002 on the wings of overwhelming public desire for “zero tolerance” and an end to the endemic corruption that had characterised the preceding regime of Daniel arap Moi. This public push ushered in an era of repeated reform campaigns by successive regimes which eventually proved to be unsustainable. Dramatic measures would be announced with much fanfare, only to eventually taper off inconclusively until the next round of “reforms”.

Kenyan governments have, up to now, pursued a series of unconnected anti-corruption activities, mainly prosecutorial, which leave the roots of corruption intact.

Kenyan governments have, up to now, pursued a series of unconnected anti-corruption activities, mainly prosecutorial, which leave the roots of corruption intact. High-profile arrests and indictments, repatriation attempts, re-vetting and suspending procurement officers, and revitalising and funding blue-ribbon multisectoral agencies have all been tried before and proven to be ineffectual.

Within Kibaki's first year in office, the Anti-Corruption Commission had been strengthened under new leadership; new anti-corruption and public-ethics laws were passed; commissions of inquiry into past major scandals began their work, including Moi's signature Gold-berg mega-scandal, which involved the payment of inflated state subsidies to this gold-exporting business; and Kenya became the first country in the world to sign and ratify the United Nations Convention Against Corruption (UNCAC). Gallup found then that Kenyans were the most optimistic people in the world. Sadly, this did not last long. The scandal that symbolised and delegitimised Kibaki's tenure was the above-mentioned Anglo Leasing scandal.

Uhuru Kenyatta's government [2013–] also launched an anti-corruption drive just before it went to the market to issue its first



© AfriCOG

Eurobond, which, ironically, purportedly necessitated the repayment of Anglo Leasing “debts” to “ghost companies” to attain international confidence. Essentially, the Kenyan taxpayer was mugged twice, paying for corrupt contracts that produced nothing of value in order to facilitate the next round of plunder, which became apparent when Kenyatta’s government was unable to credibly account for at least USD 1 billion from Eurobond proceeds. Clearly, that level of funding should leave tangible evidence of projects on the ground, but the government could point to very little, if anything. The suspicion was that this sum had gone to replenish the ruling party’s election coffers, just as Anglo Leasing proceeds had gone to help Kibaki face his former political allies in a referendum in 2005 and the general election of 2007 after he had betrayed a power-sharing deal with them reached before he became president.

What these emblematic scandals show is the evolution of Kenya as an institutionalised kleptocracy from one in which officials abused their public power or discretion for private gain to a situation in which the state itself was captured and repurposed for personalised appropriation.

What role have past legacies of corruption played in shaping contemporary state capture? How do we break these links?

Akin to South Africa’s apartheid regime, the colonial regime was the embodiment of corruption: it mobilised coercive power to set up a predatory extractive state that subjugated the African majority and worked in the interests of a racial minority and the metropole. But the colonial bureaucracy can, to a certain extent, be said to have been quite disciplined and corruption-free, even if they were embedded in a system whose logic was essentially corrupt. With very few changes, the post-independence state retained many of the features of the colonial state, although obviously with a much broader developmental mandate, with a small black elite moving into the position of the former white rulers. Over time, and especially when civil servants were eventually allowed to run their own private businesses while in office and Africanisation policies were adopted and institutions built to create a black business class, conflicts of interest became ever more rampant.

The gist of the state capture thesis is that the Kenyan state is run by politico-business cartels with the presidency at the centre. Moi and

Kibaki were at the centre of the Goldenberg and Anglo Leasing rackets and Uhuru Kenyatta is clearly implicated in the Eurobond scandal. All three scandals emerged in situations where incumbents had to fill their war chests to fight political opponents. Once the presidency becomes compromised by mega-corruption, the whole government machinery becomes completely permissive towards corruption. Its defining feature is the ability to change or shape the rules of the game (i.e. law and policy) to the captors' advantage.

Breaking these links would require breaking away from the colonial state. A strong start has already been made by the 2010 Constitution, which set out changes that would reconfigure the postcolonial state, bring government closer to the people, provide it with a guaranteed share of funds and subject it to closer scrutiny, enable participation, and demand accountability. Its central feature was the devolution of political power through a two-tier system of national and county government.

This achievement is now under threat as Kenyatta and former opposition leader Raila Odinga contemplate far-reaching constitutional amendments to reshape political power in their own short-term interests. The Jubilee Party government is cynically using its own profligacy as an argument to illustrate why the representation required by the new Constitution and devolution is too expensive and should be changed. However, the popularity of devolution and the Constitution should not be underestimated.

What about the role of the middlemen, agents and private-sector enablers of state capture? Do you think we focus enough on them in Kenya?

This is an area in which much more needs to be done, in terms of analysis as well as in securing accountability. In all the scandals mentioned in the report, middlemen and other agents – such as lawyers, accountants, businessmen and the brokers who hang about the corridors of power to fix massive deals and recruit successive government operatives – play an essential role in state capture. Unsurprisingly, given this role and the information to which they become privy, very little has been done to prosecute them, except when public outrage had to be appeased with processes that invariably turned out to be ineffectual.

Businessman Kamlesh Pattni, who masterminded the Goldenberg scam, has never been held accountable for the grand heist that cost Kenya roughly the equivalent of 10 percent of its GDP. Most recently, he popped up in Zimbabwe as an associate of former Vice-President Joice Mujuru in a gold-mining-sector scam that reportedly helped deplete that country's foreign-exchange reserves. Anura Perera, of Anglo Leasing fame, was actually paid out money that Kenya purportedly still "owed" to him from the scam, under the pretext that this was necessary before the launch of the Eurobond. Anglo Leasing involved many companies owned by the same set of individuals: Deepak Kamani, Anura Pereira, Amin Juma, Merlyn Kettering and Ludmila Katuschenko, among others.

Ketan Somaia – Pattni's partner at one time in Goldenberg International and allied to a powerful permanent secretary in Moi's office – successfully conducted many fraudulent deals with the Kenyan government, for which he was never penalised apart from a lenient conviction and sentence which saw him spend more time in the private ward of Kenyatta National Hospital than in prison. It took the UK to bring Somaia to justice in 2014, when he was sentenced to eight years in prison following the largest-ever private prosecution by an aggrieved former partner.

Similarly, the notorious drug-dealing Akasha brothers now face long jail terms in the USA, after years of operating with impunity in Kenya, under apparent official protection, to make the port city of Mombasa an

international drug-supply hub. There are a host of other local and international operatives who are essential to oiling the cogs of corrupt deals and have never been held accountable for their crimes in Kenya.

I'm sure that you agree that pessimism often leads to cynicism. Given the failure of democratic institutions in Kenya, why should young social-justice activists in Kenya be hopeful? What can they do to help lead the struggle against impunity?

We are aware that our study is not a particularly optimistic one. However, it offers hope in that it clarifies some of the reasons for the failure of earlier strategies and helps to illuminate alternative paths to change. It debunks the earlier notion that corruption was an aberration, a pathology in an otherwise healthy body politic that could be "cured" through discrete and standard reform measures. Our study argues that the assumption that the state exists for benign ends, but is debauched by corruption, is mistaken. This level of clarity should at least help activists to develop more clear-sighted strategies.

Some of the report's proposals are to use the opportunities provided by Kenya's 2010 Constitution, even though it is under a determined attack by the political elite. The creation of 47 new county governments through devolution in

2013 offered opportunities for experiments in governance. Although many county governments, perhaps inevitably, adopted some of the same bad behaviours as the national government, including extreme corruption, other counties are committed to doing the right thing. This could generate peer pressure, increasing the demand for others to emulate them.

Successful county governments have the potential to generate a virtuous cycle of governance reforms. A critical mass of progressive counties could undermine the hold that the state-capture elite has on the national government at the centre. County governments are increasingly gaining a sense of their own powers and possibilities, as is evidenced in growing organised resistance to the efforts of the national government and Treasury to resist devolution and grab back power and resources to the centre.

The report also suggests a range of things that civil society can do, such as developing case files and archiving records for future prosecutions and pursuing foreign indictments and convictions in friendly jurisdictions. In addition, the president and his erstwhile opponent, Raila Odinga, reached a rapprochement in March 2018 that is clearly aimed at perpetuating the hold of the Kenyatta dynasty on power, and will probably involve a constitutional referendum to achieve a dispensation that will accommodate a broad coalition of formerly competing interests, or what economist David Ndii calls an "eat-and-let-eat grand ethnic coalition".

There is always a risk to the elite of the unintended consequences of their strategies, particularly against the background of intense political competition within the ruling coalition and a deepening economic crisis. The excitement generated by Kenyatta's recent show of arrests and indictments indicates the viability of an anti-corruption platform, and unexpected new challengers could emerge. There is no guarantee, however, that these challengers would be progressive. As

Our study argues that the assumption that the state exists for benign ends, but is debauched by corruption, is mistaken. This level of clarity should at least help activists to develop more clear-sighted strategies.



© AfriCOG

in other countries, autocratic “saviours” could emerge and find public support. A further democratic reversal is possible.

The report, particularly in the concluding chapter, grapples with the broader question of the corruption–democracy nexus. It posits that, inasmuch as corruption subverts democracy, deepening democracy is the only sure cure for corruption. This invites civil society to reflect on the broader question of deepening democracy and also to develop its capacity to recognise and seize opportunities if and when they emerge, and to develop their political and forensic skills and form useful coalitions and partnerships for future actions.

What's next for your organisation?

AfriCOG is aware that a lot of work is still to be done in understanding the nature of state capture in Kenya, refining our analysis and subjecting it to greater public debate. Much still remains to be done in disseminating and popularising the contents of this report.

We are already undertaking further, partly empirical, research to drill down into specific elements of state capture. To describe the mechanics of state capture, our study examined three emblematic grand corruption cases, Goldenberg, Anglo Leasing and Eurobond. While illuminating, this also risks making state capture appear rather episodic and not highlighting enough the dense and intricate networks of relationships and interactions that it creates. We will therefore be looking more deeply at the impact of state capture on specific areas.

At the launch of the report, Kenya's courageous auditor-general, Edward Ouko, also spoke about the abuse of the budget-making process. Likening the budget process to a highway, he described how the corrupt are experts in “manipulating the exit lanes”, leading to regular losses of at least one-third of the budget, as one senior official admitted. Understanding this aspect of capture is work that needs to be continued. ■■

Of Cartels, Collusion and Captive Consumers:

On the State of Kenya's Energy Sector

Jerotich Seii

Interview

Since January 2018, the Kenya Power and Lighting Company (KPLC), the entity responsible for the country's electricity distribution, has found itself under siege by an organically mobilised and extremely angry battalion of Kenyans from all walks of life in their quest for energy justice.

The #SwitchOffKPLC campaign that started on Twitter has since spread through the wider media space and unleashed an unprecedented outcry against KPLC following several months of erroneous billing of customers. The campaign has been fuelled by KPLC's "pay-first-ask-questions-later" approach, which left many consumers with inflated bills that they were forced to pay to avoid being disconnected.

Perspectives spoke to one of the campaign's leaders to shed light on the dark side of Kenya's power sector, which is said to be one of the most developed in sub-Saharan Africa, having undergone structural reforms and liberalisation since the 1990s.

Perspectives: What is the state of capture in Kenya's energy sector?

Seii: The capture of the energy sector in Kenya is almost complete. Here I particularly refer to the electricity sector, which is in the hands of mafia-like cartels who control both the policy and procurement sides of electricity generation, transmission, regulation, distribution and sale. These actors are embedded within the ministry of energy and all its related state corporations, and private energy companies, which ensures that they are always part of the feeding frenzy that ensues when lucrative contracts are in the pipeline. This means that, whether we are talking about geothermal, hydro, solar, diesel, wind or even the dirty coal in Lamu, cartels are fully present and influencing all the elements of procurement and implementation processes.

This capture has been systematically perfected over the last forty years and resulted in a seemingly inextricable linkage between the captors (cartels) and captives (energy sector). What is important to note is that, very often, the cartel kingpins are themselves employees of the national energy sector or the wider government.

How is this situation different from other forms of corruption?

The cartel influence over policy-making means that their corrupt activities do not revolve around individual transactions where, for example, a private company would pay a kickback to one individual who can influence the issuing of a contract. It is rather more systematic and includes everyone from cabinet secretaries, principal secre-



Jerotich Seii has worked for 22 years in East, West and Southern Africa with a focus on both development programming and humanitarian response. On the social and political front, Jerotich is committed to consumer justice and the fight to end theft, mismanagement and exploitation in the public sector, in Kenya and beyond.

taries, CEOs and board members, to senior and junior officials across the industry.

The cartels utilise their knowledge of policy, financing, procurement and operational processes to either exploit loopholes or collude with state corporations and private sector power-producers to rig contracts in their favour. When faced with uncooperative private-sector actors, pressure is applied in the form of extortion and even exclusion from the business opportunity.

So, the very same individuals who pretend to be interested in cost-effective energy access for all in actual fact increase the price of electricity for consumers in Kenya by developing and implementing plans and visions that suit their own pockets.

Energy acts and related policies are supposedly in place to guide the sector but what they do is more akin to undermining public participation and transparency. Resultant plans, such as the Least Cost Power Development Plan (LCPDP), are skewed in favour of cartels and preferred independent power producers (IPPs). When you analyse no fewer than 20 IPPs listed in the LCPDP, you will find that contracts are *not* signed based on least cost, which should be one of the criteria, but rather on which firms are politically connected.

What makes the energy sector so vulnerable?

The energy sector is vulnerable because electricity is an essential service and people will pay whatever it takes to avoid being disconnected. They are the real captives.

Without electricity, most households cannot function effectively, commercial enterprises are paralysed, and public utilities grind to a halt. Think about it. How many times a day do you encounter technology that requires electricity to power it? Be it traffic lights, hospital equipment, fuel pumps, commercial equipment, building elevators, household appliances and night-time lighting, electricity is running through all of it.

Those who have captured the sector know that. Electricity is not a luxury. It is a necessity. This is what is being exploited.

In addition, the fact that the sector turns over billions of Kenyan shillings (KES) in local and foreign direct investment makes it a lucrative target. It is also a sector that has flung open its doors to investors from all over the world, some of whom come with bilateral conditions (if, for example, the Spanish government provides a loan, a Spanish firm is also expected to implement a part of or the whole project) and

others who are straight-up criminal enterprises in collusion with the national-level operators.

The energy sector is vulnerable because electricity is an essential service and people will pay whatever it takes to avoid being disconnected. They are the real captives.

What are the implications of energy capture for Kenyan electricity consumers?

For ordinary Kenyans – be they domestic or commercial consumers – electricity has increasingly become unaffordable. I, for one, spent close to KES300 000 (USD 3 000) on electricity bills during the course of one year for a three-bedroom apartment with average consumption. If I did not pay up, I would simply be disconnected.

Countless households have been financially ruined because of high and fraudulent electricity bills. Many have had to either live in darkness for months on end or dip into their savings in order to pay



for their electricity. Elderly people have been hit with bills as high as KES80 000 (USD 800) for one month and ended up living in darkness. Mothers have suffered the pain of spoiled breast milk due to frequent power cuts by Kenya Power.

© #SwitchOffKPLC

Dangerously dangling wires, exploding transformers, overloaded grids and extortionate installation prices are but the tip of the iceberg of the challenges faced by electricity consumers today. Never mind the Kenya Power meter-readers who often collude with compound managers to tamper with meter readings and extract hefty bribes from consumers who wish to avoid disconnection.

Many small- and medium-sized businesses had to shut down due to inconsistent power supply and unaffordable bills. A business owner received an electricity bill of KES570 000 (USD 5 700) for the period of one month. Kenya Power did not rectify the bill but rather arranged a payment plan with the business owner that would be paid alongside subsequent monthly bills. Unsurprisingly, this business folded.

This is how energy capture in Kenya continues to destroy the hopes and dreams of millions of Kenyans.

The aggregate sums are eye-wateringly high. If we look at the 2017–2018 illegal billing of consumers by Kenya Power, we are talking about a minimum of KES10 billion (USD 100 million). If we look at the power purchase agreements (PPAs) of *just* 20 politically connected IPPs, we are talking about KES100 billion (USD 1 billion) every year for the next 25 years.

The main challenge is that most of these figures do not compute in the minds of the average Kenyan. I struggle with the numbers of zeros as well. Therefore, what computes is the steady bleeding of household

and commercial finances into fraudulent bills in order to ensure the servicing of multi-trillion shilling commitments that ultimately enrich the cartels.

What changes are needed to “un-capture” the sector and prevent similar situations in future?

The un-capturing of the energy sector requires nothing less than a complete and forensic audit of the systems and finances of the ministry of energy and its related agencies, corporations, and, of course, the private companies such as Kenya Power. This should date back at least twenty years, and with the commitment to investigate and prosecute all those found to have been involved in corrupt practices.

At the moment, audit reports are ignored or court cases compromised when individuals or corporations seek justice. Hence impunity is entrenched and cartels are ever more emboldened to exploit and steal from Kenyans.

Constitutionally, counties should be able to manage their utilities, including electricity, and this should be allowed to flourish according to their needs.

At the moment, audit reports are ignored or court cases compromised when individuals or corporations seek justice. Hence impunity is entrenched and cartels are ever more emboldened to exploit and steal from Kenyans.

Restitution through compensation is a critical part of cleaning up the energy sector, where pre- and post-paid electricity consumers will finally receive refunds for monies stolen from them through fraudulent bills, illegal tariffs and third-party vendor services.

In terms of energy production, we need to see: 1) capacity charges cut by 50 percent; 2) energy costs cut by 10 percent; 3) more players in open-tender systems (this

is crucial in the context of, for example, oil importation, because diesel thermal IPPs are frequently used as the reason for increasing oil prices); 4) development of private modular refineries; and 5) more power distributors.

We are talking about opening up the playing field, ensuring the impeccability of regulatory bodies, and de-monopolising the generation, distribution and sale of energy so that the consumer is able to benefit from competitive prices and good service.

What measures and tactics has the #SwitchOffKPLC pursued to achieve these?

Thus far, strategic litigation has played a central role in our efforts. Although there have been some setbacks along the way, two petitions to the High Courts are in the process of examination for re-opening in the Constitutional and Human Rights Division. The one petition (Petition 6 of 2018) focuses on consumer justice with a view to end fraudulent billing, third-party vendor cartels, dangerous and shoddy service, and to obtain orders for the refund of said bills and the de-monopolisation of Kenya Power. The second petition (Petition 59 of 2018) looks at the nature of IPPs and the illegalities surrounding their contracting – and how this impacts on consumer bills and taxpayer's monies – with a view to cancelling all irregularly allocated PPAs.

Another key area of the #SwitchOffKPLC movement is public education: using social and other media to ensure that we demystify a sector that has always hidden behind its own complexities to steal from consumers. This is an exhilarating part of our work when we see – pun intended – the lights go on in the hearts and minds of the public. Cru-



#SwitchOffKPLC

@JerotichSeii

Follow



WaKenya: no more turning the other cheek while electricity bills kill us.

The President will NOT act as he is beholden to & part of the energy cartels.

We will march for Energy Justice. Stand up, be counted & join this great fight of our generation.

Mpo?

[#SwitchOffKPLC](#)

cially, this is a movement that is non-partisan, non-ethnic, but indeed very political.

Finally, with the exception of basic legal and visibility costs, we have galvanised a peaceful army of volunteer and active citizens who have begun to understand that the healing and restoration of Kenya will take place when we restore respect for honesty and integrity across all public-service sectors, even those that are meant to be profitable. Aluta continua. ■■

Discretionary Awards of Oil Blocks in Nigeria:

A State Capture Culture Passed Down from the Military Government

Mark Amaza

Nigeria's history as an independent country is very closely intertwined with the history of its oil industry. The "black gold" was discovered in a small village called Oloibiri four years before the country took the reins of its affairs and stopped being a British colony in 1960. No other economic activity has shaped the country as oil has. Even before it became the country's primary source of revenue and foreign exchange, oil played a role in the 1967–70 Nigerian Civil War, which was fought between the government of Nigeria and the oil-rich secessionist state of Biafra.

As with most developing nations that are rich in resources, postcolonial Nigeria did not have the capacity to prospect and explore its rich oil deposits by itself. It inherited oil blocks that had been concessioned to the company then known as Shell-BP, the sole concessionaire that struck oil in 1956. From a modest 5 100 barrels per day in 1958 when the field became operational, Nigeria's oil production rose to 2.4 million barrels per day in 1974, increasing government oil revenue from N200 000 to N3.7 billion in the same period. By then, many other oil companies were active in prospecting and exploring oil in Nigeria.

However, these companies had one thing in common: they were all foreign-owned. Although the federal government had established the Nigerian National Petroleum Corporation (NNPC) in 1977, its participation in the upstream oil sector was through joint ventures and production-sharing contracts. It was not until 1987 that the first indigenous oil-producing company

in Nigeria came into existence.

The military government of General Ibrahim Babangida (1985–93) considered it an aberration that there were no Nigerian companies in the country's largest and highest-earning economic sector. It felt that some form of local participation in the upstream oil industry was imperative and that Nigerian-owned companies should operate side by side with foreign companies and the supermajors, such as Shell, Chevron, Mobil and Eni.

There had been numerous Nigerian-owned companies in the downstream oil industry (sales, marketing and distribution) right from the 1960s, with numerous local players operating as importers, transporters, distributors and retailers of refined petroleum products. The Nigerian government itself had also become a player in that subsector when it bought controlling shares in the 1970s in Esso Africa (renamed Unipetrol), British Petroleum (renamed African Petroleum) and Shell (renamed National Oil and Chemicals). These were privatised in 2001.

However, the prized jewels remained the oil blocks from which the crude oil is pumped, and which have the biggest profit margins.

Indigenisation for the Connected Few

Against the backdrop of these realities, any attempt to transform the sector for the benefit of Nigerian society appears as a noble undertaking. The subsequent actions of the military government, however, point in the opposite direction.



Mark Amaza is a freelance writer and also works in the development sector in Nigeria, with a focus on strategic communications, research and policy development and analysis. He has written for and contributed to numerous outlets, including Quartz Africa, African Arguments, The Scoop and YNaija. He is also a social and political commentator and has been involved in various causes, such as helping to raise relief materials for persons internally displaced by the Boko Haram conflict and the Not Too Young to Run campaign, designed to increase youth political participation in Nigeria.



Transformation of the sector seemed easy enough to achieve, considering the fact that the 1969 Petroleum Act gave the minister of petroleum unfettered power to use whatever method desired to award oil blocks. But maybe a bit too easy, as would become apparent soon. The 1990 indigenisation policy did not choose to award oil blocks through an open bidding process, which could have ensured transparency. Instead, the government invited those Nigerian entrepreneurs it felt had the financial muscle and/or could mobilise both financial and technical resources to carry out exploration and production activities to apply for oil block licenses. Any Nigerian company that was offered a license could have it through the exchange of a “signature bonus” of at least USD 1.5 million.

This is where the problems started. The objectives of the federal government to increase local participation in the oil industry were not clearly set out in any policy document, guideline or regulation. There were no specifications for what percent-

age of licences and leases were reserved for Nigerian companies, or for the restrictions on awarding licences and leases to multinational oil companies.

It is standard practice that official government communications be gazetted, to create prima facie proof of any fact of a public nature of which the gazette is meant to notify. However, the 1990 indigenisation policy was not published in an official gazette, and its vagueness created the possibility of the policy being abused by those charged with its implementation.

The first set of discretionary awards was made in 1991 and then a second one in 1993, with many of the recipients influential Nigerians who had never been in the oil industry before, but were well-connected to the government and especially the president, General Babangida.

For example, the family of Okunade Sijuade, the late influential Ooni (King) of Ife, who is regarded as the spiritual leader of the Yoruba ethnic group, was granted an oil block, Oil Prospecting License (OPL)

302 through its company, Alfred James Petroleum. MKO Abiola, an influential businessman and a close friend of General Babangida (and future acclaimed winner of the 1993 presidential election, which was annulled by Babangida), received two oil blocks. Mike Adenuga, another close friend and one of Africa's richest men today, also received his first oil block in 1993.

It has been argued that the awardees still assumed the risk in prospecting for oil within the acreages and some did not strike "gold" until much later, or even never. OPL 226, which was awarded to Soglas Nigeria Limited, a company controlled by the family of the late Jerome Udoji, a senior civil servant, had its first oil discovery only in 2001, halfway into the 20-year lease that all awardees were given.

While the development of the guidelines was an improvement on the earlier indigenisation policy, where implementation was left to the determination of the minister of petroleum, the guidelines have yet to be approved, more than twenty years on. This effectively means that the government is not bound to follow them when approving marginal oil field operators.

Nevertheless, some oil finds showed the inadequacy of the \$1.5-million "signature bonus". Perhaps the best-known example is OPL 216, which was given to Famfa Oil Limited. This is also one of the most-cited examples of how such discretionary licensing is prone to abuse.

Famfa Oil is owned by Folorunso Alakija, a popular fashion designer who was also close to the fashion-loving wife of General Babangida. After being awarded the oil block in 1993, she sold 40 percent to Star Deepwater (a Texaco company), which sold 8 percent of its stake to Brazil's Petrobras. Today, the oil block produces 200 000 barrels of crude oil-and-gas liquids daily, making Alakija's net worth about \$1.1 billion.

Even in this most blatant instance of abuse of power, it would have been unheard of for the minister of petroleum *not* to award the oil block to Alakija, given the overwhelming power of the office of the president. Even though ministers' appointments are subject to parliamentary screen-

ing, the president can fire them at will.

Famfa Oil's sale to Star Deepwater also defeated the purpose of the indigenisation policy, which is to allow for more local participation. But in the absence of any explicit prohibition of such sale by law or policy, licensees are within their legal rights to bring in foreign technical partners. This loophole particularly assisted smaller foreign oil companies that lacked the financial muscle to compete against the majors to gain entry into the Nigerian oil-exploration industry.

Military Rule to Democracy

Under the administration of military ruler Sani Abacha (1993–98), the Petroleum (Amendment) Decree was passed in 1996 to provide the legal framework for the awarding of "marginal oil fields", which were fields that had been discovered by major international oil companies in the course of exploring their larger acreages, but had been left undeveloped for more than ten years. It did not remove the power of the minister of petroleum to award licenses and leases discretionarily.

In the same year, draft guidelines were prepared by the department for petroleum resources, which is the government agency responsible for the exploration of petroleum products. According to the guidelines, only technically qualified Nigerian citizens who own locally incorporated companies may apply; current holders of oil prospecting or mining leases, except indigenous oil companies, are excluded from expanding into marginal fields; and indigenous companies must relinquish existing oil prospecting and mining licences to be eligible.

While the development of the guidelines was an improvement on the earlier indigenisation policy, where implementation was left to the determination of the minister of petroleum, the guidelines have yet to be approved, more than twenty years on. This effectively means that the government is not bound to follow them when approving marginal oil field operators.

The practice of discretionary awards of major oil licenses also did not end with the Babangida administration. General Sani Abacha gave away as many as eight licenses, the most famous of which was given in 1998, "as a reward" to the former chief of army staff and future defence minister, General TY Danjuma. That oil block, OPL 264, later

received \$2.3 billion from CNOOC, China's offshore oil company, for a 45-percent stake, which contributed heavily to Danjuma's current worth of \$750 million.

Another prominent example is the award of OPL 245 in 1996 to Malabu Oil, a company controlled by Dan Etete, the minister of petroleum at the time, in a clear conflict of interest. The oil block is now the subject of at least four court cases across Nigeria, Italy and the United Kingdom after the license was revoked by Olusegun Obasanjo's administration in 2001 and re-awarded to Shell, which was challenged in court by Malabu Oil until 2006.

In 2011, under the administration of Goodluck Jonathan, Shell and Italian oil industry giant ENI transferred USD 1.1 billion through the Nigerian government to accounts controlled by Etete. Although the two companies initially claimed they did not know the money would end up with Etete and his cronies, evidence has shown otherwise. Shell, Eni, Etete and several others are now being prosecuted for their roles in the scandal, highlighting the role of international oil companies in the corruption.

This practice has continued into the Fourth Republic. With every administration since Nigeria transitioned into democracy in 1999, the list of oil awardees still consists of the well-connected who have taken advantage of the Petroleum Act to take control of these resources. As before, there have been awardees who struck it big and those who did not until their licenses expired.

Due to the latitude of powers given to the minister of petroleum under the Petroleum Act, particularly with regard to the awarding of oil prospecting and mining leases, the occupant of the office has always been seen as one of the most powerful cabinet members. On two occasions, the president has also doubled as the minister of petroleum (Olusegun Obasanjo, 1999–2007, and Muhammadu Buhari, since 2015). Although they appoint special advisers or ministers of state in the portfolio, they retain the overall legal power to award or cancel a lease with the stroke of a pen.

Appointments into the crucial positions that have oversight of the oil industry are hotly contested by the political elites, creating opportunities for entrenched crony capitalism and patronage. These political elites continue to use the rhetoric of indigenisation to justify the opaque processes of leasing. For example, news broke in 2017 of the

federal government's plans to award 46 oil blocks while setting aside some discretionary awards for firms owned by Niger Delta indigenes, "in order to sustain the prevalent peace in the oil-rich region and give its citizens a sense of ownership in Nigeria's oil wealth"¹. While this seems like a noble objective, given that the oil-rich Niger Delta has for decades experienced civil unrest and violence related to longstanding political and environmental issues, the opaque nature of the process makes it prone to abuse. When the awarding of the oil blocks eventually happens, cronies and fronts will benefit at the expense of the country and region.

Attempts at Legislative Reform

By 2000, there was a general admission across the political class, oil companies, civil society and the public that the structure of the petroleum industry did not allow for transparency nor did it serve to attract the best investments into the sector. In response, the Petroleum Industry Bill (PIB) attempted to create an omnibus for the sector by bringing together 19 separate pieces of legislation. The Bill, which enjoyed widespread public support, was drafted to

With every administration since Nigeria transitioned into democracy in 1999, the list of oil awardees still consists of the well-connected who have taken advantage of the Petroleum Act to take control of these resources.

cover all aspects of the industry, including a properly defined regulatory structure, a fiscal regime for the sector, and breaking up the NNPC. However, it was criticized for not removing the discretionary powers afforded to the minister with respect to the awarding of oil blocks. Despite the PIB stalling in the National Assembly and undergoing several revisions, that provision was retained. A special parliamentary committee for the Bill recommended that the discretionary power of the president to grant licences and leases be removed and replaced by an open competitive bidding process.

In order to more easily pass the PIB, the

National Assembly broke it into four bills. The first, the Petroleum Industry Governance Bill (PIGB), focused on the regulatory framework. The Bill creates the National Petroleum Regulatory Commission (NPRC), which will, among other functions, “conduct bid rounds or other processes for the award of any licence or lease required for petroleum exploration or production”. This eliminates the power of the minister of petroleum to award licenses and leases using whatever process s/he deems fit.

However, in August 2018, despite its passage by both the Senate and the House of Representatives, the president declined to assent to the Bill, raising concerns with certain aspects. Since then, it has not been re-presented to him. With new members of parliament coming into both chambers, the Bill will have to be introduced again in both houses as its slow crawl begins again. In the meantime, the minister of petroleum continues to enjoy unfettered powers to allocate whatever oil block s/he deems fit to anyone, and without checks or reparations to anyone – other than those that benefit the vested interests who strategically placed them there.

Conclusion

Nigeria is a country that is sadly synonymous with numerous forms of corruption, from kickbacks to the awarding of public contracts to front companies that inflate contracts and divert public funds. There have also been instances where public policy and laws have been made for the sole benefit of a group of people.

However, the indigenisation policy may be one of the most crucial examples of state capture in Nigeria. In many ways, it has shaped the oil exploration industry, which sits at the heart of revenue generation for the country. Major losses of revenue have occurred due to the payment of signature bonuses that were lower than they should have been, and to lower oil production due to the inability of the licensee to develop the oil block. It has incentivised successive political elites to retain the law that allows the minister of petroleum discretionary powers to award oil field licenses, leading two presidents to double as the minister for petroleum in order to exercise that power. ■■■

1 CKN Nigeria, FG sets guidelines for auctioning 46 oil wells, 18 September 2017. Available at <https://www.cknnigeria.com/2017/09/fg-sets-guidelines-for-auctioning-46.html>.

Presidential Families & Co. in Senegal: A State of Capture in the Making?

El Hadji Malick Sy Camara

Interview

Senegal is often referred to as an example of democracy in Africa. The country holds regular free and fair elections, has a vibrant civil society and a population protective of its democratic achievements. On the back of numerous anti-corruption efforts, Senegal fares comparatively well in Transparency International's Corruption Perception Index (67/180). However, according to a study by the Senegalese National Office to Fight Fraud and Corruption, 95.3 percent of the general public and 61.7 percent of professionals attest to the presence of corruption in their immediate environment. Although the country has had its fair share of grand corruption scandals, the term "state capture" has not yet found its way into the Senegalese vocabulary.

To shed light on how corruption has evolved in the country, and what needs to be done to prevent worse, *Perspectives* spoke to social anthropologist Dr El Hadji Malick Sy Camara. For additional context, the team at the Heinrich Böll Foundation's Senegal office offer their thoughts and reflections in the form of an epilogue.

Perspectives: The year 2000 is widely considered the year of *alternance*, of great political change in Senegal's history. Has everything really changed since then?

Camara: The year 2000 marked the first peaceful political transition in Senegal's history when Abdoulaye Wade defeated incumbent president Abdou Diouf in a presidential election that was generally regarded as free and fair. Arriving in office with a seal of good governance, President Wade instructed the state inspector-general to conduct audits into the dealings of the Diouf regime. These led to the imprisonment of many political figures who had long been denounced by the public. However, the hopeful new beginning did last long.

Wade's cabinet was soon inflated with additional ministers and a plethora of ministerial advisers – appointed not to move the country forward but to reward members of his biological and political families. Two years into office, Wade appointed his son, Karim Wade, as the personal advisor to the president of the republic responsible for the implementation of major projects such as the Blaise Diagne International Airport and, in 2004, as president of the National Agency for the Organisation of Islamic Cooperation – the structure in charge of organising the Summit of the Organisation of Islamic Cooperation to be held in 2008. By giving him these responsibilities, Wade wanted to groom and provide his son with visibility on the national and international stage in order to convince the public of his capabilities. Despite his increasing unpopularity with the electorate and the electoral defeat of his party in Dakar's local government elections in March 2009, Wade went on to appoint Karim as minister of state for



El Hadji Malick Sy Camara is a teacher-researcher in the sociology department of Cheikh Anta Diop University of Dakar and associate researcher with the Health and Transitions in Africa team at the Virtual University of Senegal. His main research interests are democracy, health, religion and public space.

international cooperation, regional development, air transport, and infrastructure in May 2009 – a position that earned him the nickname of “minister of heaven and earth”.

The father-president, who was never short of public praise for his son who, in his eyes, had proven his skills – “I tell your mother, you worked well” – did not forget his daughter, Sindiely, either. He appointed her to help organise the 2010 World Festival of Black Arts and Cultures (Fesman). The state had become a family affair: a patrimony in the hands of father, son and daughter.

What damage did President Wade inflict with this nepotism?

The full scale of the damage caused by son and daughter was only revealed years later when Wade’s successor, President Macky Sall, ensured that Karim was put on trial for corruption, which led to a sentence of six years of imprisonment and a fine of USD 228 million in 2015. Karim stood accused of fraudulently amassing assets worth USD 240 million. As for the management of Fesman, the state inspector-general’s report accused SindielyWade of having personally embezzled as much as USD 750 000, with millions more squandered by mismanagement. The auditors requested that Wade’s daughter be prosecuted for embezzlement. However, she has never been heard or prosecuted in court investigations.

The Wade era introduced a new category of politician: “the entrepreneur politician”. In order to consolidate his political power and guarantee his survival, he has to monopolise state resources. He develops his economic resources through his political resources and vice versa. The entrepreneur politician therefore needs political corruption and favours from the state to live. This not only includes preferential treatment of aligned private-sector entities in the awarding of state contracts but also changes in economic policy and regulation that favour a particular actor.

The Wade era introduced a new category of politician: “the entrepreneur politician”. In order to consolidate his political power and guarantee his survival, he has to monopolise state resources.

So in some ways, the state is a fiction in Africa, to the extent that everyone exploits their public position to extract rents. The state is captured by those who act on its behalf but operate it for their own benefit. These state agents, in turn, are often captured by their families and benefactors. Although Senegal is often cited as an example of democracy, it clearly is not immune to this type of realities.

The 2012 elections marked another important turning point in Senegal’s democratic transition. Has the new government put an end to entrepreneur politicians?

In 2012, Senegal experienced its second democratic transition when opposition leader Macky Sall was elected president, preventing Wade from serving for an unconstitutional third term. Though Sall sang from the same hymn sheet as Wade did before obtaining office, the change in power hardly led to anything new with regards to the political favouritism the Senegalese public were getting accustomed to. After talking of the “sober and virtuous governance” of “the country before the party”, Sall soon condoned the dodgy dealings of his political opponents by putting auditing files “under his elbow”, and using them as a Damocles sword to force opponents to join the ruling Alliance for the Republic (APR).

Those Senegalese who thought the country had at least turned the page on the omnipresent “ruling family” in the affairs of the state were soon disappointed. After making his brother-in-law, Mansour



Faye, the minister of hydraulics and sanitation in 2014, President Sall appointed his younger brother, Aliou Sall, to the Deposits and Consignments Fund, a public-sector financial institution, in September 2017. The latter nomination triggered a huge public backlash, leading Sall to publicly declare to never appoint his brother to a state function again. However, Aliou only resigned from his position in June 2019, after being named in a BBC report that alleged he was secretly paid USD 250 000 in 2014 by Timis Corporation, a gas company that sold its shares in Senegalese gas fields to BP. Aliou Sall denies the claims, calling them part of a political campaign to get rid of him.

Mansour Faye's career has continued to flourish. With the establishment of the new government in April 2019, he seized the jackpot with the ministry of community development, social and territorial equity. This is a key ministry that exercises technical supervision over the Social Security Agency; the National Health Insurance Agency; the Community Development Emergency Programme; the Emergency Programme for the Modernisation of Border Roads and Territories as well as the Programme of Modernisation of Cities.

Meanwhile, the public is increasingly growing weary again. This is how the rapper Kilifeu of the Y'en a Marre (We are fed up) movement – which helped to mobilise the youth to oust Wade in the 2012 election – expresses it: “Our position of yesterday is still the one of today. We should have closed this chapter under the Wade administration. We denounced this practice then and the wound has not yet healed.”

The interference of the first lady in state affairs is another dark spot on President Macky Sall's time as president. Although the first lady has never officially held any position in the political party of her husband, it is not uncommon to hear people say, “We call Marième Faye Sall for solving our problems”.

Demonstrators gather during a protest against President Macky Sall after a possible corruption case was discovered by a BBC investigation.

© Xaume Ollerós/ Getty Images

In 2014, during a handover ceremony, Mbagnick Ndiaye, the outgoing minister of sports, declared publicly that several ministers owe their appointment to the first lady: “Without Marième Faye Sall, Matar Ba [his successor] and I would not be ministers.” The public admission sent shivers through the president’s political camp as, for the first time, someone had dared to say aloud what many Senegalese had long whispered.

The first lady is also said to have prevented Mame Mbaye Niang, minister of youth and citizen construction, from resigning after a charge of embezzlement against him. Following a report of the general inspectorate of finance of the ministry of economy, finance and planning into the Programme for the Development of Community Agricultural Domains (PRODAC), which Mame Mbaye Niang was in charge of, he submitted his resignation but reconsidered his decision following an intervention by the first lady.

To what extent is the media able to uncover these issues and alert concerned citizens and civil society?

The media has for a long time been entangled in the activities of government and the ruling party, whoever it happens to be. This absence of a clear distinction between the public sector and private media has led many Senegalese to qualify, rightly so, Radio Television Senegal (RTS) and the daily newspaper *Le Soleil* as “state media”.

The press is, in many ways, a kingmaker, but it is also used as a bargaining tool with the ruling party. There is a logic of predation behind the ways in which registered media owners ally themselves with those currently in power. Major media players have been appointed to government positions: this includes Youssou N’Dour, president of the Futurs-Médias group, who first served as minister of culture and now as a ministerial advisor, and El Hadji Ndiaye, president of 2STV, a private television channel, who has been appointed as president of the Council of Administration of the Société de Télédiffusion du Sénégal (TDS- SA).

Unsurprisingly, during the presidential campaign of February 2019, the press organs whose presidents were appointed provided biased information. They ran a lot of infomercials in favour of the candidate Macky Sall. Moreover, their alliance with the party in power allows this partisan press to evade their tax obligations with the complicity of the president.

What other “red flags” do you see on the political scene?

It is in this logic of reciprocity that we must understand and analyse the presidency of Macky Sall, his party mates and political allies.

To create greater transparency, a section of civil society has already proposed to launch public calls for applications for director positions in state-owned entities like the national lottery or the post office. Going into the last election, President Sall threatened to dismiss the directors of state-owned entities and members of his party who would not win in their constituency. Such a statement is nothing more than a thinly veiled threat that he only wants people appointed to positions of responsibility who are party activists before they are citizens. So, in reality, to be appointed a director or minister is to take advantage of the largesse of state power. As a result, any activist who owes his nomination to his party membership must in turn contribute to the financing of political activities. This is why directors of state-owned entities with skeletons in their closet are brought to justice only when

their party is no longer in power.

Worryingly, under Macky Sall we are witnessing, for the first time, the appointment of a politician to head the Finance Ministry and the General Tax Authority. This sensitive position has so far always been sheltered from politicians.

It is therefore urgent to lay the foundations for a revolution of active citizenship towards an emerging Senegal where being elected comes with a heavy responsibility and is not just a political reward. A Senegal where the state is no longer captured, where one is elected or appointed to serve the people and not to serve yourself.

Epilogue

Selly: Since independence, Senegal has shown a desire to combat the misuse of state funds for private gain. It began with the ratification of most international legal instruments against corruption within the framework of the West African Economic and Monetary Union, the Economic Community of West African States, the African Union and the United Nations, and carried on with the incorporation of anti-corruption provisions into Law 61-33 (1961) on the general status of public servants. Structures dedicated, inter alia, to the fight against corruption were set up, too, demonstrating the commitment of public authorities to fight corruption. This is exemplified, in particular, in the former National Commission to Combat Non-transparency, Corruption and Misappropriation, the existence of commissioned audits that have helped to bring senior officials to book, and the development of a National Good Governance Programme.

Claudia: Yes, anti-corruption efforts have multiplied – but are they really effective? To me, it seems quite obvious that Senegalese politics is riddled by corruption: petty as well as grand corruption. The question is, however, whether we can speak of “state capture”. If we start by asking whether there are (more or less) clandestine networks of public and private actors who accumulate unchecked powers – the answer would be “yes”. As Camara explains, these networks are more often than not related to family ties.

But when we ask whether the networks at play effectively subvert the constitutional state and social contract, the answer becomes much trickier. In a way, we can argue that all forms of grand corruption, if practised over a long period of time, are undermining the social contract. The accumulation of unchecked power runs counter to the constitutional principles of Senegal, to say the least. But are we not still far from observing the capturing of entire institutions, including tailor-made legal frameworks for particular business interests? Do you see a danger of this type of state capture in Senegal?

Yes, anti-corruption efforts have multiplied – but are they really effective? To me, it seems quite obvious that Senegalese politics is riddled by corruption: petty as well as grand corruption.

Selly: It is not easy to change laws in Senegal. If you look at the pace of reforms, you see that the Senegalese constitutional and legal framework is quite stable. But that does not mean that governments do not find other ways to capture institutions. It is probably much subtler. Also, when we look at the South African example, changes in law were

not required for private interests to command policy and public procurement. I am afraid we are not immune to this in Senegal, either.

GnaGna: Take, for example, the creation of new agencies that are linked to state politics, such as youth employment. We see a mushrooming of secondary agencies, although we already have other bodies that should be responsible for the work they do. If I look at it from a very cynical perspective, they seem to be a means not of creating jobs for young people but positions and means of economic gains for networks of political “friends”. So there are other ways than changing the constitutional or legal framework to cater to the economic interests of specific groups.

Claudia: So do you think we actually might not win much by simply adopting a term that is *en vogue* because of the South African experience? Rather, we need to analyse the Senegalese DNA of corruption and manipulation of the institutional structure in their own right?

Selly: I think we are not yet there to really talk about state capture. That is true. But I increasingly see the need for this type of discussion. We, as Senegalese intellectuals and civil society, should not take too

much comfort from the fact that we are better off than other African countries when it comes to democracy, checks and balances, or civil society mobilisation. We should be aware of the risks of state capture and learn from countries like South Africa. Civil society needs to engage much more with the private sector, for example, and put pressure on the government when it comes to dubious linkages between public

and private interests. These linkages might one day go well beyond simple corruption. Whatever we want to call it, then, we need to be aware of its risks.

Claudia: One of the most talked-about risks of state capture in Senegal is the involvement of international – mostly, but not exclusively, French – corporations with the Senegalese state. With regard to former governments, personal ties between Senegalese politicians and European business people, based on shared biographies – for example, in the French education system – might have been pertinent. But Sall continues to underline the fact that he has never lived in Europe, and is a “true product of Senegal”. Does that change anything?

GnaGna: Honestly, I don’t think so. Look at the Timis Corporation scandal. The deal that Timis Corporation could explore the Senegalese offshore oil-and-gas reserves was signed under Wade. Heavy criticism around this dubious deal, and the recommendation to withdraw the licenses from Timis by a commission that Macky Sall himself has established when he came to power, has not made Sall cancel the deal. Timis could keep the licences and sell them for a fortune to British Petroleum. Thus, as it now becomes increasingly clear, Sall might have had – but that is to be judged by the experts – a strong interest in keeping the deal intact, although he might not have had any prior ties, to neither Timis nor BP.

Claudia: What I find striking in Senegal is the parallel existence of a very strong democratic culture, regular free and fair elections, a demo-

Civil society needs to engage much more with the private sector, for example, and put pressure on the government when it comes to dubious linkages between public and private interests.

cratic consciousness within the population, a vibrant civil society on the one hand, and the dynamics of corruption and embezzlement that Camara describes on the other.

Selly: Yes, there is a very strong democratic culture and vibrant civil society that is very well aware of the negative impact of nepotistic politics and the risk of a degeneration of “the state as a family affair” into a proper capture. However, Senegal is still in the process of consolidating democracy. We already had quite strong checks and balances under the presidencies of Léopold Senghor [1960–80] and Abdou Diouf [1981–2000], although there was corruption back then already. But when Wade came to power in 2000, he introduced a form of nepotism and obvious corruption that was unprecedented in its dimension, and revolting. He gradually manipulated institutions in a way that we really feared the end of democracy was near.

GnaGna: But the Senegalese population is, in a way, very aware and politically literate when it comes to anything that would seriously endanger our democratic achievements. There is a strong sense of democracy and vigilance within the population. And there is a limit to everything when you ask the Senegalese people. Enough is enough. When Wade tried his bid for a third term in 2012, which was considered a violation of our constitution, people took to the streets in masses. The fact that the current president, Macky Sall, won the elections of 2012 is first and foremost due to the fact that people were fed up with the Wade system of governance. That vigilance of the population with regard to the misuse of political power for private gain is still intact. When the BBC revealed corruption allegations against Aliou Sall, the outrage was enormous and Sall finally resigned from his post.

Claudia: However, it was a foreign broadcaster, the BBC, who revealed the case. Not the Senegalese media. Why is that?

Selly: That is true. The Senegalese media has become quite soft in recent years. It seems that, in every important media outlet, there is somebody who is either too close to the presidency personally or has too many privileges to really criticise.

GnaGna: That is a symptom of a larger problem. You see, the current government is very special. Sall was heavily supported by civil society and independent media during his campaign against Wade in 2012. Many of the current civil-society leaders and independent media bosses have been his allies back then. That does not necessarily mean that they are

not able or willing to criticise today. If you look at movements like Y'en a Marre, who have been the driving forces behind the mobilisation for Sall in 2012, they are

But still, the fact that Sall is somehow the embodiment of civil society's success against a full-fledged nepotism-in-the-making took the wind out of the sails of civil society.

openly disappointed with Sall's current politics. But still, the fact that Sall is somehow the embodiment of civil society's success against a full-fledged nepotism-in-the-making took the wind out of the sails of civil society. Sall knows very well how to deal with and manipulate civil-society actors for his own interests. Even though it is true that civil society in Senegal is much more outspoken and free to act than

in many other African countries, they could still play a much stronger role of watchdogs than they do today.

Selly: Another problem is that outrage more often than not is directed against a certain individual. Wade overstretched the people's tolerance, so he had to go. Aliou Sall also became the face of an alleged corruption scandal that was considered so outrageous that he had to resign. But there are people and networks behind these individuals. When we content ourselves with exchanging or even "sacrificing" individuals, we will never combat the core of the problem.

Claudia: From what I hear from you, I think what we might actually win from using the "state capture" concept is to understand grand corruption as a political project rather than an individual or collective act of greed. To me, it comes as no surprise that certain practices and even specific dubious deals, such as the allotment of oil-and-gas exploration licenses, are being taken over from one government to the next – even though the governments and presidents themselves are opposed to each other.

If we have a better political analysis of the context in which grand corruption occurs, we might not only be able to understand why anti-corruption measures and activism have so far not yielded the results we would hope for but also to allow Senegalese civil society to make better use of the outrage surrounding corruption scandals, like the one we are witnessing today, in their fight for true democracy. It would also shed a different light on discussions around presidential terms and their circumvention.

When we look at the concerted action of civil society and social movements against a third term for ex-President Wade in 2012, those two factors really came together in a very obvious way: grand corruption and a total disrespect of fundamental democratic values of the Senegalese people. Back in 2012, it really was not about Wade only. It was about an entire system of governance that only served a handful of people to the detriment of the general population. To uphold this spirit today, we might in fact need an analysis that can reveal how extracting rents from the state and the consolidation and concentration of unchecked – thus undemocratic – political powers are going hand in hand. ■■■

Claudia Simons is the acting director of the Heinrich Böll Foundation's Senegal office in Dakar. Dr Selly Bâ is the coordinator of the Democracy Programme. GnaGna Koné is responsible for the office's public relations.





This publication can be ordered from our Africa offices:

Cape Town Office

Wale Street Chambers
33 Church Street
Cape Town, South Africa

T: +27 – 21 – 4616266
E: info@za.boell.org
I: www.za.boell.org

Nairobi Office

Prof. Wangari Maathai Road
PO Box 10799-00100 GPO
Nairobi, Kenya

T: +254 – 20 – 3750329
E: info@ke.boell.org
I: www.ke.boell.org

Abuja Office

93 Obafemi Awolowo Way
Jabi District
Abuja, Nigeria

T: +234– 80– 99905176
E: info@ng.boell.org
I: www.ng.boell.org

Dakar Office

Rue de Louga
x Impasse PE 10 - au fond
BP: 49 87, Point E
Dakar, Senegal

T: +221 33 825 66 06
E: info@sn.boell.org
I: www.sn.boell.org

Publication information

Publisher	Heinrich-Böll-Stiftung e.V.
Publication Date	August 2019
Editors	Jochen Luckscheiter, Keren Ben-Zeev and Thoko Madonko.
Copy Editor	Helen Douglas
Cover Image	Persuasion, 2011. © Brett Murray. Courtesy of the artist.
Layout/Typesetting	Catherine Coetzer
Printed by	Hansa Print, Cape Town
	Opinions expressed in the articles are those of their authors and not Heinrich-Böll-Stiftung.
	All articles in this publication are subject to Creative Commons License CC BY-NC-ND 3.0



About the Cover Artist

Brett Murray was born in Pretoria and studied at the University of Cape Town, where he was awarded his Master of Fine Arts degree with distinction in 1988. The title of his dissertation was *A Group of Satirical Sculptures Examining Social and Political Paradoxes in the South African Context*. His focus has not shifted.

His show *Hail To The Thief*, which takes a broad swipe at the new South African dispensation, in which tenderpreneurs and conspicuous spending have replaced the more ascetic values of the struggle, was first held at the Goodman Gallery in Cape Town in 2010, and then at the Goodman Gallery in Johannesburg in 2012. *The Spear*, a controversial painting on this show, resulted in the African National Congress and President Jacob Zuma taking him and the Goodman Gallery to court.

He lives in Cape Town with Sanell Aggenbach and their two children.

