

State Capture: Rethinking its Characteristics, Manifestations and Enablers

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Introduction

If we have to put an image to the term ‘state capture’ we can easily imagine a giant hand catching government institutions, or a net thrown over those institutions leaving them trapped and powerless. But, how does state capture look like in real life? Who are the captors? How can they capture the state? And, what do they really capture?

The definition of state capture is not free from debate. For some, it is a form of corruption, but the definition of corruption falls way too short to encompass what the phenomenon of state capture entails. For others, it is when private actors influence policy making on their own benefit, but to defend the own interest is part of the human condition and of the democratic practice. In some cases state capture is expressed in outrageous ways; in others it is subtle and only visible over time. In any case, state capture always involves policy or legal changes through abuse of power in favor of private interests and against the public good. Its consequences always include the deligitimization of the government and the exacerbation of inequality of opportunities at the social, economic and/or political levels between those privileged by those policy/legal changes and those excluded from them.

The aim of this paper is to rethink the phenomenon of state capture to provide a deeper understanding of its complexity in a way that can empower policy makers, experts and citizens in general to better combat it. In the first part of this paper, I break down the concept of state capture into their essential components while addressing the debates around them. In the second part, I look at the role of context in how state capture manifests, showing examples from different parts of the world. In the last part I reflect and provide examples on two of its enablers: the lack of independence of the judiciary and the creation of tailor-made laws.

Characteristics: State Capture Essentials

Who is the captor(s)?

Initially, the idea of state capture was mainly understood in terms of the undue influence that the private sector exercised over the public sector to increase their financial gain by influencing the policies and laws affecting them. In an influential paper for the World Bank on transition economies in Eastern Europe, Hellman, Jones and Kaufmann talked about state capture in terms of firms shaping and affecting the formulation of the rules of the game through private payments to public officials and

politicians.¹ The private sector was seen as the main captor of the state. Depending on the context, the private sector might be represented by large firms, powerful and well-connected businesspersons, or even small and originally disadvantaged companies as shown further in the second part of the paper.

Different experiences of states being captured by private interests around the world justified later on the consideration of public and political actors as possible captors too.² The political or ruling elite or an incumbent political party might be the agents behind a sort of capture of the state from within the state.

In some contexts, the intertwined character of the relationship between business and political elites makes it difficult to establish a clear distinction between the captor and the captured. State-owned enterprises are located at the intersection of the private and public spheres, where the rents obtained through captured state-owned enterprises have been used by powerful individuals to propel forward their political careers or finance political parties or campaigns.³ In some post-communist settings such as the Western Balkans and some countries in Africa, for example, political parties are controlled by oligarchs, often the owners of former state-owned enterprises and former communist officials themselves. By controlling the political party, they capture public institutions such as the Parliament, ensuring easy access to decisions concerning policies, procurement and civil service appointments.⁴

Besides the diversity of the potential ‘captors’, what is characteristic of state capture is the presence of networks behind those captors. To modify policies and laws based on ones benefit requires strategy and allies. According to Fazekas and Tóth, the essence of state capture ‘lies in a distinct network structure in which corrupt actors cluster around certain state organs and functions’.⁵ In their research, the authors gauge state capture in Hungary based on the presence of micro-level contractual networks in public procurement. In this line, a prominent characteristic found by Transparency International in its analysis of corruption cases involving high-level officials as possible entry point to state capture in the Western Balkans, is the presence of networks involving the same top-level officials and different hierarchies within the

¹ Joel S. Hellman, Geraint Jones and Daniel Kaufman, “Seize the State, Seize the Day” State Capture, Corruption and Influence in Transition’, Policy Research Working Paper 24444 (The World Bank, September 2000).

² Tom Lodge, ‘State capture: Conceptual considerations’, in Melanie Meirotti and Grant Masterson (Eds.), *State Capture in Africa. Old Threats, New Packaging* (EISA, 2018); Anna Grzymala-Busse, ‘Beyond Clientelism: Incumbent State Capture and State Formation’, *Comparative Political Studies* 41(4-5).

³ OECD, *Preventing Policy Capture. Integrity in Public Decision Making* (OECD Public Governance Reviews, 2017).

⁴ Tom Lodge, 2018, op. cit.

⁵ Mihály Fazekas and István János Tóth, ‘From corruption to state capture: A new analytical framework with empirical applications from Hungary’ (Corruption Research Center Budapest, November 2014), p. 3.

civil service.⁶ For example, in North Macedonia between 2010 and 2013, the former prime minister Nikola Gruevski, and the former minister for transport Mile Janakieski, collaborated in five different corruption cases. As further explained in the next section, the political practices and incentives conducive to capturing the state in the Western Balkans are characterized by long-lasting commitments and loyalty to political parties and patronage networks, as also pointed out by Vurmo.⁷

In the United States, Hertel-Fernandez explains that a concerted push of conservative groups operating within and outside of state legislatures was behind the new conservative legislation adopted at the same time by many states when state governments began convening in 2011 with new Republican leaders.⁸ In particular, the American Legislative Exchange Council (ALEC) a coalition of politicians, businesses, conservative activists and wealthy donors, the State Policy Network (SPN) an association of over sixty-seven think tanks focusing on free market and conservative policy, and Americans for Prosperity (AFP) a cross-state conservative network, are, according to the author, behind the capture in the United States.

What is captured (and why)?

If state capture involves changing the ‘rules of the game’ in the form of policies, regulations and/or legal framework governing a society, ultimately, what is captured is public-decision making. This implies the loss by the state of its autonomy in that particular area, as well as the loss of its capacity to function to serve a broad social interest or to achieve long-term developmental goals.⁹

The distinction that OECD does between different types of capture¹⁰ adds some nuances to what is captured:¹¹

- *Policy capture*, defined as the situation where the decisions taken throughout a policy cycle mainly reflect the interest of a narrow group. It specially occurs during agenda-setting, policy development and policy adoption;
- *State capture*, defined as the situation where the central government is captured at a large scale, including parliamentary law making;
- *Regulatory capture*, defined as the situation where a regulator, industry regulatory agency or regulatory process is captured.

⁶ Nieves Zúñiga, *Examining State Capture. Undue Influence on Law-Making and the Judiciary in the Western Balkans and Turkey* (Transparency International, December 2020).

⁷ Gjergji Vurmo, ‘Tailor-made laws in the Western Balkans – State capture in disguise’, *CEPS Policy Insights*, May 2020.

⁸ Alexander Hertel-Fernandez, *State Capture. How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States – and the Nation* (Oxford University Press, 2019).

⁹ Lodge, 2018, op. cit.

¹⁰ For the purpose of clarity and simplification, in this paper we will refer only to state capture as a broader term including elements of policy and regulatory capture.

¹¹ OECD, 2017, op. cit.

The specific motivation for capturing the state is influenced by the context, as shown in the following section, but the ultimate purpose can be of two main types: wealth and power, or both. Which one of these purposes predominates will be determined by who is the captor. The financial motivation can result in different types of preferential treatment such as rents, tax breaks, investment credits, state subsidies, access to public loans, official delays in tax payments, subsidized licensing, free grants of state property, special ‘open economic zone’ status for the territory, regulatory barriers to the entry of new firms in the market, allocation of monopolistic positions in competitive markets, getting import licenses granted.¹² The political motivation can be expressed in the abuse of public resources and the long permanence in government.

How is a state captured?

It is generally agreed that a state is captured 1) by undue influence, and 2) through corrupt means. What is not always that clear is where is the line between legitimate and illegitimate influence, and if state capture is a form of corruption rather than just using corruption to achieve it.

As several authors note, a state is a reflection of bargaining outcomes among groups of empowered economic and political actors,¹³ and all governments have some type of power-sharing arrangements, regardless of their regime type.¹⁴ State capture is considered a deviant relationship between the state, the business sector and the political class.¹⁵ The occurrence of state capture depends on what is considered an ideal or legitimate relationship between the political elite and the business in a given society. When the relationship has been corrupted and the collective good has been compromised there is likely state capture.

However, to identify when there is a deviation of that relationship is not easy. There are multiple forms of relationships between governments, elites and private sector with both positive and negative consequences for the public good. The World Bank uses the term ‘elite bargaining’ to define ‘the processes through which elite actors and the organizations that support them coordinate and commit to one another to determine outcomes’.¹⁶ They bargain over the design and implementation of policies and the definition of rules. The World Bank points out that the modification of rules only coincide with elite self-interest under certain circumstances. One of them is

¹² The World Bank, *Governance and the Law*, World Development Report 2017; OECD, 2017, op. cit.; Irina Slinko, Evgeny Yakovlev and Ekaterina Zhuravskaya, ‘Laws for Sale: Evidence from Russia’, *American Law and Economics Review* 7(1), 2005.

¹³ The World Bank, 2017, op. cit.

¹⁴ Bruce Bueno de Mesquita, Alastair Smith, Randolph M. Siverson and James D. Morrow, *The Logic of Political Survival* (MIT Press, 2003).

¹⁵ Center for the Study of Democracy, *State Capture Diagnostics Roadmap*, Working paper, August 2016.

¹⁶ The World Bank, 2017, op. cit., p. 197.

when the cost to ruling elites of losing power is high, which in turn will be significantly determined by the level of polarization between the preferences of elite groups. When the uncertainty about continuing in power is high, ruling coalitions are more likely to implement reforms to protect them in the event of losing power; but if the uncertainty is low they might be open to accommodate demands of other elites and potentially create rules for contestability and accountability.¹⁷

One way of establishing a line between legitimate and illegitimate influence is through the regulation of lobbying activities. As Zinnbauer points out, lobbying is not an illegitimate activity *per se* but an important element of the democratic discussion and decision-making process.¹⁸ Following Zinnbauer, concerns arise when there is disproportionate influence of corporate lobbying difficult to match by less powerful voices competing for political visibility and persuasion. Unequal access to policy-makers and decision-making processes, conflicts of interest between government officials and business sectors, direct political corruption and influence-peddling, and the balance of information and representation in shaping public opinion and debates on specific policy issues,¹⁹ are some of the areas that can turn influence from legitimate to illegitimate.

Miller argues that, in order to obtain a more subtle and sustained impact, lobbying groups are increasingly working at the level of shaping public debates promoting the evidence that support their messages and gain public support for a certain company and industry.²⁰ They do it through sponsoring dubious scientific research, manipulating media coverage and creating of ‘fake’ citizen groups, also called ‘astroturf’ organizations that work to inhibit or encourage particular policy changes as coming from grassroots demand. In the United States, for example, the conservative networks ALEC and SPN used research, data and expert commentary to convince state legislatures to support their legal proposals. Americans for Prosperity (AFP), another conservative network, activated over two million conservative grassroots volunteers across fifty states to organize protests and flood state legislatures and governors’ offices with mailers, calls and emails.²¹

Despite the existence of laws on lobbying, in many countries the latter is still perceived as an opaque activity resulting in undue influence to the detriment of a fair

¹⁷ Ibid.

¹⁸ Dieter Zinnbauer, ‘Corrupting the rules of the game: from legitimate lobbying to capturing regulations and policies’ in Dieter Zinnbauer, Rebecca Dobson and Krina Despota (Eds.), *Global Corruption Report 2009. Corruption and the Private Sector* (Transparency International, Cambridge University Press, Ernst & Young, 2009).

¹⁹ Ibid.

²⁰ David Miller, ‘Corporate lobbying’s new frontier: from influencing policy-making to shaping public debate’ in Dieter Zinnbauer, Rebecca Dobson and Krina Despota (Eds.), *Global Corruption Report 2009. Corruption and the Private Sector* (Transparency International, Cambridge University Press, Ernst & Young, 2009).

²¹ Alexander Hertel-Fernandez, 2019, *op. cit.*

public decision-making.²² One of the reasons is that the quality of the legal framework regulating lobbying is as important as its existence, as well as the commitment of governments to implement the law. Nevertheless, some methods of influence such as providing biased information, a self-interest service to fill a gap in the system or even threats creates the risk of mistaking was simply a misinformed policy choice for deliberate subversion (OECD 2017 and World Bank 2017).²³

Finally, it is important to point out that state capture is not the only form of undue influence between political and economic actors. Favoritism, nepotism and cronyism shared with state capture the intention of diverting decision making from the public good to benefit private interest. The main difference between these forms of undue influence is the scope of those decisions and their effect over time.²⁴ In the case of state capture, it is not about how or if a law is implemented in a specific situation, but about changing the law, which has a longer-term impact.

Corruption and state capture - Frequently, state capture is defined as a form of corruption. In words of the Center for the Study of Democracy, ‘state capture is a form of corruption which leads to a systematic and permanent delivery of private goods to the captors (or privatizers) of the institutions.’²⁵ When considered corruption, is often considered as widespread corruption. However, state capture is much more than that. It is possible to have a lot of administrative corruption in a certain institution, but does not necessarily mean that the institution is captured. One of the main difference between corruption and state capture is the instrumental goal of each of them. In corruption the idea is to convinced those in power to violate the laws and regulations in order to favor them. In state capture the idea is to change the ‘rules of the game’.

Another characteristic of the corruption involved in state capture is that it clusters around certain areas or institutions. Fazekas and Tóth distinguish between corruption without state capture and corruption with state capture. The first one is understood as institutionalized grand corruption distributed across the organizational network in a random and roughly evenly way. The second one is defined as institutionalized grand corruption clustered on certain public organizations that lose their autonomy fully or nearly completely. As pointed out by the authors, the quantity of corruption is not enough to talk about state capture; what it matters is the particular distribution of the corruption.²⁶

²² OECD, 2017, op. cit.

²³ Ibid; The World Bank, 2017, op. cit.

²⁴ Nieves Zúñiga, ‘State Capture in Asia Pacific’, Transparency International Helpdesk Answer, 22 July 2019.

²⁵ Alexander Stoyanov, Alexander Gerganov and Todor Yalamov, *State Capture Assessment Diagnostics* (Center for the Study of Democracy, 2019), p. 35.

²⁶ Mihály Fazekas and István János Tóth, 2014, op. cit.

The role of the context in how state capture manifests

The existence of state capture is not linked to a specific type of government or to a certain level of economic development. It can happen anywhere where the prioritization of private interests is pushed forward to affect public decision making without scrupulous. But, state capture does not look like the same everywhere in the world. How state capture manifests will be determined by the context in which it takes place. The context presents the opportunities and shapes the motivations behind the privatization of the state function.

The ultimate purpose of state capture is always to privilege private interests over the common good in a scale that ensures its continuity over time by affecting how a country is regulated. However, if we look at experiences of state capture in different regions, that purpose is motivated by different reasons that explain why state capture happens in a particular way. Among those motivations are ensuring the continuity of long-lasting forms of relationships, maintaining certain reputation or influence, equalizing market opportunities, or protecting the national economy from foreign influences.

Loyalty and maintaining patronage and clientelistic networks are main driving forces behind the capture of the state perpetrated by political parties and political elites in Western Balkan countries such as Albania, Serbia, Bosnia and Herzegovina, Kosovo, Montenegro and North Macedonia.²⁷ Those networks, inherited from the communist time, have been adapted according to the opportunities offered by the different historical conditions lived in those countries. The state-building period after the conflicts in the former Yugoslav countries and the intervention of international actors were instrumental to political elites to consolidate their power. In particular, anomalies brought by internationally brokered peace agreements such as the Ohrid Agreement in North Macedonia or the Dayton Agreement in Bosnia and Herzegovina, promoted power-sharing arrangements based on ethnicity, facilitating the control of the government and economy by ethnic private agendas.²⁸

During the democratization in the Western Balkans, often political elites formalized and developed their previous informal clientelistic networks in the form of political parties, maintaining thus their power and evolving into a 'political clientelism'. Membership in a political party became the safest and fastest way to achieve jobs, positions of power, promotions, contracts or other goods in exchange for political support. In a political system significantly founded on patronage and clientelistic networks, those informal commitments and exchanges between patrons and clients

²⁷ Nieves Zúñiga, 2020, op. cit.

²⁸ Jelena Džankić, 'Capturing Contested States: Structural mechanisms of power reduction in Bosnia and Herzegovina, Macedonia and Montenegro', *Southeastern Europe* 42, 2018; John Hulsey, 'Institutions and the Reversal of State Capture', *Southeastern Europe* 42, 2018.

prevail over democratic decision-making, professional duties and ethical behavior.²⁹ To maintain the status quo in order to do not lose acquired privileges or break the trust in those relationships becomes the priority, and corruption and state capture the mechanisms to achieve it.

If political power and political parties are the main forces behind the capture in the Western Balkans, in transition economies in Eastern European countries such as Kyrgyzstan, Azerbaijan, Latvia, Moldova, Ukraine, Bulgaria and Russia, state capture was mostly done by private companies motivated for economic reasons. The form of capture in those countries reveals that the captors are not always the most powerful. During the transition to an open economy after communism, governments did not provide new firms with the necessary goods to compete in the economy in equal conditions.³⁰ The latter were in a position of disadvantage in comparison with large companies with former ties to the state, mostly state-owned companies with a high market share in their sector. Those large companies retained certain influence over the government and advantages inherited from the past, such as secure property rights. Hellman, Jones and Kaufman explain how in that context, new firms turned to capture the state to compensate for the weaknesses in the legal and regulatory framework that benefited the old large companies over them.³¹ For the new companies, to capture the state was the way to buy private property directly from the government and to remove obstacles to their economic performance.

The regional level might be as important as the national one for the capture of public-decision making as state capture in Russia shows. This example also teaches us how much the context influences if the capture of public-decision making, even if still self-interested, might be directed to have a positive or negative effect on others. Large firms in Russia might invest in lobbying at the regional level because regional authorities have considerable discretion over regulating small business regarding entry cost by altering the rules of registration, certification and licensing, or influence operating costs with inspections and regional property leases.³² But the decision of lobbying regional authorities to create a difficult regulatory system for small business is not straightforward since it will depend on how small business affect the large ones. On one side, according to Slinko, Yakovlev and Zhuravskaya, in some transition economies, and particularly in Russia during the 1990s, when large firms could not shed excess labor for political reasons, they might be interested in small-business growth so the latter can absorb that excess labor. In those cases, large firms might create a benign business environment for the small ones. On the other side, when

²⁹ Marika Djolai and Corina Stratulat, 'Clientelism in the Western Balkans', *The Crisis of Democracy in the Western Balkans: Authoritarianism and EU Stabilitocracy*, BiEPAG, 2017.

³⁰ Joel S. Hellman, Geraint Jones and Daniel Kaufman, 2000, op. cit.

³¹ Ibid.

³² Irina Slinko, Evgeny Yakovlev and Ekaterina Zhuravskaya, 2005, op. cit.

large companies compete with small ones for government resources, the former might take actions against small-business growth.

In East Asia, dynamics resembling state capture acquire a certain nationalistic tone. Based on long-lasting close relationships between big corporations, centralized governments and banks, the agreements between them were often initially justified as measures to protect national economies from foreign influences.³³ Some analysts, instead, define the situation as crony capitalism.³⁴ In those countries, the creation of large and politically connected corporations are often the result of highly interventionist states in the economy with the motivation of protecting national economies by reducing external and internal competition and preventing external actors to take over economic control. States justified this interventionist model as a way to ensure the survival and competitiveness of national economic players in catching up with their Western counterparts, and to facilitate a rapid industrialization.³⁵ The importance given in those societies to bonds and networks as the institutional foundation of the economy gives legitimacy to these relationships, even though they have presented several irregularities including poor bureaucratic and regulatory oversight of those companies and irresponsible use of state-generated bank loans.³⁶ For example, in South Korea, the government has supported the conglomerates called *Chabeols* since the 1960s, inspired in the Japanese style conglomerate of companies called *keiretsu*, which hold extraordinary power over politics. They have a mutual dependency relationship where politicians turn to *chabeols* to fund their campaigns, and *chabeols* lobby for favorable legislation and policy.³⁷ In recent years, leaders of strong *chabeols* such as Samsung have been involved in high-level corruption scandals.³⁸

The way state capture manifests in some countries in Africa very much reflect the collective perception of the state as the primary source of power and financial fortune, a personality-driven political style based on ethno-religious identities, and a general distrust towards democratic institutions to bring economic development. Hence, state capture in the African context is often expressed through strong ties between powerful

³³ Nieves Zúñiga, 2019, op. cit.

³⁴ Vithiatharan Vighneswaran and Edmund Terence Gomez, 'Politics, Economic Crises and Corporate Governance Reforms: Regulatory Capture in Malaysia', *Journal of Contemporary Asia* 44 (4), 2014; Haj Chang, 'The Hazard of Moral Hazard: Untangling the Asian Crisis', *World Development* 28 (4), 2000; David C. Kang, 'Transaction Costs and Crony Capitalism in East Asia', *Comparative Politics* 35 (4), 2003.

³⁵ Nieves Zúñiga, 2019, op. cit; Vithiatharan Vighneswaran and Edmund Terence Gomez, 2014, op. cit.

³⁶ Vithiatharan Vighneswaran and Edmund Terence Gomez, 2014, op. cit.

³⁷ Eleanor Albert, 'South Korea's Chaebol Challenge', 2018.

³⁸ BBC, 'Samsung Scandal: Who is Lee Jae-Yong?', 5 February 2018: <https://www.bbc.com/news/business-39191196>

families or groups of interest and the individuals at the top of government.³⁹ Rent-seeking and economic reasons seem to be the main motivation for the privatization of the state function. State captors' networks are strengthened in the context of ethno-religious politics where power is created around individuals who are considered to be 'kingmakers' or representatives of those ethnic or religious groups, as it happens in Nigeria and Kenya.⁴⁰

In this context, elections represent a key opportunity for captors to exercise their influence and have access to the state power.⁴¹ The ability to capture or control the process of setting the electoral rules constitutes a common practice, facilitated by corruption administrations and weak democratic institutions, to capture the state by deciding in advance who gets into power. Clientelistic relationships, intimidation and reward-punishment political dynamics are part of these dynamics.⁴² The manipulation of the constitution to ensure that the incumbents can be electoral candidates after the completion of their mandate is also frequent. In Uganda, for example, Yoweri Museveni serves as president of the country since 1986 after several constitutional reforms to make such a long presidency possible.

One of the most well known cases of state capture in the African continent is South Africa and good example of the possible confusion between the 'captured' and the 'captor'. From the outside mainly the Gupta family and their business associates, and from the inside President Zuma and some of his Cabinet members, mutually benefit from the situation. In particular, Duduzane Zuma, the president's son, was appointed director of more than 10 Gupta companies. In this way, Duduzane was a useful conduit to the president as well as direct access to the president for the Gupta family. Duduzane became instrumental in the captured participating in state matters such as the appointment of Cabinet ministers. According to Mkhabela, the constitutional powers vested in the president Jacob Zuma became an entry point for state capture to the point that it lead to the emergence of a shadow state in constant contradiction with the constitutional state.⁴³ Moreover, because in South Africa policies have to be adopted collectively by the Cabinet, Zuma subjected the entire executive to capture.

The capture of the state was executed through the implementation of a patronage-punishment scheme consisting in rewarding those collaborating for the benefit of both Zuma and the Gupta family, or punishing those who did not help the captured agenda

³⁹ Melanie Meirotti and Grant Masterson (Eds.), *State Capture in Africa. Old Threats, New Packaging* (EISA, 2018).

⁴⁰ Olufunto Akinduro and Grant Masterson, 'Encoding the rules: Capturing the state through the electoral process', in Melanie Meirotti and Grant Masterson (Eds.), *State Capture in Africa. Old Threats, New Packaging* (EISA, 2018).

⁴¹ Ibid.

⁴² Ibid.

⁴³ Mpumelelo Mkhabela, 'South Africa and the Capture of the Executive. Undermining Transformation?', in Melanie Meirotti and Grant Masterson (Eds.), *State Capture in Africa. Old Threats, New Packaging* (EISA, 2018).

by being removed from their positions, denied promotion or harassed.⁴⁴ Following Mkhabela, two factors offered favorable conditions for the capture in South Africa. One was the lack of ‘moral capital’ of president Zuma. Previous investigations for corruption and lack of effort to endorse ethical principles in his government, turned president Zuma into an easy target to use by private interests. The second condition was the lack of vetting process and constitutional criteria for election to the presidency, making any member of Parliament qualified to be elected president.⁴⁵

In the United States, the characteristics of the political system are well used by conservative networks to influence public decision-making in their own interest. In particular, those networks took advantage of the fact that not every lawmaker in every state has the same experience, expertise and resources to draft laws and design policies. Aware of this situation, conservative networks such as ALEC offered ‘their services’ to compensate for that challenge. As Hertel Fernandez explains, ALEC provides the policy tools that many lawmakers lack such as prewritten bill ideas, model bills, research, evidence and political talking points, exactly what lawmakers need.⁴⁶ And, even if conservative and Republican legislators are more likely to rely on ALAEC bills, unresourced democrats under pressure circumstances have found in ALEC’s resources what they need to present on time a portfolio of policy ideas with the necessary legislative language to implement them.

Enablers: Lack of the Independence of the Judiciary and Capturing Law-Making

Considering the illegitimacy involved in state capture, two things become important when it comes to successfully capture the state: one is to remove the possibility of being prosecuted and condemned by the judiciary and, two, to make the undue influence in public decision-making legitimate. The first can be achieved through reducing the independence of the judiciary and the second through the creation of tailor-made laws.

How the judiciary can contribute to state capture

A Transparency International’s study on state capture in the Western Balkans and Turkey found that impunity for grand corruption was one of the key enablers of state capture.⁴⁷ In a context where state capture comes from within the political class, the political control of the judiciary, is instrumental to maintain state capture by preventing the proper prosecution of high-level officials abusing their offices. The study shows how impunity for corruption involving top-rank officials is the result of

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Alexander Hertel Fernandez, op. cit.

⁴⁷ Nieves Zúñiga, 2020, op. cit.

the procedural failures of the judiciary and the negligence of judges and prosecutors motivated more by personal interests than by professional ethics.

Inspired on the situation in the Western Balkans and Turkey, we can identify several causes of the judiciary's lack of independence and inefficiency that might contribute to the problem of state capture. Among them are: a limited legal framework, the control of the executive over the judiciary, the performance of prosecutors, and shortcomings in judicial performance.

The limitation of the legal framework

This can be expressed by the insufficient recognition of the crime of corruption involving high-level officials in the legal system, which, in turn, will affect the extent to which relevant institutions are empowered to act on the crime. For example, the offence of illicit enrichment,⁴⁸ -criminalized under Article 20 of the United Nations Convention against Corruption (UNCAC), is not included in the criminal codes of several countries in the Western Balkans.

It is also important to pay attention to how the crime is defined. For instance, in Serbia, the lack of explicit inclusion of 'active bribery' in the criminal code makes not possible to prosecute someone who bribes and MP to vote for a certain proposal.⁴⁹ A way to overcome this challenge would be to establish criminal liability for both the person who gives or offers a bribe to an official and the person who is offered a bribe to influence the decision of an official when the latter has neither the obligation nor the prohibition to decide or perform an official action. As it is in Serbia at the moment, this type of bribery case, which is especially relevant to undue influence in public decision-making, goes unnoticed.

In the political setting in Turkey, the constitution contributes to the challenges to open criminal procedures against high-level officials involved in corruption. Under Turkish Constitution, opening an investigation against vice-presidents and ministers requires an absolute majority of Parliament. Considering that, at present, 49 per cent of the parliamentary seats are occupied by the ruling AKP, in practice very few investigations into high-level corruption are realized.⁵⁰

The limitation of the legal framework can also be expressed in the lack of harmonization between criminal legislation in different jurisdictions. This is the case in Bosnia and Herzegovina, whose complex administrative setting including different

⁴⁸ Illicit enrichment is defined as a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income (Art. 20, UNCAC: https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)

⁴⁹ Transparency Serbia, *Grand Corruption and Tailor-Made Laws*, 2020.

⁵⁰ Nieves Zúñiga, 2020, op. cit.

levels of government potentially leads to inconsistencies, duplication, double standards and complexity.⁵¹

Political control over the judiciary

Another key obstacle for the proper prosecution of high-level corruption is the political control over the judicial system. The politicization of the judiciary can be achieved by dictating the appointment of judges and prosecutors, corrupting judicial authorities to prevent the proper implementation of laws and regulations, and through fear and intimidation. One of the effects of the political pressure on the performance of the judiciary is exemplified by the case of state guarantees for an aluminium plant in Montenegro. In April 2013, the Montenegrin State Audit Institution found that the government had issued state guarantees worth 135 million of euros for loans made in 2010 and 2011 to the Montenegrin aluminium smelter company Kombinat Aluminijuma Podgorica (KAP).⁵² The guarantees were given without adequate justification or counter-guarantees. The case involves high-ranking members of the ruling party and top government officials, including former premier ministers, the president of the State Aid Control Commission and a former economy minister. The case has been in the preliminary stage of investigation since a Supreme State Prosecutor's request in July 2013.

Besides affecting the independence of the judiciary, political control of the judiciary can also affect its effectiveness. In North Macedonia, political influence explains the ineffectiveness of the automated system for court case management used to guarantee the random distribution of cases in courts. The frequent modification of annual court schedules against the will of judges,⁵³ and the exclusion of some judges from the system without notice, has allowed cases to be assigned to judges chosen by the political elites, which increases the chances to receive favorable treatment in the prosecution of cases involving those elites.

Prosecutors' performance

The performance of prosecutors can also be a key element regarding the contribution of the judiciary to the problem of state capture. The poor performance of the prosecution can easily prevent the proper prosecution of high-level officials involved in corruption. In Albania, for example, the General Prosecutor's Office decided to close the investigation related to the Albanian Supreme State Audit Institution (ALSAI) lawsuit filed against the minister for energy and infrastructure and the

⁵¹ OSCE, 'Trial Monitoring of Corruption Cases in Bosnia and Herzegovina: Second Assessment', 2019.

⁵² Montenegro State Audit Institution, 'Except from the Audit Report on "State Guarantees of the Government of Montenegro for 2010 and 2011"', in *Annual Report of the State Audit Institution for the Period October 2012 – October 2013* (DRI, 2013).

⁵³ Ministry of Justice Republic of Macedonia, *Report on the inspection of functioning of the information system and implementation of provisions of the Rules of Procedure of Courts* (title translated), (Skopje, 2017).

state's general advocate open in October 2015, alleging that the state had incurred financial damages of 479 million euros because of their actions or inaction to settle a disagreement with the Czech electrical distribution company CEZ.⁵⁴ The disagreement came because of the cancellation of the company's licence to operate by the Albanian government obtained in 2009 when CEZ bought 76 per cent of the shares in the Albanian electrical energy distribution company. The decision of the prosecution was questioned because it limited itself to publicly known facts without investigating further into the conduct of the negotiation and the role of the defendant who acted as chief negotiator. Despite ALSAI's appeal against the prosecution's decision, the High Court did not hold the General Prosecutor's Office accountable for its decision.⁵⁵

Problems in the performance of the prosecutor are also common in Bosnia and Herzegovina as reported by the 2019 OSCE assessment.⁵⁶ The OSCE found that, in 2017 and 2018, the country's specialized prosecutorial bodies were more focused on petty corruption cases than in initiating processes on serious corruption cases. Additional challenges found in the assessment where the inadequate capacity of prosecutors in drafting indictments and in gathering evidence to support charges.

In some cases, prosecutors are involved themselves in corruption, as it happened in North Macedonia, where the Special Public Prosecutor, whose office was created in 2015 with the objective of eliminating the impunity of high-level officials for corruption and restoring trust in the judicial system, was sentenced himself in 2019 to seven years in prison for abuse of office.⁵⁷ In other cases, prosecutors do not have enough jurisdiction to properly prosecute high-level corruption. That is the case in Serbia, where the Prosecutor's Office for Organised Crime does not have jurisdiction over corruption crime by officials directly elected by the people, such as the president or MPs.⁵⁸

Shortcomings in judicial performance

The study on state capture in the Western Balkans and Turkey also revealed several shortcomings in judicial performance with impact on the judiciary's effectiveness. One of the most frequent shortcomings was lengthy court proceedings. In Bosnia and Herzegovina, for example, the optimum deadline of 298 days for first instance court proceedings according to the Rulebook on the Time frame for Proceedings in Cases in Courts and Prosecutor's Offices, was not respected in any of the grand corruption

⁵⁴ Supreme State Audit Institution of Republic of

⁵⁵ Supreme State Audit Institution of Republic of Albania, 2015; Supreme Court, Decision No. 20, 24 October 2016. 'Tirana court halts case of Czech CEZ firm's suspected corruption', (Prague Stock exchange, 8 February 2020).

⁵⁶ OSCE, 2019, op. cit.

⁵⁷ TI Macedonia, *National Report. Grand Corruption and Tailor-Made Laws Republic of North Macedonia*, 2020.

⁵⁸ Transparency Serbia, 2020, op. cit.

cases collected for the Transparency International project.⁵⁹ Instead, they lasted from a minimum of one-and-a-half years to over three years. In North Macedonia, the court proceedings for grand corruption cases last on average five years.⁶⁰ This problem is also acknowledged by the OSCE, which for the case of Bosnia and Herzegovina identifies two factors to explain the delays: changes to the composition of the panel of judges, which often implies the restart of a trial; and poor management by judges.⁶¹ The poor management of the cases by judges is expressed in their poor efforts to ensure the presence of the parties in the trial, and in the quality of evidences.

The absence of parties from court without proper justification becomes even more challenging when the defendants flee to another country. A well known example from North Macedonia is when the former prime minister Nikola Gruevski, who was involved in five corruption cases and sentenced to two years in prison, fled to Hungary where he was granted asylum.⁶² In Bosnia and Herzegovina, Lejla Fazlagić-Pašić, a judge in the Municipal Court in Sarajevo defendant in the case of former interior minister Alija Delimustafić, fled to Croatia while under investigation, and has remained there for three years.⁶³ Her absence and the absence of other defendants in the same case has delayed the trial 17 times so far, causing damages to the public budget of 175,000 euros in trial court costs. The presentation and quality of evidences have also shown poor management of cases by judges both in Bosnia and Herzegovina and North Macedonia. Long processes for the presentation of evidences has caused delays in North Macedonia, where the lack of strict criteria to define the admissibility and relevance of evidence and the relations between them has in some cases led to not adequate assessment of the quality of the evidences presented.⁶⁴ In Bosnia and Herzegovina, the poor quality of evidence, together with the abuse of procedures and negligence, result in low number and poor quality indictments for corruption offences.⁶⁵

In Kosovo, one of the consequences of the delays in court proceedings has been the lack of accountability when charges are dismissed after the statute of limitations elapses, generating a form of impunity for corruption.⁶⁶

⁵⁹ TI Bosnia and Herzegovina, *Bosnia and Herzegovina National Report. Ending Impunity for Grand Corruption in Western Balkans and Turkey*, 2020.

⁶⁰ TI Macedonia, 2020, op. cit.

⁶¹ OSCE, 2019, op. cit.

⁶² 'Anti-asylum Orban makes exception for a friend in need', *The Guardian*, 20 November 2018.

⁶³ Cantonal Prosecutor's Office of Sarajevo Canton, 'Conformed incitement against Alija Delimustafić and others including judge, prosecutor, lawyers, court experts, notary' (title translated), 10 December 2017.

⁶⁴ TI Macedonia, 2020, op. cit.

⁶⁵ TI Bosnia and Herzegovina, 2020, op.cit.

⁶⁶ Kosova Democratic Institute, *The 'culture of impunity' in Kosovo*, 2020.

Another common shortcoming in judicial performance is soft sentencing and the abuse of acquittals. In some countries, similar outcomes in court proceedings reveal patterns in this regard. In Kosovo, for example, the frequent acquittal of defendants in corruption cases involving high-level officials raises questions about the fairness and equality in the implementation of the law. According to data provided by the Kosovo Law Institute, from January to September 2019, the Basic Court of Prishtina imposed imprisonment on only 18 per cent of those convicted of corruption, 26 per cent received suspended sentences, 12 per cent were fined, and 44 per cent were acquitted.⁶⁷

The creation of tailor-made laws

Tailor-made laws are legal acts created for the purpose of serving only the interests of a person or a narrow group of connected persons and not the interest of others in a sector or group or the public interest. They decriminalize the capture of the state and they make harder to fight against it. Following Transparency International's work on tailor-made laws, there are at least three types of tailor-made laws based on their purpose: 1) laws to control a sector or industry, or part of it; 2) laws to ensure that loyal people are in strategic positions of power or that those who might be against the capture agenda are removed; and 3) laws to reduce institutional check and balance power by controlling personnel procedures, reducing the monitoring capacity of agencies or audits, preventing accountability, or weakening scrutiny by the media and civil society organizations.⁶⁸

Laws to control a sector or industry

The ambition of this type of law may varied from the attempt to monopolize a sector or industry, to the aspiration to control a particular aspect or opportunity in that sector or industry. In Albania, for example, what initially was proposed as a Law on Gambling to reduce the damage caused by gambling among youth and poor households in the country became a propulsive force for the gambling industry's growth. Initially, the law draft included provisions to charge the gambling industry a 25 per cent tax, limit the number of stations to a maximum of 500 per gambling company, and locate stations at least 200 meters from religious and education institutions.⁶⁹ 24 hours before the plenary session of Parliament, two MPs from the Socialist Party and the Socialist Movement for Integration party submitted amendments that, instead of reducing it, they expanded the industry significantly.⁷⁰ Those amendments decreased the tax from 25 to 15 per cent, doubled the limit on gambling stations from 500 to 1000, and decreased the minimum distance from 200 to

⁶⁷ Kosovo Law Institute, *Special failures in fighting corruption*, 2019.

⁶⁸ Examples from the Western Balkans and Turkey come from Transparency International's work on state capture in that region. For more examples of tailor-made laws see Nieves Zúñiga, 2020, op. cit.

⁶⁹ 'New law to reform gambling market in country', *Invest in Albania*, 16 February 2015.

⁷⁰ Aleksandra Bogdani, 'The gambling industry flourished after the 2015 law' (title translated), *Reporter.al*, 14 September 2018.

100 meters.⁷¹ As a result, in the two years after passing the laws, the gambling industry increased its revenue by 68 per cent.⁷² The main beneficiaries of the law were five gambling companies (Top Bast, Apex-Al, Astra Albania, Adriatic Game and Top Start) that dominate around 80 per cent of the industry.

In North Macedonia, Regulation No.29 set the conditions for the production of electricity from renewable energy since 2019. Based on the Energy Law of 2018, the regulation includes the conditions for determining two types of support for electricity producers using renewable energy sources: feed-in tariffs and premiums. According to the Regulation, the maximum level of installed power to obtain feed-in tariffs is 10 MW for hydropower plants, 50 MW for wind power plants, and 1 MW for biomass and biogas thermopower plants. To be eligible for premiums, the maximum installed power should not exceed 50 MW for wind power plants and 30 MW for photovoltaic power plants. Feed-in tariffs are provided for long periods of time, ranging from 15 to 20 years. Premiums are awarded to the best bidder in an open competition process. These conditions are especially convenient for hydropower producers because of the cut-off point to obtain feed-in tariffs relative to other producers. Moreover, competition in the wind and solar energy sector has increased because now they are regulated by premiums, whereas competition remains the same in the hydropower plants.⁷³

This Regulation specially benefits the company Small Hydro Power Plants Skopje, one of the major investors in the hydropower sector that owns seven hydropower plants. The manager of the company is Todor Angjushev, brother of Deputy Prime Minister Kocho Angjushev. Moreover, the company is the result of a joint venture between the companies Feroinvest and Granit AD. Feroinvest was funded by the Angjushev brothers, and it owns 25 of the 75 small hydropower plants registered in the country. Thus, the deputy prime minister, who participates in the drafting of energy sector laws and regulations, owns one-third of the small hydropower plants in the country, which reveals a potential conflict of interest.⁷⁴

In some cases, tailor-made laws seem to be created to benefit a particular beneficiary rather than intervening in an ongoing initiative. Turkey offers an example of it in the Social and General Health Insurance Law No. 5510, in force since May 2019. The law creates a new category of hospitals defined as ‘advanced level hospitals’, which are supposed to receive better benefits from the Ministry of Health. The requirements to be considered as such are to have a 600-bed capacity, 60,000 square meters of indoor facilities, 240 doctors and 480 nurses. Only one hospital meets the

⁷¹ General Directorate of Taxation, *Other taxes and tariffs*, (General Directorate of Taxation, Tirana, 2015).

⁷² Aleksandra Bogdani, 2018, op. cit.

⁷³ Nieves Zúñiga, 2020, op. cit.

⁷⁴ Zorana Gadzovska Spasovska and Vladimir Kalinski, ‘Angushev leader in the business of small hydropower plants’ (title translated), *Radio Slobodna Europa*, 3 September 2019.

requirements, which, interestingly, is formerly owned by the Health Minister Fahrettin Koca.⁷⁵ The fact that prior to the law, Medipol Hospitals, founded by the health minister, received support from the government in the form of donations, including land and historical buildings, increases the suspicions that this law was exclusively motivated by a private interest.

Of this type is also regional preferential treatment legislation found in Russia. For example, in the Adygeya Republic in 1999 a Law on Preferential Tax Treatment of the Meat-packing Plant Li-Chet-Nekul was enacted granting this specific plant a property-tax break for a period of two years.⁷⁶ Another example took place in 2001 in the budget law of Kamchatskaya Oblast, which contained a special budgetary item called Support of Fishing Industries and there was only one firm named Akros who received a large sum of money.⁷⁷

There are also laws created to satisfy a temporary need or to remove the obstacles preventing the satisfaction of that need. This is the case with Regulation on Wetland Conservation No. 28962 in Turkey of 2014. The purpose of the regulation was to reclassify wetland areas in two groups –of ‘national importance’ and of ‘local importance’- in order to diminish the legally recognized importance of the wetlands on property allocated for the construction of the new Istanbul Airport. The law defined the wetlands on the property planned for the airport as of ‘local importance’, which implied the decriminalization of their devastation for construction purposes and released the General Directorate of State Airports Authority from any responsibility in regard with the Ramsar Convention on the protection of wetlands, in force since 1994. The beneficiaries of this decision are the airport’s contractors, which are firms in the Cengiz-Kolin-Limak-MAPA-Kalyon Venture Group, known for their personal and financial ties to the government.⁷⁸

Laws to diminish institutional oversight capacity

An example of this type of law can be found in the Amnesty Law adopted in December 2018 in North Macedonia. This law exempts from criminal prosecution, terminates criminal proceedings against and exempts from prison anyone who is suspected of having committed a crime related to the events in the Parliament of North Macedonia on 27 April 2017. On that day around 300 people from the Association for a Common Macedonia stormed the Assembly to prevent the election of Talat Xhaferi as President of the Assembly. The law received opposition from lawyers, legal experts and civil society because, they argued, it intervenes in the independence of the judiciary and it contains confusing provisions on the role of the

⁷⁵ İsmail Ari, ‘The Minister of Health is not getting enough income: he issued a special notice for his own hospital’ (title translated), *Bir Gün*, 5 August 2019.

⁷⁶ Irina Slinko, Evgeny Yakovlev and Ekaterina Zhuravskaya, 2005, op. cit.

⁷⁷ Ibid.

⁷⁸ Andrew Wilks, ‘Turkish opposition challenges conglomerates that “exploit” the economy’, *The National News*, 11 December 2020.

court and the prosecutor.⁷⁹ Critiques also argued that an amnesty law should be a general legal act rather than based on the category of the person. Under this law, 20 people were granted amnesty.

Laws to remove or appoint un/wanted officials

One of the most effective ways to control public-decision making is to have loyal people in responsibility roles. That implies the need to control who is appointed, as well as how to remove those against the capture agenda. In 2018 in Kosovo, for example, the Law on Notary Office enacted two controversial issues with respect to the previous law: an increase in the number of notaries and a weakening of the eligibility criteria. Under the new law, the number of notaries may be increased by minister's decision to one notary for every 10,000 people (in the previous law it was one notary for every 20,000 people). Regarding the selection criteria, under the new law notaries are required to have at least three years of working experience in the field of law, instead of three years of experience as a lawyer under the previous law. Another controversial change was that, if in the previous law there was a requirement about not being a member of a political party, in the new law the person will be deemed as not meeting the criteria only if he or she holds a political post.

Since in Kosovo notaries are considered public servants and they have a quasi-judicial character, the new Law was perceived by some as paving the way for political appointments.⁸⁰ The concern on its risks increased considering the role of notaries in real state deals and that this is one of the most lucrative economic sectors in Kosovo. The risk of conflict of interest in this law was expressed when, in a call for notaries in 2019, at least 60 candidates who passed the written exam were members of political parties and family members of individuals connected to the judiciary.⁸¹

An attempt of this type of tailor-made law was made in Bosnia and Herzegovina through the Amendments to the Law on the Civil Service of the Federation of Bosnia and Herzegovina (FBiH), adopted in October 2015. These amendments excluded high and mid-management positions from the category of civil servants, which meant that their appointment or dismissal would depend directly on the political mandate of the ruling party at the time. Moreover, assistants in the ministries would be nominated by ministers and approved by the government of the FBiH, which increases the direct power of the FBiH's government over appointments. Finally, the Constitutional Court of FBiH declared the amendments unconstitutional because they were adopted in urgent procedure without legal justification, and also because the law did not guarantee equal opportunities in the civil service. Thus, the law did not come into force.

⁷⁹ Vlado Apostolov, 'The amnesty puts the court in an abnormal situation' (title translated), *Prizma*, 19 December 2018.

⁸⁰ Kosova Democratic Institute, 2020, op. cit.

⁸¹ Saranda Ramaj, 'Candidates for notaries related to politics, system and selection committee' (title translated), *Koha*, 29 June 2019.

In some countries in Africa, as already explained, constitutional reforms and intervention in electoral rules are common strategies to maintain incumbents in power after their initial mandate is over, to control which candidates are elected, and to reduce the chances of the opposition to reach the government. A concrete example of how this can happen is found in Uganda and it consists in fractioning the electoral map. The creation by president Museveni of 75 new counties lead to the creation of 53 new constituencies at the time of the 2016 elections in order to fraction areas where the opposition was gaining support.⁸²

The control of the election process is facilitated by the fact that often the power to appoint members of the electoral authority lies on the executive power. This opportunity is used by networks of state capture to influence presidents to nominate certain individuals that will act as their proxies extending, thus, the patronage network in government.⁸³ The expectation is that once elected, those proxies will deliver the profits of office to their benefits in the form of goods or allowing them to be the facto decision makers in the office held by the proxy.

Strategies in the adoption of tailor-made laws

Tailor-made laws are not easy to identify, but irregularities in the laws adoption and who benefits or are excluded from their benefits, might be indicators of whether a law is tailor-made. Several aspects and strategies can be instrumental in the adoption of tailor-made laws as follows.⁸⁴

The institutional system

Institutional systems might have some characteristics that enable its manipulation. In Turkey, for instance, since the 124th amendment of the Constitution, ministers are allowed to issue regulations to ensure the implementation of the laws in their area of functioning without the approval by Parliament or any other legislative body. This capacity has been used in some of the tailor-made laws collected by Transparency International Turkey such as the Social and General Health Insurance Law No. 5510 modifying the categories of healthy-care providers,⁸⁵ and the Presidential Decree No. 17 altering the conditions to appoint university rectors.⁸⁶ Decree No. 17 rescinds the requirement of a three-year tenure as professor to be appointed as rector and allows newly tenured professors to achieve that position. Two days after the amendment, the

⁸² Olufunto Akinduro and Grant Masterson, 2018, op. cit.

⁸³ Ibid.

⁸⁴ Classification based on Transparency International's work on tailor-made laws in the Western Balkans and Turkey. For more examples see Nieves Zúñiga, 2020.

⁸⁵ Official Gazette, 16 June 2006, No. 26200.

⁸⁶ Official Gazette, 10 July 2018, No. 30474.

one month tenured professor and former undersecretary in the Ministry of Education, Prof. Dr. Yusuf Tekin, was appointed rector of Hacı Bayram Veli University.⁸⁷

In the Western Balkans and Turkey, where political parties play a key role in the capture of the state, the control over the Parliament of the ruling party has been found instrumental for the creation of tailor-made laws. In Albania, the 2008 constitutional amendments introduced an electoral system that empowers establishment parties to decide who enters Parliament, and offer the prime minister more control over the majority in Parliament by means of a vote of confidence. This system weakens the role of the president of the republic since his veto on laws is easier to overturn with a simple majority instead of a qualified majority.⁸⁸

Two operating practices in Serbia such as the fact that the government, and not the Parliament, effectively dictates the legislative agenda, and the practice of grouping unrelated items on the agenda in a single session, limiting thus the time and quality of debate on legislative proposals, are instrumental in facilitating the control of the ruling party over parliamentary activities.⁸⁹ In this way, legislative proposals from the opposition MPs are not discussed, or simply rejected if the government disagrees with them.

Legal loopholes

Legal ambiguities can also help in capturing the system by making laws ineffective. In Bosnia and Herzegovina, the amendments to the Law on Conflict of Interest transfer decisions on conflicts of interest to a new Special Parliamentary Commission with that role. According to the amendments, the new commission delivers decisions by qualified majority, while the rules regulating the commission's work must be approved by both houses of the Parliamentary Assembly, which puts the commission under the control of MPs and their political parties.⁹⁰ This legal loophole played in favor of Dragan Čović, president of the political party HDZ BiH and former member of the presidency of Bosnia and Herzegovina when he was accused of conflict of interest. The case was reported in 2108 to the Special Parliamentary Commission but never got a resolution because the commission members of his party never appeared at the meetings.⁹¹

In some countries there is a tendency to use urgent procedures to pass laws, which increases the risks of undue influence in law-making since the urgency excludes public debate and the possibility of making amendments to the law proposal. For

⁸⁷ 'It became clear to whom the personal decree was issued: Professor last month became rector this month', (title translated), *Cumhuriyet*, 15 September 2018.

⁸⁸ Gjergji Vurmo, 2020, op. cit.

⁸⁹ Sanja Đurković (Ed.), *PrEUgovor Alarm: Report on the progress of Serbia in Chapters 23 and 24* (Belgrade Centre for Security Policy, 2019).

⁹⁰ TI Bosnia and Herzegovina, 2020, op. cit.

⁹¹ Ibid.

example, GRECO's 2019 compliance report on Serbia points out that the large majority of the laws and decisions are adopted under urgent procedures, and most amendments are introduced up to 24 hours before discussion.⁹² Sometimes those urgent procedures have been justified in the Balkan country under national interest or national security reasons, as in the case of the Law on the Security Information Agency, aiming to give the agency's director exclusive rights to decide on the employment, job organization and professional training of the agency's employees.

The typology of laws

In particular, the creation of 'special laws' (*lex specialis*) can assist in capturing law-making by enabling the bypassing of other laws and procedures. Serbia offers a good example in the law regulating the Belgrade Waterfront project, which sought to build a complex of offices and buildings on the riverfront. The project was adopted in 2015 through one-time legal mechanism of *lex specialis* after the government presented it as of prime national interest. From a technical point of view, *lex specialis* are laws created to regulate a specific aspect of a general law. In the Serbian case, however, it was created to suit the exclusive deal between the company Eagle Hills, from the United Arab Emirates, and the Serbian government, which otherwise would have violated Serbian rules on expropriation, public-private partnerships, taxation and public procurement.⁹³

Conclusions

State capture is a complex phenomenon. Its complexity comes from the fact that, despite having an essence as we tried to show in this paper, its expression varies according to the context where it takes place. In addition, the concept of state capture represents the negative form of an unavoidable relationship between the government, the private sector, and a third party often ignored but with a decisive vote on the quality of that relationship which is the society. In other words, it is about the relationship between the private interest and the public one, and the responsibilities and expectations of every actor in a society to preserve the harmony between them. When faced from this perspective, to combat state capture is not anymore the job of a specific public institution –specially difficult in a captured state-, but it requires the awareness and participation of the whole society.

A deep understanding of how state capture operates can provide the clues to combat it. For example, to face the concrete underlying motivations that make actors to invest in capturing the state in order to achieve their goals in a given context, is more manageable than the impossible task of trying to eliminate unstoppable self-interest. Moreover, the fact that state capture operates through networks indicates the need to combat it in a similar way, through broader and interconnected actions at different

⁹² GRECO, *Fourth Evaluation Round. Interim Compliance Report Serbia*, Strasbourg, 2 April 2019.

⁹³ Transparency Serbia, 'Discussion in Parliament on Belgrade Waterfront' (title translated), 8 April 2015; Lucy Barnard, 'Mega-project for Abu Dhabi's Eagle Hills in Belgrade', *The National News*, 26 April 2015.

levels. To be able to see the specificities of state capture and its differences compared to corruption is key to designed tailored anti-capture measures in addition to the traditional anti-corruption ones. Finally, to understand how different parts of the system, such as the judiciary and the parliament, might play a role in favor of the privatization of public institutions, offers valuable knowledge to address the problem in a holistic way.