

RE-CONCEPTUALISING STATE CAPTURE

WITH A CASE OF SOUTH AFRICAN
POWER COMPANY
ESKOM

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INTRODUCTION

- **State Capture**, or institutional corruption, has long been recognized as a challenge for developing and transition countries.
- Yet, from diagnosis, to prognosis and prescription, developed country or **Western-centric tools of analysis have been dominant** in the treatment of this complex condition.
- **Case studies from developing countries are reframing the theoretical and conceptual foundations** of this approach, making it more reflective of the diverse realities and concerns in developing contexts (Khan, 2004, 2012).
- The primary contribution of developing country case-studies to the understanding of state capture is to **challenge its basic accepted definition**.
- This paper provides a synthesis of emergent conceptual developments, explored through a case study of state capture at Eskom.

PART 1:

**CONCEPTUAL
DEVELOPMENT**

STATE CAPTURE AS A SUBSPECIES OF CORRUPTION – A CRITICAL REVIEW OF CONCEPTS AND PRECEPTS

- State capture has traditionally been treated as a sub-set of corruption, defined from an institutionalist perspective as the *misuse of public office for private gain through influence over institution making* (Rose-Ackerman, 2008).
- This definition is problematic in developing & transition contexts:
 - Unclear distinction between *administrative corruption and state capture*;
 - Moral overtones of state capture as the ‘corruption of state institutions’ become *discordant in contexts* where processes of *state (re)formation* are taking place;
 - State structures rarely conform to the *Weberian-rational ideal*;
 - Ignores questions around the *political and social legitimacy of existing institutions*;
 - *Public/private dichotomy* proves *false* in contexts where prevailing political ideology or culture makes no such distinction;
 - Public servants in low and middle income countries often face a sort of *robin-hood dilemma*;
 - *Corruption can be justified* as an actor’s or group of actors’ commitment to *furthering social or public interests*, ie. not private benefit.
 - State capture invariably *involves public and private actors*

STATE CAPTURE IN THE WILD — A TAXONOMY OF STATE CAPTURE IN DEVELOPING & TRANSITION COUNTRIES

A recent conceptual turn emerging from developing & transition contexts instead considers distinctive features of state capture with reference to organisational structure, modus operandi, immediate aim, and relation to the constitutional state.

- *Distinct network structure* in which *corrupt actors cluster* around parts of the state allowing them to *act collectively*
 - state capture involves “*collusion*” where “*groups conspire* to gain access to the distributional and regulatory powers of the state”
- Network depends on its ability to *influence, pay-off, or appoint network members into positions of power*
 - Target *veto-points* and cluster where there are fewer veto-players that would need to be captured (risk of state capture is higher where decision-making power is centralised & top down)
- State capture can take *many forms, involve diverse strategies, and utilises various methods*
 - Involves the *progressive* repurposing of governance through the quiet *invasion of governance* structures (eg. the political executive, the boards of state-owned companies, or state security institutions) in such a way that *agents of state capture are positioned to disperse government benefits to select groups.*

STATE CAPTURE IN THE WILD — A TAXONOMY OF STATE CAPTURE IN DEVELOPING & TRANSITION COUNTRIES

- Relationships between actors involved in state capture are also diverse
 - Patronage, bribery, clientelism, and coercion.
 - There is also no hard-and-fast rule on the locus of power between different groups in the network – whether “it is business capturing the state, or the other way around, or both at the same time”.
 - The deals are ultimately negotiated and managed by brokers who allow state capture agents to ‘keep their hands clean’.
- State capture can often have an ideological face
- Immediate and observable aim of any state capture network: the *accumulation of unchecked power*.
 - “[p]ower is not a means; it is an end”
 - Power enables network to extract material and other benefits from the state,
 - used for other purposes as well - such as suppressing political opposition, altering power dynamics between social groups or securing geopolitical alliances.

A WORKING DEFINITION OF STATE CAPTURE

We propose that state capture is best understood as:

A political-economic project whereby public and private actors collude in establishing clandestine networks that cluster around state institutions in order to accumulate unchecked power, subverting the constitutional state.

The **state capture network** seeks above all else to be beyond the reach of the law, accountable only unto itself, **free to loot or oppress or extend patronage and favour**.

The **systematic erosion of accountability**, made more insidious by the often attendant appeals to social justice or transformation, between state capture networks and the rest of society is its **definitive source of corruption**.

State capture is essentially corrupt because it seeks to cheat the **social contract**, however that contract may manifest in any given country, and however it is reflected in the constitution.

PART 2:

THE CASE OF ESKOM

STATE CAPTURE AT ESKOM

In November 2016, South Africa's former Public Protector, Thuli Madonsela, released the *State of Capture* report.

Much of the argument centred on events at Eskom, specifically:

- Zuma and Gupta families', as well as their associates', involvement in the appointment and removal of state ministers and board members
- various conflicts of interest and information sharing to the benefit of Zuma- Gupta aligned interests
- the special treatment of the Zuma and Gupta families and associates to the prejudice of other parties
- incidents of bribery, fraud, and corruption

The Parliamentary Portfolio Committee on Public Enterprises' inquiry into allegations of state capture at Eskom (Eskom Inquiry) has already reached completion (final report was expected in March 2018).

- Extensive evidence and important testimony to shed light on state capture within and beyond Eskom
- More than 2000 documents have been handed from the Inquiry to the Zondo Commission

WHAT MADE ESKOM SO VULNERABLE?

Eskom survived the transition from apartheid to democracy, and policy aimed at unbundling and sector reform, largely unchanged

- **Market-dominant**, state-owned company, generates more than 90% of South Africa's electricity, controls the entire national high voltage transmission grid, and distributes around half of electricity directly to consumers
- **Assets are valued at R710 billion** and its **capital expenditure** programme amounts to around **R350 billion over the next five years**
- At the centre of SA's minerals-energy complex (MEC), with **close interdependent relationships having evolved over decades between elites with vested interests** in primary energy, energy intensive industry, the power utility, and the state (Fine & Rustomjee, 1997)
- Apartheid state's legacy of **low transparency and accountability** in the energy sector, including the workings of coal and nuclear energy deals and plans
- Eskom continues to expand from its centre – very much reflected in the IRP2018

1. STATE CAPTURE IS A POLITICAL-ECONOMIC PROJECT

Evidence suggests that political and other actors involved have been motivated not only by economic interests – the spoils of rent-seeking and corruption – but also by the desire to stay in power or to maintain power

The narratives of radical economic transformation and white monopoly capital speak to a set of motives that it appears had real currency among some actors at least some of the time

The project was to achieve RET by reforming the political settlement to a more dominant and authoritarian system, to rule without contending with the strictures of a constitutional democracy

- Example of Gigaba's unilateral 50+1% policy for coal contracts, which allowed Eskom to prejudice not only the old 'white monopoly capital' coal majors but also legitimate BEE accredited mining houses to benefit the Zuma-Gupta owned Tegeta, reveals the tension between the rhetoric of economic transformation and the practical needs to secure resources to fund patronage or pay off those who manage the complex financial flows of the state capture network
- The nuclear deal with Russia reveals a geopolitical element – for which big infrastructure projects are often used, not only in cases where corruption may be involved, but also for solidifying long term political alliances

2. THE POLITICAL-ECONOMIC PROJECT OF STATE CAPTURE INVOLVES PUBLIC AND PRIVATE ACTORS, WHO COLLUDE TO ESTABLISH CLANDESTINE NETWORKS

In the case of South Africa, this could not be more perspicuous in the relationship between the Zuma and Gupta families, as well as their associates and extended, overlapping networks.

Through the Eskom Inquiry, the *State of Capture* report, and other investigations, the discovery of undisclosed relationships and connections between public and private actors has been integral to exposing the project of state capture at the utility – and its parallels and links to the broader state capture project.

- Eskom staff undeclared trips to Dubai paid for and organised by the Gupta's (as revealed in the #Guptaleaks); and, phone calls and emails between the Guptas and their associates and public officials.
- Eskom board members' and executives' undisclosed interactions or private meetings with Gupta Lieutenant Salim Essa, the Gupta brothers, Duduzane Zuma, state ministers, and CEO's at various Gupta owned companies

Typically, the public and private actors play distinctive roles

- public actors are gatekeepers to state resources, information, processes etc.
- private actors have access to or provide services related to money laundering, fraud, and other necessary elements that allow the resources needed by the network to circulate without triggering the types of check and balances public servants often have to contend with

In Eskom, this pattern was present:

- Eskom procurement contracts (TNS, Trillian, Tegeta, T-Systems, McKinsey etc.) provided ways of transferring public resources into private entities, including entities in Dubai
- We are still coming to grips with financial flows out of SA

Additionally, however, private companies, notably consultancies and auditors, were used to justify decisions for deals brokered by politicians:

- Trillian's role on in the Duvha Boiler Tender (March 2017), awarding contract to Chinese Dongfang at inflated cost
- KPMG acted as an intermediary for Oakbay in the purchase of OCH – made unsolicited bid to OCM business rescue practitioners and provided a model ("Project Dragline") used in Gupta plan to take over OCH

2. THE POLITICAL-ECONOMIC PROJECT OF STATE CAPTURE INVOLVES PUBLIC AND PRIVATE ACTORS, WHO COLLUDE TO ESTABLISH CLANDESTINE NETWORKS

ESKOM BOARD UNDER MALUSI GIGABA

Minister Public Enterprises
November 2010
to May 2014



**Director General
Public Enterprises**
Tshediso Matona
Dec 2010 – Sept 2014



**Advisors to
the Minister**
Siyabonga Mahlangu
Dec 2010 – May 2014

Eskom Board Chair



Mpho Makwana
Nov 2009 – June 2011



Zola Tsotsi
June 2011 – March 2015

Eskom Board Members

Bernie Fanaroff
Queendy Gungubele
Neo Lesela *
Bejabulile Luthuli *
Chwayita Mabude
Yasmin Masithela
Collin Matjila *
Boni Mehlomakulu *
Mafika Mkwanazi *
Phenyane Sedibe
Lily Zondo
MJ Husain *
MM Matutu

Eskom CEO



Brian Dames
July 2010 – March 2014

Financial Director



Paul O'Flaherty *
Nov 2009 – July 2013



Caroline Henry (Acting)
July 2013 – Jan 2014



Tsholofelo Molefe
Jan 2014 – June 2015

ESKOM BOARD UNDER LYNNE BROWN

Minister Public Enterprises
May 2014
to Present



**Director General
Public Enterprises**
Richard Seleke
Nov 2015 to Present



PA to the Minister
Kim Davids
May 2014 – July 2017

Eskom Board Chair



Zola Tsotsi
to March 2015



Ben Ngubane *
April 2015 -
June 2017



Zethembe
Khoza (Acting)*
June 2017 -
present

Eskom Board Members

Chwayita Mabude * *
Nazia Carrim * *
Venete Jarlene Klein *
Giovanni Michele Leonardi (Swiss)
Devapushpam Viroschini Naidoo * *
Pathmanathan Naidoo
Mark Vivian Pamensky *
Romeo Khumalo *
Mariam Cassim *

New members June 2016:

Pulane Molokwane
Simphiwe Dingaana
Banothile Makhubela
Sathiaseelan Gounden

Eskom CEO (including Acting CEOs)



Collin Matjila
(Acting)*
April 2014 –
Oct 2014



Tshediso Matona
Oct 2014 –
March 2015



Brian Molefe *
April 2015 –
Nov 2016



Matshela Koko
(Acting) *
Nov 2016 –
May 2017



Johnny Dladla
(Acting)
June 2017 –
present

Financial Director



Tsholofelo Molefe
Jan 2014 – June 2015



Anoj Singh
Aug 2015 – July 2017

* On tender committee

a. Dismissed/resigned 2017 b. Dismissed/resigned 2016

c. (Group Executive for Technology and Commercial/ Generation 2014 - 2016)

3. CLANDESTINE NETWORKS CLUSTER AROUND STATE INSTITUTIONS

The success of state capture rests, to some extent, on establishing political legitimacy and support:

- Clustering within political parties and politically powerful groups, such as unions – often through the use of patronage and populist campaigns) [Radical Economic Transformation](#)
- Disarming state institutions which could discover or combat corruption (for example - the police, national prosecuting authority, and state security agency) [No action on Mr Piers Marsden's \(Business Rescue Practitioner\) report in terms of Section 34 the Prevention and Combating of Corrupt Activities Act, 2004 \(Act 12 of 2004\)](#)
- Experimenting at sub-national levels (eg. provinces or municipalities) or institutions that bare less scrutiny (eg. smaller state owned companies or government departments) [Transnet training ground; Des van Rooyen](#)
- Eskom had been able to resist attempts by the Zuma-Gupta network to secure coal contracts, media deals, and consulting services until about 2014...before these networks penetrated [CEO Brian Molefe and CFO Anoj Singh](#)
- And then scaling up to bid for the real seats of power and resource distribution [Eskom/SARS](#)

3. CLANDESTINE NETWORKS CLUSTER AROUND STATE INSTITUTIONS

Regarding Minister Brown's December 2014 Board reshuffle Mr Zola Tsotsi said the following of his interactions with a Gupta brother:

"When I had the occasion to discuss something with him, and when I was not able to give it to him, he turned around and he said he must report me to Baba (President Jacob Zuma)... The impression he gave me was that he had a very close relationship with Baba and that he could do anything."



4. CLUSTERING AROUND STATE INSTITUTIONS ALLOWS CLANDESTINE NETWORKS TO ACCUMULATE UNCHECKED POWER

While some may argue that state capture is primarily oriented around corrupt rent-seeking, we instead argue that it is about the accumulation of unchecked power.

- This power is typically used to extract resources from the state to sustain and expand the state capture network (TNS, Trillian, Tegeta, T-Systems, McKinsey etc.)
- Payment in exchange for support and cooperation (Molefe pension payout)
- Ultimate aim is the establishment of a network that has the power to do whatever it wants:
 - R19 billion in irregular expenditure
 - Refusing to connect renewable energy IPPs [Going against national policy](#)
 - Pushing through (and now still continuing to work on) nuclear procurement – long-term geopolitical arrangement

The dissolution of sound governance at Eskom has made it near impossible for the company to fulfil its mandate: to provide electricity in an efficient and sustainable manner to grow the economy and improve the quality of life of the people of South Africa.

4. CLUSTERING AROUND STATE INSTITUTIONS ALLOWS CLANDESTINE NETWORKS TO ACCUMULATE UNCHECKED POWER

G9 report found culture of non-compliance, and poor record-keeping

King Code largely ignored

PFMA regularly contravened, and prima facie evidence of fraud & corruption



MOI is out of date and not public

While criminal proceedings may be under way, including the Judicial Commission of Inquiry, those known to be involved in corrupt tenders and governance interventions have not been criminally prosecuted or forced to face the weight of the law.

Shareholder compact was not regularly updated and not public (since early 2000s)

Based on urgent new Corporate Plan, Eskom clearly not accountable for previous plans

5. THE ACCUMULATION OF UNCHECKED POWER ENABLES THE STATE CAPTURE NETWORK TO SUBVERT THE CONSTITUTIONAL STATE AND PREVAILING SOCIAL CONTRACT

Constitutional violations

- Procurement violations: Section 217(1) of the Constitution (equitable, transparent, fair, competitive and cost-effective)
- Secrecy: constitutional values of accountability, responsiveness and openness
- Misinformation and lies: right of access to information held by the State

*Molefe pension judgement: Paragraph 82: We also find that Mr Molefe was never entitled to receive any pension benefits from Eskom Pension Fund and any payments made in lieu of such benefits were **patently unlawful**.*

Eskom and those responsible for its precarious financial position, spiraling capital expenditure and operation costs, increased electricity prices and the other effects of state capture at the power utility remain – broadly – **unaccountable to the people of South Africa**

DISCUSSION