

Public Affairs Research Institute

**State Capture and its Aftermath: Building
responsiveness through state reform**

Conference: 22-24 October 2018

Report

Key points emerging from the conference	7
DAY 1: Monday 22 October	10
9.00-10.45: WELCOME AND OPENING REMARKS	10
Professor Linda Chisholm: Chair, PARI Board	10
Dr Mbongiseni Buthelezi: Executive Director, PARI	10
Justice Zak Yacoob (Former Judge of the Constitutional Court): Keynote Address	10
Discussion.....	11
11.00-12.45: PANEL 1: LEGACY OF APARTHEID ON CONTEMPORARY STATE STRUCTURES AND POLITICS	11
Chair: Nomboniso Gasa	11
Hennie van Vuuren and Michael Marchant (Open Secrets): <i>‘A Long Shadow’: South Africa’s Deep State and the Arms Trade</i>	11
Verne Harris (Nelson Mandela Foundation): <i>Reckoning with Legacies</i>	12
Noor Nieftagodien (History Workshop, University of Witwatersrand): <i>Historical Legacies of State Capture</i>	12
Discussion.....	12
11.00-12.45: PANEL 2: POLITICAL PARTIES, POLITICAL REPRESENTATION AND THE STATE	13
Chair: Anthony Butler.....	13
Juan Pablo Luna (Pontificia Universidad Catolica, Chile): <i>Neither populism nor anarchy. The meltdown of political representation in Latin America</i>	13
Caroline James (Global Development Studies, Queens University, Canada): <i>Political accountability in a constitutional democracy. How Jacob Zuma’s resignation demonstrates the fundamental political nature of our executive accountability system.</i>	13
Discussion:.....	14
13.45-15.30: PANEL 3: TRADITIONAL LEADERSHIP IN POST-COLONIAL AFRICA	15
Chair: Mbongiseni Buthelezi.....	15
Robert Thornton (Anthropology Department, University of the Witwatersrand): <i>South African Canonical Social Forms: The farm, the mine and the chiefdom in the devolved post-colonial state</i>	15
Bright Nkrumah (Political Studies Department, University of the Witwatersrand): <i>Troubled Royalty: (Ir)relevance of traditional rulers in post-colonial Africa</i>	15
Professor Anne Mager (Historical Studies, University of Cape Town): <i>Chiefly politics and state capture: the past in the present</i>	16
Discussion.....	16

13.45-15.30: PANEL 4: STATE LEGITIMACY, THE SOCIAL CONTRACT, TAX POLICIES AND REDISTRIBUTION	17
Chair: Khaya Sithole	17
Erwan Malary (Alternative Information and Development Centre): <i>The South African Tax Secrecy Culture: The Need for a Paradigm Change</i>	17
Federica Duca (PARI): <i>Tax and state-society fiscal relations: A comparative perspective</i>	17
Lucas Gonzalez (National University of San Martin, Argentina): <i>The Unequal Distribution of Inequality: Provincial States, Local Elites and Income Distribution in the Argentinian Provinces 2003-2011</i>	18
Discussion.....	18
 15.45-17.30: PANEL 5: POLITICS, PUBLIC ADMINISTRATION AND CITIZEN MOBILISATION	 19
Chair: Mbongiseni Buthelezi.....	19
Karl Von Holdt (Society Work and Development Institute, University of the Witwatersrand): <i>Globalisation, elite-formation and the politics of corruption</i>	19
Phindile Ntliziywana (Department of Public Law, University of Cape Town): <i>The Rise of New Public Management and Bureaucratic Reform</i>	19
Patrick Heller (Brown University, USA): <i>Democratic Deepening in the Age of Neo-liberalism: Comparing Brazil, India and South Africa</i>	19
Discussion.....	20
 15.45-17.30: PANEL 6: STATE CAPTURE, REGULATION AND THE PRIVATE SECTOR	 20
Chair: Stuart Theobald	20
Khaya Sithole: <i>Auditors, agencies, politics ... The trinity of solicitudes</i>	20
Susan Comrie (amaBhungane Centre for Investigative Journalism): <i>Sorry, not sorry: Why we can't fix state capture until we change "business as usual"</i>	21
Lawson Naidoo (Council for the Advancement of the South African Constitution): <i>Law as a set of tools to pursue or evade justice?</i>	21
Discussion.....	22
 DAY 2: Tuesday 23 October	 23
9.00-11.00: PANEL 7: STATE CAPTURE IN COMPARATIVE PERSPECTIVE	23
Chair: Lumkile Mondi	23
Joe Abah (DAI, Nigeria): <i>'The Selfie State: State Capture in Nigeria</i>	23
John Githongo (Inuka Kenya Ni Sisi, Kenya): <i>Beyond the Failed "War Against Corruption"</i>	24
Discussion:.....	26
 11.15-13.00: PANEL 8: STATE CAPTURE, STATE OWNED COMPANIES AND ANTI-CORRUPTION	 27
Chair: Alan Hirsch.....	27

Catrina Godinho, Lauren Hermanus, Anton Eberhard (Graduate School of Business, UCT): <i>Reconceptualising state capture for anti-corruption action: how South Africa recast the cast out capture at state owned companies</i>	27
Jaap de Visser (Dullah Omar Institute, University of the Western Cape): <i>The appointment and dismissal of Board members to state-owned enterprises</i>	27
Amy Thornton (Development Policy Research Unit, University of Cape Town): <i>State Capture and the Economics of Corruption</i>	28
Discussion.....	28
 11.15-13.00: PANEL 9: MEDIA, STATE ACCOUNTABILITY AND SOCIAL MOVEMENTS	29
Chair: Anton Harber	29
Thandi Smith (Media Monitoring Africa): <i>How has South African media contributed to public understanding of corruption, state capture and the political narrative over the last 3 years?</i>	29
Ferial Haffajee (Associate Editor, Daily Maverick): <i>The media and state capture</i>	29
Rafael Marques de Morais (Maka Angola): <i>Ending Impunity: Jail the corrupt</i>	29
Discussion.....	30
 14.00-15.45: PANEL 10: LOCAL GOVERNMENT, POLITICS, PUBLIC ADMINISTRATION AND LOCAL CITIZENS	31
Chair:.....	31
Thina Nzo (History Workshop: University of the Witwatersrand): <i>Organogram Politics: Building Capacity in a Neopatrimonial Local Government in South Africa?</i> ...	31
Joel Pearson (PARI): <i>Local Government Instability: The Need for a Broader View</i>	31
Andries Nel (CoGTA)	32
Discussion.....	32
 14.00-15.45: PANEL 11: POLITICAL CONTESTATION, PUBLIC ADMINISTRATION AND THE LOCAL STATE	33
Gareth Newham (Institute for Security Studies): <i>The link between State Capture and rising violent crime. What criminal justice reforms are needed?</i>	33
Nicole Fritz (Freedom Under Law): <i>The State of the Criminal Justice System</i>	34
David Bruce: <i>Always captured? The Special Investigations Unit and South Africa's anti-corruption architecture</i>	34
Discussion.....	34
 16.00-17.45: PANEL 12: OVERSIGHT INSTITUTIONS AND STATE ACCOUNTABILITY	35
Chair: Tracy Ledger	35
Khuraisha Patel and Michael Marchant (Open Secrets): <i>In pursuit of democratic renewal: Alternative methods for securing corporate accountability</i>	35
Jonathan Klaaren (Wits Law School): <i>Mobilization against State Capture: Evidence of Counterpower in South Africa</i>	36

Lukhona Mnguni (University of KwaZulu-Natal): <i>Keeping the executive in check while crystalizing the separation of party and state</i>	36
Discussion.....	36
16.00-17.45: PANEL 13: POLITICS, CIVIC MOBILISATION AND THE LOCAL STATE	37
Chair: Sarah Meny-Gibert.....	37
Saul Roux (Centre for Environmental Rights): <i>The erosion of state (water) institutions and the role of civil-society in rebuilding state capacity: A case study of the Department of Water and Sanitation</i>	37
Nontando Ngamlana (Afesis Corplan): <i>A Critical Assessment of the Infrastructure for Public Participation in Local Government</i>	37
Crispian Olver: <i>Battle for Nelson Mandela Bay</i>	37
Discussion.....	38
DAY 3: 24 October.....	38
9.00-10.45: ROUNDTABLE 1: SECURITY STRUCTURES AND STATE CAPTURE	38
Chair: Mluleki Marongo (Right2Know Campaign).....	38
Karabo Rajuili (amaBhungane Centre for Investigative Journalism).....	38
Dale McKinley (Right2Know Campaign).....	38
Discussion.....	40
9.00-10.45: ROUNDTABLE 2: WHISTLEBLOWING AND BROKEN SYSTEMS	40
Chair: Gabriella Razzano (Open Democracy Advice Centre)	40
Fazela Mahomed (ex-Registrar of Members' Interests, Parliamentary Committee on Ethics).....	40
Jessica Bezuidenhout (Daily Maverick)	40
11.00-12.45: ROUNDTABLE 3: THE ROLE OF CIVIL SOCIETY IN CONTESTING POLITICAL MANIPULATION OF THE CRIMINAL JUSTICE SYSTEM.....	41
Chair: Lucky Menoe (Corruption Watch).....	41
David Bruce: Independent researcher	41
Lawson Naidoo: Council for the Advancement of the South African Constitution	41
Gareth Newham: Institute for Security Studies	41
Discussion.....	42
11.00-12.45: ROUNDTABLE 4: GRANTS PAYING THE PRICE FOR STATE CAPTURE ...	43
Chair: Ghalib Galant: Right2Know Campaign.....	43
Lynette Mart: National Director: Black Sash	43
Advocate Gina Snyman.....	43
Programme	45

Abbreviations

AG	Auditor-General
AU	African Union
CEO	Chief Executive Officer
CFO	Chief Financial Officer
COGTA	Cooperative Governance and Traditional Affairs
CSO	Civil society organisation
DPCI	Directorate for Priority Crime Investigation
EPWP	Expanded Public Works Programme
GEAR	Growth, Employment and Redistribution
HR	Human Resources
IMF	International Monetary Fund
IPID	Independent Police Investigative Directorate
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
NPM	New Public Management
PFMA	Public Finance Management Act
PIC	Public Investment Corporation
PPP	Public private partnership
PSC	Public Service Commission
RICA	Regulation of Interception of Communications and Provision of Communication-Related Information
SA	South Africa
SABC	South African Broadcasting Corporation
SAPS	South African Police Service
SIU	Special Investigating Unit
SOE	State-owned enterprise
TRC	Truth and Reconciliation Commission
UDF	United Democratic Front
UK	United Kingdom
US	United States

Background

This document reports on the conference which formed part of the programme by the Public Affairs Research Institute on state capture.¹ The programme's four main objectives are:

1. To build momentum and support for state reform
2. To host a conference to develop proposals on key areas of intervention and comparative 'best-practice' from the global South
3. Flowing from the conference, to establish technical commissions to influence political party agendas by deepening thematic proposals, developing specific recommendations on state reform and identifying key drivers to take such recommendations forward.
4. Relying on the state reform proposals developed through the technical commissions, to engage political parties to adopt and/or support such proposals for state transformation and their implementation. The aim is to work with political parties to incorporate such proposals into their manifestos and election platforms.

¹ The programme and its four objectives are summarised at https://s3.amazonaws.com/v3-app_crowdc/assets/d/d8/d88ae80961483800/State_capture_and_its_Aftermath.original.1537352754.pdf?1537352757

Key points emerging from the conference

The influence of the past²

- The secrecy and authoritarianism of the apartheid era continued into the period after 1994, with many apartheid laws still in force and others of a similar nature introduced.

The role of the Constitution

- It gives inordinate power to the President and the executive and should not be seen as sacrosanct
- However, Ministers, officials and MPs must understand it and carry out their responsibilities in its light.

Ethics and morality

- The private sector (banks and others) must be expected to conduct itself with probity and refrain from offering inducements to politicians and public servants.
- A new culture and firm values, rather than new institutions, are needed at all levels to guard against state capture. Specifically, political will is required.
- Current doubts about the legitimacy and credibility of auditing and other oversight institutions need to be allayed through visible reform.
- Citizens should guard against becoming inured to, and therefore ignore, continuous corruption.

The need to increase compliance

- At all levels, from voters to public servants, there must be ‘training, training, training’ (Judge Yacoob).
- There is a need for an effective, fair tax regime accepted by citizens.
- Performance management is critical but needs to be insulated against political meddling.
- A cohesive top police management, much undermined in the Zuma era, is required.
- Legal instruments to guard against state capture must be properly drafted as well as implemented.

The local, national and international

- Analysis should be both local and macro if state capture is to be understood.
- There must be detailed examination of local politics if state capacity, and its undermining, are to be understood.
- Implementing bureaucratic virtues at local level may conflict with the ‘imagined institutions’ of local citizens and politicians; critics must be realistic about this while promoting adequate compliance with norms and standards.
- Conservative authoritarian networks in various parts of the world should be studied to throw light on parallels in SA.

- Some traditional authorities have been important players in state capture, fronting for corruption; this needs further examination and action.

Legitimacy

- Publish the reports of all commissions of enquiry.
- Politicians should not be absolved by abstractions and recognition of systemic issues; they must be held personally to account for their greed and lack of accountability.
- The language of 'good governance' is widely spoken; this must not be accepted at face value and we must always strive to get behind the rhetoric.

The structure of state capture

- State capture by the Guptas and associates was remarkably crude; this should not blind us to more sophisticated long-term projects of this kind.
- In understanding state capture, we need to recognise (as was the case under Zuma) the use of formal and informal power. The following tend to apply:
 - a faction controls the party
 - decisions are centralised in the party office
 - the competent are targeted
 - the bureaucracy is politicised
 - technical advice is ignored
 - the supply chain process is controlled
 - rents are seized.

Thus:

- competent oversight bodies are needed, including of the police
- the supply chain process must be well regulated
- civil society must be protected
- there should be appropriate and transparent allocation of state monies.
- Ministers' appointment of heads of institutions is a crucial weak link in governmental structures.
- Middle-level rather than the most senior bureaucrats can be crucial facilitators of corrupt networks.
- Parliament has been a 'key enabler of state capture'. This must be addressed.

Fighting back

- Periods of crisis can create windows of opportunity of perhaps 18-24 months, to fight effectively against corruption: civil society should seize such opportunities.
- Prosecution for corruption can be effective but is a blunt instrument: travel bans, barring from office and the like can be highly effective.
- There is a need for an overarching legal framework to deal with the transparent appointment and dismissal of SOE boards.
- Whistle-blowers are crucial and must be protected from weaponisation of anti-corruption activities and processes.
- There is a need for decisive use of current legislation and policy instruments in the criminal justice system in reforming SAPS, the NPA etc although it should be

recognised that there are limits to the courts' ability to address issues such as the SASSA crisis.

- Civil society organisations have limited ability to influence reform processes but can influence public discourse and thus provide the basis for concrete action.
- Transparency in party funding is required.
- Civil society must 'go deep' and demonstrate the interconnectedness of security issues with citizens' lives.
- While this is not universally agreed, there is an argument for a dedicated state anti-corruption agency. Others believe that current institutions could and should carry out this function.
- Parties are currently not accountable to citizens; electoral reform is required.

DAY 1: Monday 22 October

9.00-10.45: WELCOME AND OPENING REMARKS

Professor Linda Chisholm: Chair, PARI Board

Among the issues that the conference would discuss, Professor Chisholm said, were:

- whether South Africa (SA) is in the after-capture period.
- the types of continued investigation and analysis needed, by all disciplines; PARI has an excellent research track record in this respect.

Thanking the University of Johannesburg for its facilities for the conference, she welcomed the national and international participants who had come together to reflect, learn and look at ways forward. Professor Chisholm also thanked the conference's funders¹ and the civil society organisations taking part in the roundtables on Day 3.

Dr Mbongiseni Buthelezi: Executive Director, PARI

After warmly recognising the role that Professor Ivor Chipkin, previous Executive Director of PARI, had played in laying the groundwork for the conference, Dr Buthelezi noted that despite many serious issues South Africa (SA) is in a much better situation than when the conference was mooted. He then summarised PARI's research into and engagement with the issue of state capture. The *Betrayal of the Promise* report in April 2016, much of which was borne out by the Guptaleaks revelations, formed an important part of this academic involvement, in spite of the 'tremendous fear' that the authors had for their personal safety. The events documented can be traced back to the Polokwane ANC conference 'Coalition of the Wounded' with its expressions of resentment against the old white elite and a self-evident need to create a new economy involving black industrialists. This programme was quickly hijacked by a small self-interested elite.

Dr Buthelezi hoped that the conference would deepen understanding of state capture and would help to make clear what reforms are needed and what systems and processes are needed in order to 'remain vigilant'.

Justice Zak Yacoob (Former Judge of the Constitutional Court): Keynote Address

Understanding why state capture happened and to avoid its recurrence, Justice Yacoob said, needs complete frankness. The causes lie not simply in the Zuma presidency but to the supply of arms to SA under apartheid, which led to the arms deal; and to the way in which the state and Cabinet conduct their activities. There are few in power who can say they had nothing to do with it. A prerequisite for progress is that all international sanctions-busting crimes, and the arms deal, be properly investigated followed by prosecutions.

SA Presidents have the power to make appointments but only in terms of Section 85 of the Constitution, in consultation with Cabinet. If it was the case that former President Zuma acted unilaterally, his Cabinet members were either criminally liable for, or connived in and are therefore all responsible. It is vitally important that Ministers understand their responsibilities in terms of the Constitution. Senior public officials also need to be capable and honest; and the separation of powers must work effectively; and MPs must vote in terms of the Constitution, which they swear to uphold.

The private sector, in numerous instances guilty of offering inducements to politicians and public servants many of whom were previously poor, must also conduct itself differently. It also needs far more education about the content and values of the Constitution.

The poverty of the majority of SA's people means that they are politically manipulable. Voter education is therefore essential as part of the means of preventing the rise to power of politicians with criminal records or other disqualifying characteristics.

Solving the present situation will require more than a few years. Government will not become open and responsive immediately.

Discussion

- **Justice Yacoob:** prosecutions fail to take place because prosecutors are not properly trained and have a limited understanding of their role in terms of the Constitution; salaries are large and disincentivise challenging the system; and there is a lack of 'prosecutorial fervour'. 'Training, training, training' is required.

Extending constituency voting could arguably assist but more fundamental is the need for more education, enabling informed choices in an atmosphere of political 'vigour'.

Political parties are 'Constitutional instruments'; all should commit themselves to the values of the Constitution.

The Bill requiring disclosure of party funding offers hope of a more transparent system.

It needs to be asked why the morally compromised and corrupt capture the public imagination and rise to power. Accepting that the end justifies the means should have no place in an open and democratic society.

National government has an obligation to ensure that effective mechanisms to capacitate local government are in place.

11.00-12.45: PANEL 1: LEGACY OF APARTHEID ON CONTEMPORARY STATE STRUCTURES AND POLITICS

Chair: Nomboniso Gasa

Hennie van Vuuren and Michael Marchant (Open Secrets): *'A Long Shadow': South Africa's Deep State and the Arms Trade*

Part of the background to state capture in SA lies in the corrupt relationships between homelands and Gencor and other entities. In the current era, the Zondo Commission has written to the banks asking why, over a number of years, they took no action about apparent money laundering. They have been able to act with impunity. The role of private sector actors in SA and globally therefore needs to be fully understood; and actions need to be taken by competent prosecuting authorities.

The first part of bringing to light the criminality of state capture has been done. More understanding is needed about the nature of apartheid state corruption (arms companies, banks, foreign intelligence agencies, their SA counterparts and how they undermined the rule of law) and what can be done about the present networks.

The concept of 'deep state', parallel structures operating behind formal power, has been weaponised by neo-conservatives such as Donald Trump to refer pejoratively to bureaucrats and others said to be obstructing their political projects. However, the expression, referring to corporate and intelligence entities, does have meaning.

Verne Harris (Nelson Mandela Foundation): *Reckoning with Legacies*

Transformation as originally conceptualised has been reduced to affirmative action and high-level beneficiation, with corruption tolerated. The Mbeki presidency, with procurement equity rooted in 'crude nativism'; centralised power and paranoia about who had access to it; and flight of skills from the public sector with related use of consultants, laid the foundation for that of Zuma. The seeds of this capture were sown in the apartheid era.

Noor Nieftagodien (History Workshop, University of Witwatersrand): *Historical Legacies of State Capture*

Leaders' moral failings are important but there are problems with recalibrating the moral compass and there should be no utopianisation of any past period. Ronnie Kasrils has argued that the transition to democracy in SA should be re-interrogated. However, this can lead to identifying what seem to be obvious 'sell-outs'. It is important to look more closely at society more generally including, for example, how township entrepreneurs, in collaboration with their local authorities, were involved in corruption under apartheid. Analysis needs to be both macro and local.

A starting point for a new framework for analysing the nexus between capital and the state could be the 1970s debates on fractions of capital and the ideas of Harold Wolpe, Martin Legassick and others.

Discussion

- Examples of continuities between apartheid and democratic SA included Stella Sigcau, who in 1999 received arms-deal related payments from German and other corporations involved in sanctions-busting in the 1980s; and Fana Hlongwane, whose name has emerged repeatedly.

The conservatism of Zuma and his supporters should be noted; conservative authoritarian networks are emerging in Africa and world-wide.

About the extent to which the public sector opposes state capture: there are good public servants, older as well as younger, who want to do their jobs well although some have been pushed out; there are also the whistle-blowers. Such people are varied.

- The recent and current investigative processes have been proved to be powerful ways of pushing back against corrupt networks some of which made the transition from apartheid to post-apartheid SA and many of which are global. There is no single grand conspiracy, and those who do conspire do not always win.
- Service-delivery and related protests are manifestations of people's frustration with local corruption; state capture takes place at multiple levels.

About the concept of 'deep state': problems emanate from the real nexus of power rather than from a 'deep', compared with 'real', state.

- At the time of the Truth and Reconciliation Commission (TRC), deals were made that ensured certain prosecutions would not take place.

The challenge facing government now is similar to that faced by the Mandela administration, which did not transform the country. There is a need for 'an activist sensibility' amongst public servants, government and wider society.

- There is a need to discuss the relationship between conservatism and nationalism; and between money, pseudo-ideological ideas and male chauvinism and so on.

11.00-12.45: PANEL 2: POLITICAL PARTIES, POLITICAL REPRESENTATION AND THE STATE

Chair: Anthony Butler

Juan Pablo Luna (Pontificia Universidad Catolica, Chile): *Neither populism nor anarchy. The meltdown of political representation in Latin America*³

Oligarchy, and a move to populist politics, both entail state capture, Professor Luna said. Recent South American history shows a common denominator: a collapse in political representation leading to instability; the potential demise of participatory democracy; and the inability of people to indicate their political preferences. This can lead to and be echoed in territorial fragmentation and parallel socioeconomic universes. Despite considerable stretches of democratic politics and the effects of redistribution and social incorporation, much of Latin America is characterised by:

- High degrees of inequality
- Civil oligarchies exercising legal and institutional claims to land and other property
- Organised crime, often operating in 'grey zones'
- Ghettoisation, with fear of crime
- Segmented public:private provision of public goods, with related restrictions on legitimate aspirations to upward mobility

Results of this situation include:

- Fragmentation of political involvement and the emergence of 'single issue' public opinion
- Social and territorial segmentation of the experience of democratic citizenship, reinforced by decentralisation
- After elections, increasingly rapid decline in the perceived legitimacy of political leaders, such as Presidents and including populists, and their ability to affect change.

There is a need to look at how oligarchies and populism function in changing contexts.

Caroline James (Global Development Studies, Queens University, Canada): *Political accountability in a constitutional democracy. How Jacob Zuma's resignation demonstrates the fundamental political nature of our executive accountability system*⁴.

The presentation focused on weaknesses in inter-institutional checks and on the need for accountability structures outside the traditional ones; and distinguished between formal and political accountability mechanisms.

³ See Professor Luna's presentation attached to this report.

⁴ See Ms James' presentation attached to this report.

The political nature of executive accountability is intrinsic to a tripartite system. For formal accountability to work better, pressure needs to be placed on political parties, with the media playing an important role. However, in SA as elsewhere it is dangerous to rely on political will to achieve proper conduct. Recognising this could open the way to creating mechanisms that would increase accountability.

Discussion:

- Despite the short time horizons within which political leaders operate and the phenomenon of non-programmatic protests, are there signs of more consolidated push-back?
- Previously, political parties provided a way of representing democracy but are now challenged by many forces. It is easy to be trapped in the idea that classical political parties must be created/recreated; in Peru and Bolivia, for instance, there have been coalitions with some legitimacy. There is no clear answer as to what is to be done.
- In rapidly changing societies where issues of inequality are increasingly prominent, are political parties overly-concentrating on one part of population, with others expelled from the benefits? .
- What would be the effect in SA of direct elections for President; and of a constituency-based system with individuals campaigning for election?
- Voting for President every four or five year provides time to deal with issues arising from loss of legitimacy. The Latin American experience is that constituency-based systems have strengths in principle but do not necessarily prevent capture, which can happen at local level.
- Given that in Colombia, for example, there are mayors who are not from political parties, are political parties in the traditional sense no longer needed?
- A decentred system will be characterised by both good and bad politics; the worst off will suffer the worst consequences. Parties as they have traditionally existed cannot continue in the long term; anything that collects votes is a party, he noted.
- Perceptions of fair access to justice and of legitimacy generally may depend on what people expect and want.
- Given that studies show that states are unable to defend themselves against capture, who or what capture them? What is the role of global finance and networks, and the ability of individual jurisdictions to deal with capture-related crime?
- Different types of state capture have to be defined, conceptually and theoretically. At what level is it taking place? What are the roles of business and legal enterprises in relation to money laundering, and of illegal organisations that fund political parties?
- If state capture is defined as using entities for purposes other than those for which they were intended, this highlights the power of the structures or individuals making key appointments to such entities.
- How would an independent body effectively monitor state-owned entities such as Eskom? What criteria would be used? What learning programmes and new skills would be needed? There is already oversight through the Auditor-General (AG). In the absence of a culture of accountability, what would additional institutionalised

mechanisms contribute? A different kind of culture, rather than new institutions, is needed at all three levels of government to guard against state capture.

- There is no easy solution for bringing about change. Institutions are played by the powerful in society. Activists, with capacity to negotiate and to find common ground, have played an important role in Latin America; however, as they age and pass away, their impact fades. The new generation lacks their collective experience and are more individualised; they choose polarisation because this is where the short-term gains are.
- AGs do not currently have the expertise to identify and successfully address state capture. Before taking office, they should undergo relevant training.
- Thought should be given to the potential of other oversight institutions to strengthen current ones; and/or to giving more powers to existing institutions. The new AG Bill, in terms of which the AG will no longer be accountable only to Parliament, may be a step in this direction.
- The lack of a culture of accountability is not unique to SA, but there is a considerable need for education to improve the situation in this country.

13.45-15.30: PANEL 3: TRADITIONAL LEADERSHIP IN POST-COLONIAL AFRICA

Chair: Mbongiseni Buthelezi

Robert Thornton (Anthropology Department, University of the Witwatersrand): *South African Canonical Social Forms: The farm, the mine and the chieftom in the devolved post-colonial state*

A focus on state-centred issues has neglected themes relating to farms, mines and chieftaincy; they are not administrative categories and have therefore been relatively invisible in the social science literature.

Cyril Ramaphosa's background is in the mines, which are not only mining enterprises; many activities take place around them. Jacob Zuma's ultimate retreat is into chieftaincy. When Julius Malema talks about the land (with farms often being centres of other enterprises such as sand-extraction), it is not a euphemism. Resources drawn from the state get distributed in these venues

Bright Nkrumah (Political Studies Department, University of the Witwatersrand): *Troubled Royalty: (Ir)relevance of traditional rulers in post-colonial Africa*

Until approximately the 1870s, chiefly figures derived their power from social acceptance based on their healing powers and other forces ascribed to them. Under the European conquest, they were co-opted into the service of the colonial state.

From the 1990s, there has been a resurgence of chiefly power, with some mobilising and receiving state support. Some raise their own funds and are demonstrably accountable; some are not, believing themselves to embody legitimacy. This can lead to resentment, demonstrations and even violence.

Reasons why they are still maintained include the electoral strategy through which traditional authorities and politicians collaborate to mobilise votes.

Professor Anne Mager (Historical Studies, University of Cape Town): *Chiefly politics and state capture: the past in the present*

In parallel with the introduction of British law in SA, an intellectual educated elite also emerged, not all of whom abandoned the chiefs who were not a coherent centre of resistance. There was rivalry between them and different narratives of authenticity.

Under apartheid, powerful individuals such as Kaizer Matanzima captured the local state through access to and use of resources, encouraging rivalries and manipulating officials.

The post-apartheid state requires modernist innovations from chiefs, and has somewhat raised their status, in return for their cooperation. However, the Constitution is potentially highly threatening to chiefly power.

This interdependence needs to be resolved. The areas in which it plays out vary widely, some having good land or minerals and others being overstocked and impoverished. Rather than being, as is often assumed, substantially inhabited by retired migrants, increasingly their populations are young and unemployed. This is a crisis that the state is neglecting. Distributing more land will not, on its own, solve the problems. Agricultural support is needed, and the land needs rehabilitation. People currently live on farms not on what they produce from the land but on social grants.

There are areas where people do not wish to live under chiefs but most do, despite dissatisfaction with them. Belief in legitimacy through genealogy cannot be wished away.

Discussion

- Reform of chieftaincy in line with the Constitution is needed, with chiefs cooperating with local authorities and other arms of the state. The conversation should be about use of land. There is no single formula for successful and sustainable rural life.

Liberation politics in rural areas was often mixed with ethnic issues. Rural politics can be complex, with successful developmental interventions tending to relate to specifics such as waterpoints.

Individuals used ethnic narratives, such as those created by volkekunde anthropologists, to capture resources.

- Chiefs often front for others. If the system is not to be scrapped, they should be fostered as productive partners.

Initiatives to tax chiefs would probably not be met with much resistance (there was a largely passive response to the arrest of the amaTembu chief).

- Land should not be confused with agriculture. The survival of most of those on the land is marginal. Farms may also function as centres for crime. The Guptas were keen to get control over mines and farms precisely because they are opaque.

The state, and in particular the Transvaal, emerged from the farm, later incorporating the mines and chieftaincies, with tribal authorities enriched by mine royalties: a crude form of state capture.

In SA, compared for example with Buganda or Ghana, chiefly power is precarious; there are few requirements to be accountable (lacking bureaucracies to produce financial records and accounts) and they rule in such a way as to extract rent. They need to come under the remit of a more effective SARS, as do the mines and farms.

- It is not possible to discuss state capture without tackling chieftaincy and asking critical questions about identity.

13.45-15.30: PANEL 4: STATE LEGITIMACY, THE SOCIAL CONTRACT, TAX POLICIES AND REDISTRIBUTION

Chair: Khaya Sithole

Erwan Malary (Alternative Information and Development Centre): *The South African Tax Secrecy Culture: The Need for a Paradigm Change*⁵

Secrecy is entrenched in the SA tax system, with tax information defined as confidential. The privacy principle is based on the assumption that information will be used correctly and non-corruptly. However, given that there is collusion between the political elite and oversight bodies, who is overseeing the tax authorities? This should be the role of civil society organisations (CSOs); at present it is largely undertaken by whistleblowers.

Worldwide, 40 per cent of corporate taxes are moved to secrecy jurisdictions.

Building accountability requires:

- public disclosure of tax information, as is the case in some Scandinavian countries
- creating a register of beneficial owner information
- forcing multinationals to comply with a transparency paradigm.

Not all of the responsibility and/or powers to bring this about should be left to the tax authorities.

Federica Duca (PARI): *Tax and state-society fiscal relations: A comparative perspective*

Examining tax and tax reforms in countries including Cameroon, Mozambique and SA, the research on which the presentation was based did not look specifically at state capture. In most of the countries examined (but not SA), tax revenue is derived primarily from VAT rather than income taxes. While some reforms have been successful, ongoing issues include illegal flows of money; corruption; citizens' perceptions of tax; and abuse of power.

Despite differences in the histories and present socio-economic conditions of the countries examined, the following were common to tax morale, one of the main factors relating to tax payment:

- Whether taxation is seen as exploitation and a form of betrayal or a fair exchange for services provided (perceptions by the formal and informal sectors are likely to differ)
- Degree of trust of tax institutions
- Methods by which tax is collected
- Perceptions of corruption
- Concepts of citizenship and of the extent to which the 'public good' is created by state institutions.

⁵ See Mr Malary's presentation attached to this report.

More than institutional design, an effective tax regime needs to address questions of fairness and building an environment where tax paying is synonymous with belonging.

Lucas Gonzalez (National University of San Martin, Argentina): *The Unequal Distribution of Inequality: Provincial States, Local Elites and Income Distribution in the Argentinian Provinces 2003-2011*⁶

Dr Gonzalez started his presentation by stating that the more captured a state is, the greater is inequality. Conversely, provided that it is significantly free of state capture, even an undiversified economy can show relatively good Gini figures. Since the beginning of the 21st century, there has been some improvement in the extent of personal inequality in Latin America; however, there are substantial inequalities between provinces and areas (such as between the oil areas and Amazonas). Researching the limits to national-led inequality reduction policies, Dr Gonzalez concluded that the possibilities for state capture are greatest at sub-national level and that it manifests itself through the political power of provincial political elites and how long they have been in power; the administrative power of provincial bureaucracies; the fiscal capacity of the provincial state; and the extent of the state's physical power.

One simple measure of state capture is the extent to which business people in leading sectors hold Cabinet positions.

Discussion

- Is a shock of some sort required to produce a shift towards a new culture?
- How far are public perceptions directly affected by revelations of state capture?
- Defining state capture is more easily done at the sub-national level where patterns and linkages can be seen. For example, businesses in plantation economies work to have representation in government to prevent labour laws from being implemented. At national level, relevant detail can be lost.
- What influence do social contracts have?
- To what extent is there a tendency to pay taxes because something is received for them, or from fear of the consequences of not paying, rather than because of transparency? Does willingness to cross-subsidise correlate with perceptions of the legitimacy of the state? Transparency can demonstrate that the elite shares in tax paying, but this is not the only way to build a social contract.
- Business having some influence in politics is not the same as reshaping state institutions to carve out rents.
- Overcoming resistance by the elite to policy reform requires political will and strong unions to exert pressure.
- Opportunities for change may result from multinationals talking to each other and in cooperation with governments; and from global tax justice networks.
- Society is divided between economic elites and others, and they will press for opposing objectives in relation to the state. The more diversified the shares of

⁶ See Dr Gonzalez' presentation attached to this report.

various sectors (along lines of social identity, class, politics, unionisation, organised society), the more diversified the economy.

15.45-17.30: PANEL 5: POLITICS, PUBLIC ADMINISTRATION AND CITIZEN MOBILISATION

Chair: Mbongiseni Buthelezi

Karl Von Holdt (Society Work and Development Institute, University of the Witwatersrand): *Globalisation, elite-formation and the politics of corruption*

In the process of elite formation, people move up the social scale, and there is fragmentation and an increasing number of groups of the poor. This takes place, in multiple sites, through sets of practices, including those through which individuals in positions of political and other authority have control over others.

Cyril Ramaphosa's presidency is adopting an anti-corruption position but may not have the political mandate to fight corruption; some of the corrupt have to be included in his coalition. It is not clear how stable this can remain.

Phindile Ntliziywana (Department of Public Law, University of Cape Town): *The Rise of New Public Management and Bureaucratic Reform*⁷

The receptiveness of countries such as UK, US, Australia, New Zealand and Canada to New Public Management (NPM) was due to their common law tradition derived from the UK and in reaction to previously rigid public administration. NPM reached SA towards the end of apartheid. Two conferences in the early 1990s warned the new government against adopting policies that might drive out the skilled. The new minister of finance was particularly receptive to the ideas of NPM. Reinforced by policy papers influenced by NPM, the neoliberal RDP incorporated notions of nationalisation but also omitted ideas from the Freedom Charter. Managerialism required acting promptly and contractualism meant that job tenure could be as short as five or three years. This served a transformation agenda, with its move away from a tenured system.

Service delivery was corporatised and assigned to public-private partnerships, the concept being that departments would formulate policy and implementation would be through state entities. However, the system was poorly implemented and often operated through personal relationships. With some exceptions, most state entities did not function well and were characterised by dysfunctional relationships between boards and executives. This was fertile ground for state capture. Furthermore, the private sector bore little of the risk of such enterprises. If the state is to build capacity, it will have to address issues relating to the sometimes-precarious tenure of senior managers.

Patrick Heller (Brown University, USA): *Democratic Deepening in the Age of Neo-liberalism: Comparing Brazil, India and South Africa*⁸

In understanding state capture, which is not unique to SA, it is important to disaggregate those elements of the state that operate successfully (such as, in SA, targeted redistribution)

⁷ See Ms Ntliziywana's presentation attached to this report.

⁸ See Professor Heller's presentation attached to this report.

from those which do not. Democratic deepening requires robust institutions at all levels, reinforced by civil society. India lacks local democracy and has instead a form of bureaucratic authoritarianism with decisions (about slum clearance, for example) taken by engineers and other technocrats who are accountable upwards but not downwards. In such a situation, political parties are able to extract rents from urban land deals to support rural voters. There is no vigour at party branch level.

The ANC took over SA's pre-existing urban authoritarian tradition with civics dismantled and, especially under President Mbeki, a type of ANC Leninism dominated. Brazil's 1989 constitution improved the capacity of local municipalities; civil society was not demobilised; and in the more organised cities there were new participatory bodies. With the support of the medical professions, the state created universal health care. It was a period of rupture with state authoritarianism.

Discussion

- SA is moving towards merging the two models of public administration, with the state playing a leading role although it could be argued that they work against each other. There still seems to be a role for PPPs. Performance management is critical but it needs to be insulated from political meddling.
- In Brazil, citizens' discourse changed to an emphasis on rights rather than petitions. The state needs synergistic relations with civil society. This worked in Brazil; was demobilised in SA; and was not attempted in India.

Elites are no longer captive to regulatory environments and can engage in 'a kind of international arbitrage'. Reversing this will be extremely difficult.
- Elite formation is inevitable and necessary and it is untenable that the new black elite cannot possess capital and challenge the white elite. In South Korea, a new elite was developed and resources made available; however, failure to comply with expectations was harshly punished. In SA, the machinery to inhibit state looting does not yet exist. The new SA emerged at a time of globalisation, with previous developmental tools no longer available.

15.45-17.30: PANEL 6: STATE CAPTURE, REGULATION AND THE PRIVATE SECTOR

Chair: Stuart Theobald

Khaya Sithole: *Auditors, agencies, politics ... The trinity of solitudes*⁹

One of the elements enabling state capture has been legitimisation by audit companies. Tracing their origins from the latter part of the 19th century, Mr Sithole described the evolution of these companies and of the three main ratings agencies which resulted from the need for external bodies to carry out due diligence on the global auditing system. These agencies effectively own the markets in which they operate, earning their legitimacy through their views being borne out by events. They are possibly the single most concentrated sector in the capital system.

⁹ See Mr Sithole's presentation attached to this report.

Flaws in the system, including conflicts of interest, cross-selling, a tendency for the agencies to provide required findings and payments to the agencies can be exploited by those wishing to undertake state capture. There is also weak societal understanding of what the agencies base their opinions on.

Reform can take place as result of a crisis; the Lehman Brothers scandal, for example, showed the weaknesses of the system.

Issues of legitimacy and credibility, however, remain. Auditing company KPMG, for example, participated in the collapse of VBS bank; through fear of exclusion from further auditing work, and proximity and influence of the politically-connected, they failed to disclose what they knew. Similarly affected were the auditors and consulting companies involved with Eskom.

The path to reform will require finding answers to conflicts of interest; lack of sufficient competition between auditing companies; and lack of transparency.

Susan Comrie (amaBhungane Centre for Investigative Journalism): *Sorry, not sorry: Why we can't fix state capture until we change "business as usual"*¹⁰

Accused in 2017 of paying kickbacks to obtain government contracts with connections to the Guptas, multinational software company SAP denied this; subsequent investigation showed that executives knew that the accusations were true and that they had been warned by the company's lawyers of potential consequences.

Such deals have, by definition, to be approved at a level beyond an individual country such as SA. In the case of the deal with Eskom, approval would have to have been given by 13 people who would thus have been aware of the amount of commission paid. Rather than raising red flags, such arrangements tend to be considered "global practice".

Deals carried out by management consulting company McKinsey were similarly tainted by connections with the Guptas and their associates and with attempts to put the nuclear energy plan in place. How, Ms Comrie asked, for three years did McKinsey not know about the amounts being paid into politically connected accounts in SA? One of the deals was the largest that McKinsey had ever undertaken; lack of due diligence represented an enormous potential risk for the company.

Are such companies smart, as they claim, or naïve, apologising only when caught out?

Lawson Naidoo (Council for the Advancement of the South African Constitution): *Law as a set of tools to pursue or evade justice?*

Lawyers play important roles in society, including facilitating the objective hearing of cases. There is no agreed definition of what a 'fit and proper' person to become a lawyer is, with the profession setting minimum standards to retain membership. SA's adversarial system provides some checks and balances, tending towards just outcomes.

Clients' interests are supposed to be lawyers' priorities, even ahead of the legal system. Where in such a context does the national interest fit in? Among the objectives of the Legal Practice Act are accountability and transparent fee structures.

¹⁰ See Ms Comrie's presentation attached to this report.

Problems arise when lawyers play the role of consultants, narrowly interpreting their mandates in the interests of the client.

Lawyers in the public sector are governed by the Constitution. However, it can be asked whether, for example, the National Prosecuting Authority has invariably acted without fear or favour.

Generally in SA, the bar governing ethical behaviour is low.

Discussion

- The accounting profession, corporates, the law are all grappling for institutional fixes. Is it sufficient to expect that this will be achieved through people of good character? Recent examples show that those who act ethically within their organisations risk losing their jobs.
- More effective policing could unravel cases more quickly than is presently the situation.
- The question has to be asked as to why it took so long for banks to realise that money laundering was going on.
- For the past five years, Eskom has not been a going concern although the auditors did not indicate this. As soon as the political forces changed, the auditors changed their behaviour. Is there no risk to the company in such switching of opinions? There is certainly damage to society.
- What are the international as well as national oversight mechanisms in relation to companies such as SAP?
- Which of the professions (legal, audit, other) unlocked state capture?
- The KPMG/VBS saga shows not only that auditors do not make clear what they do or what they examine but that the public does not have the means to evaluate the quality of an audit.
- The auditing problem is cumulative. Issues picked up subsequently require restating previous years' reports and can result in penalties and/or loss of contracts to competitors. Audit companies thus have a disincentive to reveal errors or omissions.
- The culture within organisations is not conducive to reporting infractions; for example, a junior lawyer who pointed out that the cost of the Gupta wedding should not be categorised as business expenses was over-riden.
- SAP is just one example of companies that pay commissions, which are not taken out of profits but are added to the cost to government. Systemic problems and not rogue elements leading to this kind of behaviour include the need to circumvent compliance, and pressure to achieve targets. Can such problems be addressed by changing the system, or through people of good character working for consulting firms?
- There has been a readiness in SA to pay enormous commissions. Where corrupt payments used to amount to perhaps R200 000, they are now in the tens of millions. How can the high-water mark of corruption be lowered?
- How can public perceptions of the nobility of the professions be preserved for the next generation?

- A first step to resolving these issues should be to publish the reports of all the commissions of enquiry.
- Ways must be found to enforce more transparency in what government pays for goods and services such as stationery and software. “Crazy amounts” are currently being paid.

DAY 2: Tuesday 23 October

9.00-11.00: PANEL 7: STATE CAPTURE IN COMPARATIVE PERSPECTIVE

Chair: Lumkile Mondli

Joe Abah (DAI, Nigeria): *‘The Selfie State: State Capture in Nigeria’*¹¹

Twenty years after the end of the military regime in Nigeria, citizens still feel it to influence politics and as a result do not feel able to affect change. Given the absence of an ideological base, revolution is not likely; and people continue to join the political system for selfish reasons. The fact that resources accessed and competed for through politics are often from individuals’ home states feeds ethnic and tribal differences. An ‘accidental activist’ head of state could theoretically affect change; however, the Constitution does not allow for referenda and it can only be changed by legislators, who have no incentive to do so. The only option is to educate citizens to insist on changing the Constitution as the key election issue.

Between 2013 and 2017, Mr Abah was Head of the Bureau for Public Sector Reform in Nigeria, a government think-tank intended to help shape reform. This proved difficult to achieve on a large scale. During his time at the bureau, he moved the primary focus from public servants to citizens’ experiences of the public sector: for example, obtaining a driver’s licence or a passport, or paying taxes online. Changes that the bureau achieved suggest that some reforms, at least, are possible.

After providing various definitions of state capture, Mr Abah gave numerous examples of how access to state power in Nigeria has been used for enrichment of political leaders and those closely connected to them. The ‘selfie state’, he said, refers to a situation “in which the State has managed, through its laws and institutions, to engineer its own capture”.

In Nigeria, allocating control over land to state Governors gives them enormous power. Another vast source of influence, in the ability to assign control of oil revenues, lies with the President who is almost invariably also Minister of Oil. Exploration rights are frequently handed to associates of the President (in one case to the wife of his tailor; she is now the wealthiest woman in Africa) for on-selling to Chinese prospectors. State capture in such a situation comes about entirely at the hands of politicians. Countries such as SA which have good Constitutions which can become weakened over time must tighten controls when needed.

In such contexts, supra-state organisations such as the Nigerian National Petroleum Corporation can become so powerful that they refuse to pay the billions of dollars owed to the Treasury or to respond to freedom of information requests.

¹¹ See Mr Abah’s presentation attached to this report.

Legislators theoretically provide checks and balances through their powers to make laws. However, Nigerian politicians' generous level of remuneration means that they lack the incentive to exercise oversight.

Can this happen in SA, Mr Abah asked? Who will stop the legislature acting in this way? The Constitution states that the courts cannot interfere with the legislature when carrying out its duties; and funding it is the first call on Treasury whatever the economic conditions.

States' typical response to a problem is to create an agency, without doing away with existing ones. In 2011, Nigeria had 541 of them; in 2018, there were 1100. These are "jobs for the boys" and enable legislators to say that they have brought institutions to their areas even if others already exist and/or cannot be funded. This is an instance of the continuous expansion of the size of the state, where the machinery has been captured by the legislature and the Executive has no incentive to do anything about it.

Escaping from state capture, Mr Abah said, requires:

- Raising public awareness
- Demanding constitutional reform to block known loopholes
- The (unlikely) possibility of revolution
- The "happy accident" of an activist leader coming to power
- Unrelenting pressure by citizens
- Overcoming "the fatalism of Institutional Theory and breaking Path Dependence".

South-East Asia shows that it is possible to take a different path.

John Githongo (Inuka Kenya Ni Sisi, Kenya): *Beyond the Failed "War Against Corruption"*

Daniel Arap Moi's, one of the most corrupt regimes in eastern Africa, ran Kenya down for 24 years. State capture, therefore, that seems something of a surprise to SA, is not new to Mr Githongo.

Appointed to address the issue of ethics in government by Mwai Kibaki, Moi's successor, Mr Githongo has direct experience of grand corruption: the corrupt networks that undermine the state and fail to serve the majority of the population. What similarities are there with SA, he asked, and what lessons can be shared about what works in dealing with corrupt networks and procurement practices? These include the argument that the mundane (procurement of boots, truncheons and boilers for prisons) are matters of security for which Cabinet can give approval without competitive tendering. The architecture of the transactions is thus intrinsic to the problem. Other abuses include making payments, into private off-shore accounts, before goods or services are delivered with, in some cases, no serious expectation that they ever would be.

Financing companies in such instances are shell companies, created to channel resources to the accounts of senior public officials or, for instance, to pay their school or medical costs. In his role as Permanent Secretary for Governance and Ethics, it was made clear to Mr Githongo by government colleagues that these companies "are us: we are supplying to ourselves". The networks, particularly in the security sector but also, for example, in health, public works and construction had been in place since the 1970s and had become integrated with security services across the world including, for instance, SA's involvement in Malawi and Ivory Coast. State capture is thus a long-term project, he said. The Gupta

episode was not very competent in his view. However, politicians are disposable and networks are resilient and include:

- politicians (whose departure changes little)
- private sector actors:
 - brokers who, for example, make introductions to Ministers and know who to give a Rolex to or to pay for a holiday. Frequently from racial minorities, they therefore tend to be politically weak but have commercial skills and power, and are often pushed to the fore as the faces of corrupt transactions. With their social skills, they capture the public imagination.
 - the globalised and corporatised
 - those who design the architecture around grand corruption transactions: bankers, lawyers and others.
- the security sector: the military may be involved, and politicians and other role-players may change, but the security sector is essential and is resilient.
- key bureaucrats within institutions such as the Ministry of Finance and the Central Bank. They are never the top officials but usually work at middle levels, have been in position for a number of years and do not draw attention to themselves. Lifestyle audits in Kenya, for instance, have shown the extent of their wealth.
- those involved in human trafficking and the trade in drugs, ivory and other illicit commodities.

Global points about which Mr Githongo has learned over his years of involvement with the matter of ethical behaviour by governments are:

- Laws and institutions to prosecute corruption are largely ineffective.
- Laws are only good if they work for, and are known about by, the majority of the population.
- As shown by China and India, for example, corruption does not necessarily prevent economic growth [Mr Abah wholly disagreed with this view and with any degree of tolerance of corruption.]
- In a globalised age, the role of the service sector such as banks is highly important.
- The legal fraternity is essential to the architecture of state capture. Given the gigantic global law companies, the complexity and depth of this factor should not be underestimated.
- Anti-corruption strategies and processes can be weaponised, with the process of presenting evidence to Commissions, for example, turned against whistleblowers and issues “kicked into the long grass”.
- Some episodes, such as recent evidence of state capture in SA, attract attention through the conspicuous consumption of the players. However, to those involved the rewards from other instances, such as the arms deal, may be even greater.
- The “unique moment” of the leadership of President Mandela which created a foundation for SA’s Constitution shows that a “series of values” can emerge from particular leaders who communicate this with the majority of the population. These virtues resonate more than any academic initiative. Former President Zuma and Julius Malema both understand that “being felt” is more important than “being heard”.

SA’s strengths include a multi-racial cadre of people who believe in freedoms; the judiciary; the media; and civil society. However, “the dragon” will never be slain. The fight to defend and recreate institutions is continuous.

Discussion:

- How can civil society respond to the weaponisation of anti-corruption movements?
- Where do the multi-lateral development banks fit into the globalisation of networks?
- The impact of development banks and donors is greatest in countries which are the most dependent on them. If countries cannot, or are too weak to, articulate what they want it is disingenuous to blame the banks or donors who, however, under-focus on systemic state capture and on the instruments used to carry it out.
- Important initial thinking by multi-national institutions such as Transparency International about issues such as the need for good legal institutions and the involvement of civil society and the private sector was picked up by the World Bank and the IMF. After the fall of the Berlin Wall, there was a push for such models across Africa. However, some of these reforms, including conditionalities from the late 1990s onwards that countries must have anti-corruption agencies in order to obtain loans, accelerated corruption; and poor countries' debts have reaccumulated. Much of this is commercial, owed to banks in Europe or China. The multi-lateral institutions, and the large banks and law firms, have an important role to play in the debate about how to deal with this, including the fact that some borrowing is not declared.
- Michaela Wrong's *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower*,¹² about Mr Githongo's work shows, he said, that corrupt networks' practices, and how they undermine the law and development and manipulate constitutional reforms, are well known. Given the extent of co-option, will a situation be reached when citizens can no longer fight?
- Given the risks to journalists, what are the entry points for fighting against and closing down illicit international financial flows facilitated by banks and lawyers?
- The globalised nature of, particularly, parts of the services sector (vital to state capture) presents a daunting challenge. The media will remain central; and in every country and region there are moments of public disquiet and anger (such as Occupy Wall Street), especially among young people, when significant change can take place. Global economic corrections, occurring approximately every ten years, provide opportunities for reform especially by those who are prepared for it. Despite their use of laundering destinations and tax havens such as Lichtenstein, Switzerland and Mauritius, elites cannot continue stealing without consequences. Any kind of political change (such as recently in Zimbabwe) is typically followed by a transitional period of 18 to 24 months when civil society and media (for example, through a focus on particular pieces of legislation) can make it difficult for corruption to continue as before.
- The bluntest instrument against state capture is prosecution; lawyers are well paid and those opposing them become exhausted. More effective are, for instance, travel bans and not being able to stand for office if in breach of ethics codes.
- If it is not made clear how past corruption and economic crimes, and their related networks, are to be dealt with, they will continue.

¹² <https://www.harpercollins.com/9780061886935/its-our-turn-to-eat/>

- The biggest assurance of reform is the people not elites; small steps can raise questions in the public mind, with reform agencies playing a catalytic rather than transformational role.
- Although “you can’t digitise integrity” (Mr Abah), it is possible to constrain corruption by better and proper processes: linking Human Resources with Payroll systems can help to identify corruption, for example. Continuous tightening of the system provides information about where loopholes are being abused.

11.15-13.00: PANEL 8: STATE CAPTURE, STATE OWNED COMPANIES AND ANTI-CORRUPTION

Chair: Alan Hirsch

Catrina Godinho, Lauren Hermanus, Anton Eberhard (Graduate School of Business, UCT): *Reconceptualising state capture for anti-corruption action: how South Africa recast the cast out capture at state owned companies*¹³

Among the difficulties in defining state capture are identifying the line between administrative corruption and state capture; the nature and history of the state in which it takes place; and motives. It can have an ideological base and is fundamentally about the unaccountable accumulation of ‘unchecked power’.

State capture is a politico-economic project. Notable has been the expansion of the power of the Presidency and the diminution of its accountability. Policy introduced in SA 2011 to transform coal suppliers quickly translated into preferential treatment for Zuma-Gupta associates and was followed by a relationship with Russia in which, it became clear, many people had brazenly taken bribes and benefitted in other ways. A network of people administratively and politically linked to the Guptas was involved in flows of money out of the country, and clandestine, unchecked and unaccountable networks formed around state institutions. Due process collapsed; governance was appalling; SOE spokespersons regularly lied to Parliament; debt expanded; procurement was corrupted; audits were qualified; and the constitutional state and the prevailing social contract were subverted.

Jaap de Visser (Dullah Omar Institute, University of the Western Cape): *The appointment and dismissal of Board members to state-owned enterprises*¹⁴

In SA, the constitutional architecture for handling public money has British origins and eleven main features. State capture targeted key elements in this ‘financial constitution’.

Corporatisation affects the type of control that Parliament can exercise over SOEs, operating at arm’s length so that they can work along business lines. Their Boards are intended to be watchdogs answerable to the state and citizens. However, their legal framework is problematic and chaotic, as is the matter of how their members are appointed and how the executive is appointed and dismissed; and there is no attention to transparency. The PFMA nevertheless applies to them, and generally the Companies Act. Codes and principles, such as King IV, are in the main not legally binding. If there is conflict between the terms of the

¹³ See the presentation attached to this report.

¹⁴ See Professor Visser’s presentation attached to this report.

PFMA and the Companies Act, the former has precedence. However, the PFMA lies within the powers of the Minister, who is generally the sole 'shareholder'

There is a need for an overarching legal framework that deals with the appointment and dismissal of SOE Boards; transparency; and criteria for their selection.

Amy Thornton (Development Policy Research Unit, University of Cape Town): *State Capture and the Economics of Corruption*

A predominantly economic approach to state capture, compiling and using empirical data, can add dimensions missing from primarily political analyses.

Governance indicators place SA in the middle of world rankings; however, all are in decline. This is not due to petty bribery but to the hijacking of the state apparatus for the benefit of a small elite. The existence of networks, such as those involving the Guptas, differentiates state capture from other kinds of corruption, with research into such networks drawing on 'hard' and 'soft' information.

SOEs are crucial to these networks. Amongst others, Transnet has recently been under scrutiny. Like Eskom, it has huge capital expenditure, revenue and investment needs and these have made it the target of networks of corrupt individuals. Between 2012 and 2017, Transnet was involved with various 'tainted deals', prominent being the very large contracts for locomotives with Chinese companies. Through these deals, R 43.5 billion was paid out, a large proportion of this being kickbacks. It is possible to trace many of the paths followed by the money to a number of destinations including Hong Kong, where it was allocated to various shell companies. It was then immediately split up and allocated to smaller companies, making it very difficult to identify what happened to the money thereafter.

This analysis of corrupt networks continues. It is clear that the scale of corruption is vast and that the consequences for South Africa are enormously damaging.

Discussion

- Corruption is not only state capture; it also relates to regulatory capture. Having a good Constitution, as SA has, is not sufficient.
- Even in the case of countries which in many respects differ, such as SA and Tanzania, state capture can show many similarities.
- The courts have saved the country from an even worse disaster, but it is not their job to run SA.
- The ANC caucus in Parliament was silenced by 'agents'. Lack of transparency about party funding is part of the problem; and there is a danger of 'comfortable chaos'. Nothing guides the President in appointing the head of the NPA, although there is pressure from civil society and he has appointed a team to consider the nominations process; however, there is no basis for this in law and on another occasion the process could be abandoned.
- The ex-communist states and SA both had state control over the economy; however, the outcomes were different as the nature of state control was different.

11.15-13.00: PANEL 9: MEDIA, STATE ACCOUNTABILITY AND SOCIAL MOVEMENTS

Chair: Anton Harber

Thandi Smith (Media Monitoring Africa): *How has South African media contributed to public understanding of corruption, state capture and the political narrative over the last 3 years?*¹⁵

Ms Smith's presentation dealt with how Media Monitoring Africa has tracked and analysed information about state capture. A key finding was that stories explicitly about state capture made up only four per cent of the total analysed. The research also examined the voices heard in relation to state capture and found, for example, in the calendar year 2017 the largest single 'voice' was that of the ANC, followed by the Presidency. Female voices were highly under-represented.

In the aftermath of state capture, Ms Smith said, the sustainability of the media is essential if the current and recent levels of excellence in its work are to be maintained.

Ferial Haffajee (Associate Editor, Daily Maverick): *The media and state capture*

One of the most dramatic points in Ms Haffajee's presentation was her recalling that, although the Guptaleaks were first made public through the *Sunday Times*, the *Daily Maverick* and *amaBhungane* were slightly slower to begin their coverage as the two whistleblowers, who had made the information available to journalists, had to be got out of the country. It was a measure of their courage and of the risks they took. Whistle blowers working with the media as part of civil society have changed SA's recent history.

Given the influence of the Guptas and their associates over large sections of the media, without these revelations, and the work of journalists such as Carol Paton, the country could now be in a very different political space and the Zondo and Nugent commissions would not be carrying out their work. *Browse Mole*, the SARS Rogue Unit stories and others had been drip-fed into newsrooms, with some success.

Ms Haffajee stressed that the media must itself be accountable and present a balanced picture: for example, in writing about corruption at Transnet half of the counted words should show Siyabonga Gama's side of the story. .

News rooms are much smaller than previously and this increases their vulnerability. It is important for the media to have partnerships in civil society.

Rafael Marques de Morais (Maka Angola): *Ending Impunity: Jail the corrupt*¹⁶

The presentation by Mr Marques de Morais, head of anti-corruption watch-dog organisation Maka Angola, was a near-unbelievable account of how a small coterie in Angola were able, over decades, to take control of state power and wealth. This involved manipulating the national bank; diversion of hundreds of millions of dollars from the national oil company; international financial dealings that brought down a bank in Portugal; overbilling in state contracts; and writing off billions of dollars owed by people at the top of the ruling elite.

¹⁵ See Ms Smith's presentation attached to this document.

¹⁶ See Mr Marques de Morais' presentation attached to this document.

In power from 1979 to 2017, President dos Santos ceased to distinguish the interests of the country and those of himself and his children. In the last two years of his presidency, he awarded \$22bn in state contracts to his daughter Isabel; she maintained that she became a billionaire by developing entrepreneurial skills in childhood by selling eggs.

Dos Santos' successor, João Lourenço, inherited empty state coffers and "staggering debt" of \$50bn to China, with much of Angola's oil going to that country. When Lourenço annulled some of Isabel Dos Santos' contracts, she initiated proceedings. He nevertheless had her brother and another official arrested. However, he has still to articulate a clear vision for the country; how its stolen assets are to be returned; and how the economy can be repaired and jobs created. Offering amnesty for money returned within a fixed time period sends mixed signals as does the composition of the Cabinet, many of whom are from the Dos Santos era. Unless Lourenço turns around the economy to enable people to stand against corruption, he may be sabotaged by his own colleagues.

The central role and power assigned by the Constitution to the President means that reform of the state is dependent on the will of one person rather than on functioning institutions. On a temporary basis, Mr Marques de Morais said, laws should be introduced that would fight corruption.

Discussion

- There was no single turning point in making public so much information about the capture of SA's SOEs but publication of the Guptaleaks material and clever journalism around it were crucial.
- There is a focus in SA on sensationalising celebrity politicians rather than examining the stories around them. The media cannot be wholly blamed for this; South Africans enjoy celebrity politics and are politics-obsessed.
- It is through the media that the impact of stolen funds in terms of lost opportunities for socially-valuable spending can be made clear. The media must therefore retain its credibility with the public.
- The role of the media in revealing state capture has been heroic but has not been catalytic in enabling accountability to emerge.
- On the risks associated with his sort of journalism, Mr Marques de Morais said that "fear has not saved people"; in corrupt Angola, children are dying from malaria and not because they oppose the government. He takes precautions but continues with his work, focusing on how it will benefit the greater good. When people have pillaged on the scale that Dos Santos and his supporters have done, they must be opposed.
- There is no wide-spread belief in Angola that those who have looted the state's resources will return them. Individuals like Ms dos Santos need to be arrested and forceful litigation used to recover assets.

14.00-15.45: PANEL 10: LOCAL GOVERNMENT, POLITICS, PUBLIC ADMINISTRATION AND LOCAL CITIZENS

Chair:

Thina Nzo (History Workshop: University of the Witwatersrand): *Organogram Politics: Building Capacity in a Neopatrimonial Local Government in South Africa?*¹⁷

Based on her research into Sol Plaatje Municipality in Northern Cape, Dr Nzo argued that the institutional organogram can become a political tool to distribute state resources to particular people. An ideal bureaucracy would be run by professional public servants for whom local government was a career of choice, although there is a literature that holds that this is neo-patrimonial: a combination of the bureaucratic and the personal.

Taking an ethnographic approach, Dr Nzo shadowed the Mayor, sat in meetings and carried out interviews. Issues emerging included administrative inefficiencies, low-skilled workers and others.

With the incorporation of another small municipality, a new organogram was developed. EPWP and contract workers expected to be absorbed into it. The Mayor was aware of the increasing number of employees, which contravened the council decision not to take on more staff until the new structure was concluded. Precarious politics, and the influence of the unions, made it difficult to address this. The proposed organogram was rejected by the opposition and by the ANC although the Mayor however refused to contravene the official line.

Power dynamics thus need to be taken into account when examining an allegedly merit-based system. Policies are reshaped by local politics, and the building of state capacity is sacrificed to local demands.

Joel Pearson (PARI): *Local Government Instability: The Need for a Broader View*

Local government parallels how the broader system operates and in turn shapes the broader dynamics, including through informal processes.

The instance of the reinstatement of the Mayor of Mogalakwena in Limpopo, accompanied by police, had its roots in a years-long battle about the municipal local manager who was supported by the then-Provincial Premier against the wishes of the local ANC. When the Premier lost power, efforts intensified to remove the municipal manager who responded by using money intended for local purposes to fight his case. There were at one point two councils, in neighbouring buildings. The forceful return of the Mayor was supported with security services by the taxi industry.

There were a range of actors in this situation, often channelling influence from regional and national party structures and thus going beyond the local. The five regions into which the province is divided are increasingly decisive, including in the distribution of local tenders, with the law and lawyers both constraining and enabling. In Mogalakwena, both sides spoke the language of good governance.

¹⁷ See Dr Nzo's presentation attached to this report.

To understand local politics, it is necessary to understand the overall socio-political context. The struggle is desperate: people who 'lose', and their families, often return to a life of abject poverty.

Andries Nel (CoGTA)

Levels of trust between government, civil society and other players, and in national institutions, are very low; and planning is only as credible as delivery is reliable. This requires clarity, good personnel, robust leadership and trust between the major social partners. The state must set the ethical bar for society as a whole.

State power is required to control social conflict; by apparently standing above society, it has 'relative autonomy'. In a capture situation, when the state is unable to lead society, the captors become the leaders. This fundamentally undermines the developmental state. It is not necessary for the entire state to be captured to be effectively 'captured'.

Approximately one-third of local governments function well, one-third are reasonable but with problems and one-third are dysfunctional. There are no easy ways to address this situation, not least because in 2016, for example, almost 78% of councillors were new, contributing to instability, and there are many vacancies for senior managers. Killings of councillors demonstrate the intense conflict over access to state resources at local level.

The response has been the 'back to basics' campaign. A considerable number of competent senior managers appointed, many of them having to be imposed by central government; and there have been other moves to enforce good management. A persistent problem is municipalities' capacity to spend their infrastructure budgets and district support teams have been created to encourage this. Infrastructure is a major issue and a potential source of corruption.

Discussion

- Ministers do not often or always make their presence or influence felt. Professionals are sent to areas to perform tasks that depend on political cooperation; this can be very difficult. Local government, which has a degree of autonomy through its receipt of equitable share and some local taxes, will not be fixed by professionals: politics will continue. The practices by which senior managers are appointed often differ substantially from the bureaucratic version. Patronage and personal benefits predominate in deployment, ostensibly intended to enable development in the African way
- How does professionalisation fit with the centrality of regional ANC power?
- COGTA is highly aware of the intertwining of regions and municipalities. Administrative and political interventions are both necessary, as is recognition of contestation over resources which any party coming to power must have.

In the early 1990s, the ANC was building on UDF structures based on communities. The view, in theory, was that the ANC should align itself with the new administrative divisions. However, there were risks to aligning party and state demarcations. Over time, the relationship between the centre and the periphery changed.

In the case of traditional authorities, there is constant litigation and resources are crucial, a situation profoundly influenced by the rapid rate of urbanisation, the growth of secondary cities and the densification of rural areas, some of which contain very

large houses built by people with money and on which they are not paying municipal rates.

SA needs an inclusive social contract; this would require trade-offs and a credible and trusted state. It is difficult to transform a state formed by apartheid.

- Where, Mr Pearson, would you start with in reforming the role of the party? What scope is there to reformulate institutional arrangements?
- Reformulating institutional arrangements would require circumspection. The need for predictability and other bureaucratic virtues within municipal institutions may run against the imagined institutions of local people and politicians.

14.00-15.45: PANEL 11: POLITICAL CONTESTATION, PUBLIC ADMINISTRATION AND THE LOCAL STATE

Chair:

Gareth Newham (Institute for Security Studies): *The link between State Capture and rising violent crime. What criminal justice reforms are needed?*¹⁸

In focusing on the connection between the criminal justice system and state capture, Mr Newham said, the purpose of his presentation was to examine how any reappearance of the abuses of the system during the Zuma presidency can be guarded against.

Structural issues enabling such abuses include the President's powers in appointments to the security system and the vague criteria that apply to selecting the National Commissioner for Police; in terms of explicit qualifications, he said, it is more difficult to become a constable. President Zuma used his powers in this respect for his own benefit. However, Mr Newham said, SA has never had an untainted criminal justice system; President Mbeki appointed Jackie Selebi, who was close to him.

The current National Commissioner is the sixth since 2005; there has therefore been constant and debilitating change and restructuring of the system and there are no limits to how many appointments the Commissioner can make; in 2017 alone, Commissioner Khomotso Phalane appointed 55 people to key strategic posts without any assessment of their suitability. Similar problems affect the National Prosecuting Authority. All of this has an impact on the criminal justice system; despite a 50 per cent increase in the police budget between 2011 and 2017, crime intelligence collapsed; rates of detection in violent crime cases fell; and visible policing declined. In 2016/17, only 18 per cent of cases opened in terms of the Prevention and Combating of Corruption Act (PRECCA) resulted in convictions; and the system proved wholly unable to tackle organised crime. Meanwhile, civil claims payouts due to police conduct increased from R79.45m in 2009/10 to R335.48m in 2016/17.

Throughout this period, public satisfaction with policing steadily decreased.

Legislation and policy instruments that can be used to create a way forward include the recommendations of the National Development Plan, and the 2012 White Paper on the Police. Additional reforms required relate to leadership appointments to the SA Police Service and the National Prosecuting Authority; legislative and policy reforms to increase

¹⁸ See Mr Newham's presentation attached to this report.

police and prosecutorial transparency and accountability; and strengthening civil society's capacity to monitor and engage with the criminal justice system.

Nicole Fritz (Freedom Under Law): *The State of the Criminal Justice System*

Ms Fritz' presentation reinforced many of the points made by Mr Newham about the cost, abuse and inefficiencies of the criminal justice system. Freedom Under Law has been involved in a number of cases including the challenge to Deputy National Director of Public Prosecutions Nomgcobo Jiba and an application to have National Director of Public Prosecutions Shaun Abrahams suspended. There has not been much success, however, in creating new jurisprudence arising from such cases: for example, defining what qualifications appointees should have.

The courts are not well equipped for roles such as appointing expert panels to deal with crises like that at SASSA. Legal challenges in themselves therefore do not address such problems.

David Bruce: *Always captured? The Special Investigations Unit and South Africa's anti-corruption architecture*¹⁹

The present orthodoxy is that a multi-agency anti-corruption architecture is preferable to a single-agency model. The Special Investigations Unit forms part of this architecture. There are limits on its independence and, currently, only the President can refer matters to the SIU and can also refuse to do so: for example, President Mbeki refused to refer the arms deal to the Unit. In the matter of Nkandla, the SIU's investigation was used to discredit the Public Protector's report and recommendations.

In more recent years, the SIU has given greater attention to cases relating to procurement. Findings of criminal behaviour can be referred to the NPA, the Directorate for Priority Crime Investigation (DPCI) or the Asset Forfeiture Unit. The SIU then often appears to lose sight of the matters and is therefore unable to provide much information about their outcomes to the public.

Strengthening the role and impact of the SIU would increase the robustness of the multi-agency model although the issue of the President's power over the organisation remains.

Discussion

- How can civil society influence the values and skills that should be required in appointments to these agencies?
- In assigning so much power over the SIU to the President, those drafting the Constitution assumed that he or she would have the public interest in mind.
- The effectiveness of the Secretariat of the Police depends on how the Minister and the Secretariat define its and their roles.
- Short-duration Ministries mean that, even assuming a will to do so, there is insufficient time to consider and plan improvements to the system.

¹⁹ See Mr Bruce's presentation attached to this report.

- Assumptions about aspects of the architecture of the policing system are misplaced: for example, 80 per cent of what Metro police do is traffic policing; they therefore cannot make a major impact on the architecture.
- If a Minister is captured, appointments to police boards will be in line with this fact.
- The new police Act (to be introduced in 2019 or 2020?), could provide for minimum criteria for police appointments.
- A major shortcoming in the system is that the NPA may decide not to prosecute: it pursues only 10 per cent of the tens of thousands of cases referred to it. .
- A policing architecture involving a single agency would mean that only this agency would need to be captured.
- Using forensic analysts to examine bank and other records, the Public Prosecutor should examine all state-capture-related information provided by the policing agencies. However, the police and the Hawks have lost many of their best people; and better coordination between the agencies is needed.
- In the Cape Flats, gang-related crime goes back 100 years and reflects the apartheid and post-1994 state's lack of legitimacy, with alternative structures of belonging, control and protection emerging.

16.00-17.45: PANEL 12: OVERSIGHT INSTITUTIONS AND STATE ACCOUNTABILITY

Chair: Tracy Ledger

Khuraisha Patel and Michael Marchant (Open Secrets): *In pursuit of democratic renewal: Alternative methods for securing corporate accountability*

State capture involves the private as well as the public sectors. Two models of how formal institutions could be capacitated to address this are the Peoples' Tribunal on Economic Crimes (PTEC) and the OECD investigations. Initiated by civil society organisations, the PTEC is non-statutory, investigating economic crimes from apartheid to the present time. Among national and international economic institutions invited to make submissions to it, only one responded.

The outcome of the legal and expert analysis of the submissions was a series of recommendations which were non-binding but with the potential to influence the discourse and providing the basis for further action.

The OECD complaint guidelines were promulgated to encourage good corporate behaviour in OECD member states. Open Secrets submitted a complaint to Belgium and Luxembourg on the role of business in those countries in financing arms deals under apartheid. The relevant corporations refused to take part in mediation.

The purpose of initiating such steps is to expose the structural nature of corruption and the continuity of actors within it; and to allow for truth-telling in which the public can engage. The TRC's mandate had a minimal focus on business and the NPA has not picked up on cases referred to it. The current model of pursuing such issues is thus not working and there is a need for other models which will contribute to the formal justice system: for example, through recommendations that there be a new prosecutorial unit within the NPA focusing on business crimes. Taking the OECD route provides clarity on what needs to be done and can parallel formal legal proceedings.

Jonathan Klaaren (Wits Law School): *Mobilization against State Capture: Evidence of Counterpower in South Africa*²⁰

State capture is distinct from regulatory capture and, in often subtle ways, it is possible even for investigatory commissions to be captured. Mobilisation against state capture includes aspects of business, the public service and civil society (through organisations such as Lawyers for Human Rights). Corruption Watch and the Helen Suzman Foundation, for example, generally do not provide walk-in services, promoting rule of law rather than a socio-economic agenda. In a context of fragmented institutions, recourse to court-based litigation seems logical.

An Integrity Commission has been mooted but it is not clear why additional institutions need to be added to the Public Protector and the Auditor-General which have crucial oversight roles to play.

Lukhona Mnguni (University of KwaZulu-Natal): *Keeping the executive in check while crystalizing the separation of party and state*

An outcome of the Zuma presidency has been an improvement in jurisprudence relating to the law of accountability.

The capture of the ANC preceded and was an instrument for state capture. Consideration should therefore be given to regulation of parties' internal operations. Also in need of assessment are the institutional frameworks for accountability, including the extent to which power lies with the President.

The separation of powers is romanticised in SA. The Constitutional Court can recall a President who has violated his or her powers; it cannot be done by politicians, who have partisan political loyalties.

Discussion

- In the context of numerous commissions of enquiry, the conduct of lawyers, and the remuneration that they receive, need to be considered in an appropriately critical way.
- Banks and other international service providers can be embarrassed by exposure thus bringing pressure on their home governments.
- PARI was involved in drafting an anti-corruption strategy; this was wholly ignored. This raises questions about the likely responses to the [Gauteng open tender?] bill going out for consultation.
- Former President Zuma used both formal and informal power in his state capture campaign.

²⁰ See Professor Klaaren's presentation attached to this report.

16.00-17.45: PANEL 13: POLITICS, CIVIC MOBILISATION AND THE LOCAL STATE

Chair: Sarah Meny-Gibert

Saul Roux (Centre for Environmental Rights): *The erosion of state (water) institutions and the role of civil-society in rebuilding state capacity: A case study of the Department of Water and Sanitation*²¹

The presentation used the case of the Department of Water and Sanitation (DWS) to exemplify the erosion of state institutions. Theories of state capture include the concept of “deliberately organised chaos”. DWS was characterised by suspensions of senior management and the related effect on delivery; financial mismanagement, with money owed to water boards; regulatory uncertainty; irrational business cases made to consolidate water catchment management agencies; erosion of management and reporting systems; and the collapse of monitoring and enforcement.

Nontando Ngamlana (Afesis Corplan): *A Critical Assessment of the Infrastructure for Public Participation in Local Government*²²

When local councils are captured by factions, the quality of local government regresses, with councils in the “Premier League” provinces having the worst audit outcomes. The purpose of public participation should be to ensure that politicians are accountable and enable participation.

The electoral process forces alignments because of the use, and power, of caucuses; even constituency-elected politicians are co-opted.

Skill-building for municipal civil servants is essential.

Crispian Olver: *Battle for Nelson Mandela Bay*²³

Mr Olver’s presentation provided a picture of well-organised criminal/political syndicate who murdered a councillor perceived to be in their way and chased a Mayor from the city. Underlying this was a determination to take advantage of procurement opportunities presented by the “contract state”; and to manipulate building programmes and redraw city boundaries to their own benefit.

The capture process includes the following steps: a faction takes control of the party; decisions are centralised in the party office; competent officers are targeted; the bureaucracy is politicised; technical advice is ignored; the supply chain is controlled; and rents are channelled to the factions.

The Auditor-General complains annually about misspending at local government level and the related weakness, incompetence and corruption among Municipal Managers, CFOs and Heads of Supply Chain.

Systemic reform requires transparency in party funding (at present, this is entirely unregulated among all parties and in every municipality); competent oversight bodies,

²¹ See Mr Roux’s presentation attached to this report.

²² See Ms Ngamlana’s presentation attached to this report.

²³ See Mr Olver’s presentation attached to this report.

including the police; well-regulated supply chains; protection for civil servants; and appropriate and transparent allocation of rents.

Discussion

- The concept of public participation is currently totally meaningless and dialogue about it contentless. There are also instances where capture has been by civil society structures: for example, in relation to housing. It needs to be decided where, in the process, meaningful participation is to be inserted.

DAY 3: 24 October

9.00-10.45: ROUNDTABLE 1: SECURITY STRUCTURES AND STATE CAPTURE

Chair: Mluleki Marongo (Right2Know Campaign)

Karabo Rajuili (amaBhungane Centre for Investigative Journalism)

Dale McKinley (Right2Know Campaign)

The Chair noted that one way in which state capture has manifested itself is through capture of the security agencies and asked how these bodies should be re-envisioned. The Constitution states that security falls under Parliament, must be ethical and should not require compliance with manifestly illegal instructions.

Dale McKinley: apartheid legislation from the 1950s onwards created a framework of institutional power in the hands of securocrats. In addition, in exile the ANC was highly secretive and fearful of spies. This 'warrior culture' continued its influence as part of a culture of unquestioning political obedience to the new state and to the party that controlled it.

The results included, for example, an approach to GEAR which did not allow for debate. The 1996 Safety Matters Rationalisation Act repealed many apartheid laws but maintained others. An internal process in 1996 drew up the Minimum Information Security Standards, a Cabinet document defining various levels of secrecy; and a blanket was thrown over investigation of apartheid activities. All of this seriously compromised democratic accountability. The Anti-terrorism Bill was promoted as a 'protection against threats to democracy' but assigned very considerable power to the state.

By the end of the 1990s, 'capture' had taken place by securitised politics within the ANC and by elements of the previous regime; and this security apparatus began to be used in political and ideological battles, to protect the corrupt within the regime and to sidestep Parliament's oversight. Manifestations included the response to the Marikana massacre, covering up of the Zupta scandals, looting of parts of the mining sector and the ultimately abortive nuclear deal.

The situation can be visualised as a three-sided matrix:

1. closing down the right to all but the most anodyne information
2. militarisation of state, with the reinstatement of military-type titles and lines of command in the police, indulgence of the intelligence services and private security services with little regulation.
3. the law and its abuse, with some old and new laws maintaining secrecy. The National Key Points legislation, for example, has removed numerous places from public scrutiny; and there are many problematic aspects to the Cyber Crimes Bill before Parliament.

It is a measure of the success of the securocrats that so little attention is given to the Zupta era; and under the present President intense secrecy continues. A positive move has been the appointment of Inspector-General of Intelligence Sethomamaru Dintwe. However, there is no pattern of the intelligence services pursuing organised crime, with which they may be involved themselves; and there are massive failures in investigating political killings. The security services appear to continue to serve their political masters well.

Karabo Rajuli: the broadcast of the State of the Nation address of 12 February 2015, with its barricades and other manifestations of control, disruption of cellphone signals, focused only President Zuma. Later in that year, there were rumours of intelligence agencies spying on SABC journalists. The context was the capture of the SABC, and the Public Protector's damning report on Hlaudi Motsoeneng and the Broadcasting Amendment Bill. In 2017, Amabhungane requested and received confirmation of interception of journalists' communications which it had long suspected. In the United Kingdom, confidentiality of journalists' communications is provided for and there is an important case law on the matter in process which may have implications for SA.

It is therefore necessary to examine how SA's institutions work; interrogate the right to operate in almost complete secrecy; and ask how safeguards can be created.

The Office of the Inspector-General of Intelligence is almost adjacent to the Security Office; this is too close physically and conceptually. The budget of the Inspector-General is partly managed by the State Security Agency and is therefore bound in many ways to and by the organisation it is supposed to be overseeing. Advances in electronic surveillance mean that formerly valid reporting on the security services is outdated. Arthur Fraser, complicit in a parallel security network, has simply been moved to a different role in Correctional Services. President Ramaphosa's problematic response has been that remedying institutional oversight should be done internally through internal review.

Transparency does not imply lack of security. The budget for state security, currently around 5 billion rand, is formulated in complete secrecy and is allocated by National Treasury in a single and non-disaggregated tranche. Securitised thinking affects other legislation such as the requirement, in terms of RICA, that cellphone providers provide metadata. How this is done is secret; cellphone companies are therefore also complicit. Amabhungane is challenging RICA's constitutionality.

Oversight needs to be strengthened, with oversight by a panel of judges and supported by a public advocate, a system which works well elsewhere. Currently, individuals receive no notification, retrospectively, of having been surveyed. Also of concern is the fact that the state can keep data for 3-5 years but there is no clarity about what the disposal process is and who has access to the data compiled by the state; nor is there a legal basis for mass sweeping up of metadata. This should only be done in terms of legitimate crime- or corruption-fighting processes.

State capture hollowed out the NPA and the Hawks, SA's crime fighting capacity. Discussions about security must go hand in hand with strengthening the NPA and other key institutions. The responsibility lies on civil society, academics and others to create the pressure to bring about these changes through consensus on the need to push back against security abuses and the uncontrolled freedom that the security apparatus appears to have. Rights should not be given up for the sake of security.

Discussion

Dale McKinley: civil society must 'go deep' and demonstrate the interconnectedness of security issues with citizens' lives. The regulatory framework (the Financial Intelligence Centre and others) needs to be revived, with pressure from campaigns from below. Public Protector Madonsela showed what could be done with limited resources; rather than increasing them, budgets should be redirected. This is not a matter that can be left to technocrats; President Ramaphosa, albeit in a somewhat different way, is as dedicated to secrecy as his predecessors.

There is little definitive information about the extent to which other countries assist SA's security agencies; however, they see them as amateurish and open to bribery. There seems to have been some collaboration with 'rogue NGOs' in cooperation with Zimbabwe and there are indications of information-sharing with Botswana under Ian Khama.

Arthur Fraser has information about many people in senior positions, including President Ramaphosa and his associates. This, along with loyalties from the struggle era, explains why he has not been fired.

The security agencies' 'false flag' manoeuvres, such as the reports designed to discredit Pravin Gordhan, are often ridiculous. However, there is a ready tendency in SA to give credence to rumours.

Civil society must regain its ability to discuss and share the ample amounts of vital information that exist.

Karabo Rajuli: there is public understanding of the potential menace of surveillance, and to some extent a mass base for articulating objections to this. Parliament is potentially powerful; however, the responsible MPs often do not understand their role. Unnecessarily, the Joint Parliamentary Committee on Intelligence does its work in almost complete secrecy. Watchdog entities need to be adequately funded; and it is vital that the media's sources know that they are secure.

Michael Marchant (Open Secrets): domestic and foreign intelligence agencies work together and Open Secrets has worked on links between Israel's Mossad and SA. Such information should be shared.

9.00-10.45: ROUNDTABLE 2: WHISTLEBLOWING AND BROKEN SYSTEMS

Chair: Gabriella Razzano (Open Democracy Advice Centre)

Fazela Mahomed (ex-Registrar of Members' Interests, Parliamentary Committee on Ethics)

Jessica Bezuidenhout (Daily Maverick)

Fazela Mahomed: during the early part of her almost twenty years in Parliament, she was involved with building the system for transparency, with compliance increasing over time. During the fifth Parliament, the environment became highly politicised. Offices such as hers will always be a target in such situations, she said.

Collusion within an institution often involves capture of the CEO, CFO, HR and elements of the Board who subvert the system of governance and create a climate of fear while maintaining an appearance of compliance.

There appears to be no requirement that organisations' Annual Reports include details of whistleblowing received on their hotlines.

Organisations contesting whistleblowing often work to undermine informants' credibility and psychological state.

The PSC needs to address the issue of ethics and the creation of toxic environments where it is not possible to speak openly.

Jessica Bezuidenhout: journalists could not have exposed issues such as the nuclear deal and its potential effect on ordinary people without whistleblowers, who are not all high profile and frequently do not want fame or visibility but "to see something fixed". Once undertaken, however, there is no stepping back. Containing severe accusations against the CEO, an anonymous email was sent to the Board of the PIC. The CEO investigated the source of the leaks rather than addressing the accusations. The head of IT was dismissed and disciplinary charges brought against the Company Secretary in relation to leaking Board minutes. The accusations, which were severe, involved the CEO. The organisation's response to the whistleblowing raises the question as to what type of action they should be required to take.

Although whistleblowers are often altruistic and may risk death, their motivation may be to divert attention from their misdemeanours; others may be losing bidders for a contract or have received a poor performance appraisal.

Middle-level individuals may become party to corruption by being instructed to carry out certain actions, sometimes as part of deliberately-created crisis decision-making where, for example, documents have to be urgently signed. It is only in retrospect that they realise the implications of those actions, with some becoming whistleblowers. It needs to be asked whether it is not necessary to have a certain empathy for people who have been put in this position. Much more whistleblowing is needed in the private sector also.

Gabriella Razzano: the law understands workplace whistleblowing narrowly; and amendments to the Protective Disclosures Act which make false disclosure a criminal offence have "a chilling effect" on potential whistleblowers. There is no evidence that such criminalisation was needed as over 90 per cent of cases brought forward are considered valid. The financial cost to whistleblowers of defending themselves against legal action can be considerable; sources of funding, including from the private sector, to assist in such cases need to be considered.

11.00-12.45: ROUNDTABLE 3: THE ROLE OF CIVIL SOCIETY IN CONTESTING POLITICAL MANIPULATION OF THE CRIMINAL JUSTICE SYSTEM

Chair: Lucky Menoe (Corruption Watch)

David Bruce: Independent researcher

Lawson Naidoo: Council for the Advancement of the South African Constitution

Gareth Newham: Institute for Security Studies

David Bruce: discussing the responses of civil society to the abuses of the criminal justice system means talking about institutions (such as SAPS, IPAD and the Hawks) with the power to label people as criminals.

The disabling of the Scorpions during the Zuma presidency was part of the transition from Mbeki. The organisation was meant to be independent, but the weak link was the appointment of the head by the Minister. Use was made of leaks and there was a programme to neutralise individuals trying to operate in terms of the rule of law: for example,

Lieutenant-General Mkwanazi came under enormous pressure because of his wish to get rid of head of police crime intelligence Richard Mdluli.

Oversight organisations were seen as posing a threat and were therefore attacked and undermined. State resources were used to fight legal cases with no reasonable chance of success and thus delay the impact of court judgements. Convicted people were prematurely released from prison.

Appointments such as those of Vusi Pikoli as head of the NPA and Bulelani Ngcuka as Director of Public Prosecutions were made on political grounds although Pikoli proved that his loyalties were to the law rather than the ANC. Under Zuma, the system was compromised to an even greater degree than had been the case under Mbeki.

Gareth Newham: state capture cost people lives, because of the decline in public safety with the appointment of individuals such as Riah Phiyeka (as National Police Commissioner). Parliament was also undermined, and civil society confronted by political agendas. Appointments such as that of Phiyeka led in turn to those of many others in senior positions but without assessment of their qualifications. This process continued down the chain, leading to a decline in effectiveness and demoralisation.

The police require cohesive top management, without which there will continue to be incoherence and lack of legitimacy. There is to be a new police bill in 2019 and civil society should demand strengthening and accountability of the service, and of the NPA. Its Act should be reviewed; it should demonstrate accountability; and the requirement that the President appoint a team to advise on the appointment of its head should become law rather than being *ad hoc*. These institutions must have public trust and legitimacy.

Lawson Naidoo: a review of the criminal justice system should include the Public Protector, the Auditor-General and Parliament as well as the institutions mentioned above. Parliament was a key enabler of state capture. All institutions report to Parliament, which did little except protect the executive.

Interviews for Head of the NDPP should be open and the selection criteria should be known and appropriately high. There is also a need for a fit and proper anti-corruption agency to deal with prevention, prosecution and education. The draft NDP provide for such an agency; the final version gave preference to a multi-agency approach. Also urgently needed is an anti-corruption policy.

The location of the Hawks within the police is highly problematic.

It is critical that there is the political will to address corruption. This means budgeting adequately; and assuring skilled investigators and prosecutors, safeguards against political interference and a firm commitment to zero tolerance of corruption.

Amanda Chimambo: SA ratified the AU Convention Against Corruption in 2005. States are expected to domesticate this in terms of their own law. However, there has been minimal progress in implementing the Convention; only 12 of 40 countries have submitted reports. There have been allegations of corruption within the Advisory Board; any such wrongdoing must be punished.

Discussion

Dale McKinley: attempts to prevent political appointments from undermining the criminal justice system have so far not worked. The Constitution gives great power to the Executive, and this should be confronted. There also needs to be greater ability to investigate the role of the private sector and corporations in corruption and fraud.

Gareth Newham: given that political parties want unrestrained power and are not accountable, electoral reform is needed.

Amanda Chimambo: Corruption Watch has found a lack of engagement about corruption and little awareness of the existence of processes of consultation about it. The young are cynical about politics but active in terms of political action, mobilisation and demonstrations.

11.00-12.45: ROUNDTABLE 4: GRANTS PAYING THE PRICE FOR STATE CAPTURE

Chair: Ghalib Galant: Right2Know Campaign

**Lynette Mart: National Director: Black Sash
Advocate Gina Snyman²⁴**

Lynette Mart: this presentation dealt with Black Sash's work, including its use of the courts, to challenge the ways in which SASSA's social payments system was abused by the company contracted to distribute the payments and to build and maintain the database that underlay the system. The abuses consisted particularly of unauthorised and/or poorly understood deductions from payees. Mass mobilisation and the media were important in the campaign, as was Black Sash's presence on the committees of civil society organisations (through which the impact of the campaign could be amplified) and support from, for example, Corruption Watch and the Dullah Omar Institute. Collaborative strategising and sharing of information were crucial.

Issues of wide relevance emerging from the challenge to SASSA were the existence and influence of parallel governance structure within organisations; the need for independent Boards; lack of organisational capacity and the effect of constantly-changing top management; ambiguous legislation; the need for vigorous oversight by Parliamentary Portfolio Committees; failures by the legal system; abuse of procurement processes, and failure or inability to unambiguously state procurement requirements and to abide by them; the absence of early warning systems; and the betrayal, through corruption, special pleading and inefficiency, of national systems such as SASSA's which are in other respects world leaders.

Gina Snyman dealt with her collaboration, as a lawyer, with Black Sash in the SASSA payments affair. Among the points in her PowerPoint presentation was the way in which Net1 Applied Technologies and other companies attempted to place legal obstacles in the way of SASSA's albeit belated efforts to change the payment system to protect beneficiaries. In such a case, capture is effected by the private sector, with collaboration from decision-makers within the state system. Furthermore, regulations introduced as part of the attempt to rectify a situation which unquestionably disadvantaged country's poorest people were unclear and were open to challenge from the companies. Thus legal instruments to guard against state capture must be properly drafted as well as implemented.

Also clear from the SASSA case were conflicts of roles and interests involving the workstreams put in place on the recommendation of the Minister of Social Security during the period when the organisation was assessing its own ability to make the payments itself.

²⁴ See Advocate Snyman's presentation attached to this report.

That it seemed credible to assert that the workstreams were needed was a reflection of lack of capacity within the organisation: another factor often leading to or enabling capture.

The Minister was later found to have lied when questioned about the workstreams reflects; ethical behaviour by political and public service figures is essential to preventing or limiting state capture.

Programme