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State Capture in South Africa: Critical and Comparative Perspectives

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Introduction¹

With the election of Cyril Ramaphosa to the Presidency of the African National Congress in December 2017 and his replacement of Jacob Zuma a couple of months later as the President of the Republic amid persistent and growing allegations of Zuma's corruption, South Africa was reported to be entering a "New Dawn". This paper examines an important feature of the night before the "New Dawn" – the phenomenon of state capture. It is primarily interested in analyzing the civil society mobilization against such state capture, specifically the legal and organizational aspects.

One of President Ramaphosa's first actions was to appoint a high-powered and well-resourced judicial commission of inquiry.² The official terms of reference were "to inquire into allegations of state capture, corruption, and fraud in the public sector, including organs of state." This Commission was initially known as the State Capture Commission and later became best known under the surname of its Commissioner, Deputy Chief Justice Raymond Zondo, thus the Zondo Commission. The Commission began hearing testimony in mid-2018 and by July 2019 had heard more than 80 persons over 130 days.³ Later that month, the Commission heard from none other than ex-President Jacob Zuma himself. Obligated to answer follow-up questions that he termed "cross-examination", Zuma then threatened to withdraw, securing an agreement between his legal team and the Commission (including a postponement) but later informed the Commission he was ill and unable to continue to testify.⁴ The Zondo Commission is only the most prominent among many such forms of investigations. Indeed, the State

¹ An initial version of this chapter was presented in Leiden at the Law & Development Research Network in 2018 and at the PARI Conference: *State Capture and Its Aftermath: Building Responsiveness Through State Reform* (22-24 October 2018). It has also benefitted from comments from Firoz Cachalia, Rudolph Mastenbroek and others.

² "Searching for the Truth: Powerhouse Team to Lead State Capture Inquiry," accessed August 19, 2018, <https://www.timeslive.co.za/news/south-africa/2018-03-07-searching-for-the-truth-powerhouse-team-to-lead-state-capture-inquiry/>.

³ Mark Swilling, "State Capture Commission Awaits a Star Witness – Jacob Zuma," *News24* (blog), July 14, 2019, <https://www.news24.com/Analysis/state-capture-commission-awaits-a-star-witness-jacob-zuma-20190714>.

⁴ "Jacob Zuma Is Too Sick to Appear at Zondo Inquiry next Week," *BusinessLIVE*, accessed April 27, 2020, <https://www.businesslive.co.za/bd/national/2019-11-05-jacob-zuma-is-too-sick-to-appear-at-zondo-inquiry-next-week/>.

Capacity Research Project counted as of July 2019 no less than 28 public state capture investigations, inquiries, and commissions.⁵

By this point, the term “State Capture” had already become part of the public discourse in South Africa. One of the first instances of its use occurred in 2015. The unexpected firing of Finance Minister Nhlanhla Nene in December of that year significantly and negatively affected the financial markets and the value of the country’s currency, the Rand. Thousands of middle class and other citizens marched in the streets to protest against “state capture.”⁶

With only a slight grammatical nuance, the term was used several months later in the report of the Public Protector (one of the constitutionally established “Chapter Nine” institutions) which was released in late 2016.⁷ This report identified prima facie evidence of extensive corruption by, among others, the Gupta brothers, Jacob Zuma, and Zuma’s son, Duduzane Zuma.

Along with other terms such as “repurposing institutions”, “state capture” quickly gained further analytical and political currency after the publication of a donor-funded multi-institutional academic report published in early 2017 entitled “Betrayal of the Promise”.⁸ This was later turned into an edited volume entitled *Shadow State*.⁹ And its authoring academic network, the State Capacity Research Project (SCRP), has conducted further research, including work in the social grants sector (see section three below).¹⁰ The report of the Public Protector was submitted to the Zondo Commission now appears likely to finish its work, slowed down some by South Africa’s Covid19 lockdowns, in 2021.¹¹

After exploring the phenomenon of state capture, this paper investigates the use of legal mobilization theory to describe and contextualize the organization of South African civil society against state capture, with attention to the more general phenomenon of corruption. **Section One** covers state capture, drawing on the 2017-2018 work of the academic network, the State Capacity Research Project, to analyze and attempt to give a definition of the term. It is argued here that the term serves to identify a particular political project, one extant during the Zuma

⁵ Swilling, “State Capture Commission Awaits a Star Witness – Jacob Zuma.”

⁶ Ivor Chipkin, “The End of Tyranny: How Civil Society in South Africa Fought Back,” in *Rising to the Populist Challenge: A New Playbook for Human Rights Actors*, ed. Cesar Rodríguez-Garavito and Krizna Gomez, 2018, 101–12, https://www.dejusticia.org/wp-content/uploads/2018/04/Rising-to-the-populist-challenge_1.pdf?x54537.

⁷ Public Protector, “State of Capture Report,” October 14, 2016, <http://saflii.org/images/329756472-State-of-Capture.pdf>.

⁸ Haroon Borat et al., “Betrayal of the Promise: How South Africa Is Being Stolen,” May 2017, <http://pari.org.za/wp-content/uploads/2017/05/Betrayal-of-the-Promise-25052017.pdf>.

⁹ Ivor Chipkin and Mark Swilling, *Shadow State*, 1st ed. (Wits University Press, 2018).

¹⁰ Robyn Foley and Mark Swilling, “How One Word Can Change the Game: Case Study of State Capture and the South African Social Security Agency” (Stellenbosch, South Africa: Centre for Complex Systems in Transition, Stellenbosch University, July 2018), https://www0.sun.ac.za/cst/wp-content/uploads/2018/07/SASSA-State-Capture-_2018-07_-A4-report-for-web-standard.pdf.

¹¹ Ferial Haffajee, “Zondo Commission Will Be Long and Thorough – Will It Outlast President Ramaphosa?,” *Daily Maverick* (blog), accessed August 21, 2018, <https://www.dailymaverick.co.za/article/2018-08-21-zondo-commission-will-be-long-and-thorough-will-it-outlast-president-ramaphosa/>.

administration and drawing a degree of its force from the apparent failure of black economic empowerment. **Section Two** outlines the civil society mobilization against the state capture project, noting two significant features of such mobilization: that it formed to a significant degree around legal actions and that these actions were undertaken by a second generation of post-apartheid public interest law organizations. Then, **Section Three** describes two significant and representative instances of such legal mobilization. The first consists of litigation engaged in by a second-generation South African public interest law organization, the Council for the Advancement of the South African Constitution (CASAC), in order to ensure the impartiality of the national prosecuting authority.¹² The second instance of litigation took place from 2009 in the social grants payments sector, aiming at ensuring the provision of social assistance, a socio-economic rights benefiting nearly one-third of the South African population. **Section Four** uses legal mobilization theory from socio-legal studies to explore in further depth the mobilization of law against corruption in South African society. Here, it is significant to make the distinction between institutional anti-corruption mechanisms and impact litigation on the one hand and collective legal mobilization against state capture on the other. The **Conclusion** offers some reflections on topics for further research including the place of business in the mobilization against state capture and the emergence of new civil society actors.

State Capture Analyzed and Defined

As an initial matter, it is important to define the phenomenon of state capture. One way to do this is through a close reading of the State Capacity Research Project (SCRP), even though this literature has been as much a player within, as an objective academic observer of, the state capture events. State capture is a political project, reaching beyond simple corruption, which is undertaken by powerful persons within the state as well as in the private sector. State capture engages in a set of network activities which run counter to the intent and objectives of the Constitution.

First, the literature is very clear to distinguish the phenomenon of state capture from the more general one of corruption. It argues that “[i]f we are to expand our understanding of state capture from merely the typical activities of bribery and corruption to being a broader political project, we have to extend our enquiry beyond just the financial flows of ill-gotten gains and definitively criminal activities, to include the currency of power, the bartering of political favours by manipulation of state institutions (trading of fear and favours) and determine the cost this places on all South Africans.”¹³ This point – that state capture is narrower than the general phenomenon of corruption – is persuasive. While it has been convincingly argued that the state capture experience has crystallized and brought to light an

¹² Pierre de Vos, “Council for the Advancement of the South African Constitution (CASAC) » Constitutionally Speaking,” accessed August 25, 2018, <https://constitutionallyspeaking.co.za/council-for-the-advancement-of-the-south-african-constitution-casac/>.

¹³ Foley and Swilling, “How One Word Can Change the Game: Case Study of State Capture and the South African Social Security Agency,” 1–2.

anti-corruption principle in South African constitutional jurisprudence, state capture cannot be fully identified as equivalent to corruption.¹⁴

Second, the SCRP literature identifies seven key forms of activities undertaken within the state capture project. While not all activities need be present, these are the typical state capture activities. For instance, four of these are noted as present in the SCRP treatment of the events within the social grants payments sector. The latter include securing control over the public service, securing access to rent-seeking opportunities by exploiting regulations, in particular manipulating of tender processes, securing control over strategic procurement opportunities by intentionally weakening key technical institutions and formal executive processes, and securing parallel political, governmental, and decision-making structures that undermine the functional operation of government institutions.¹⁵ The three features not directly present in the South African Social Security Agency case study consist of securing control over state-owned enterprises by chronically weakening their governance and operational structures, securing control over the country's fiscal sovereignty, and securing the loyalty of the security and intelligence services by appointing loyalists.¹⁶ The identification of a set of typical, but not necessarily present activities is helpful towards constructing the outlines of the project.

Third, it is important to ask whether state capture was identified solely with the Zuma and Gupta families or whether it is broader. The July 2018 SCRP report on SASSA-gate argues state capture is broader, investigating an episode of politics in which neither the Gupta family nor its associates nor Zuma and his were involved. The then-Minister of Social Development, Bathabile Dlamini – responsible for the South Africa Social Security Agency (SASSA) -- was at the centre of this controversy. A tender involving the largest state contract in South Africa's history was manipulated and the monies paid to the country's social grants recipients were subjected to illegal and unethical deductions. To resolve the crisis and halt the corruption, the Constitutional Court had to temporarily declare the private firm distributing the grants an organ of state and subject it to strict monitoring and accounting requirements.¹⁷ The SCRP report states this aspect "is important as it highlights that state capture is not contained or limited to only a closed circle of connected individuals, but is part of a much larger network of political players."¹⁸ Still, the report is at pains to point out that Jacob Zuma was indirectly involved, at the very least through actions of his close political allies, including Dlamini.

¹⁴ Firoz Cachalia, "Precautionary Constitutionalism, Representative Democracy and Political Corruption," *Constitutional Court Review* 9 (2019): 45–79.

¹⁵ Foley and Swilling, "How One Word Can Change the Game: Case Study of State Capture and the South African Social Security Agency," 2; Ryan Brunette, Jonathan Klaaren, and Patronella Nqaba, "Reform in the Contract State: Embedded Directions in Public Procurement Regulation in South Africa," *Development Southern Africa* 36, no. 4 (July 4, 2019): 537–54, <https://doi.org/10.1080/0376835X.2019.1599712>.

¹⁶ Bhorat et al., "Betrayal of the Promise: How South Africa Is Being Stolen," 15–16.

¹⁷ Jonathan Klaaren, "Social Grant Payments and Regulatory Responses to Corruption in South Africa," in *Corruption and Constitutionalism in Africa*, ed. Charles M. Fombad and Nico Steytler (Oxford University Press, 2020), 90–109.

¹⁸ Foley and Swilling, "How One Word Can Change the Game: Case Study of State Capture and the South African Social Security Agency."

This account of SASSA-gate in the literature is interesting for two reasons. First, it shows that the state capture political project as undertaken through network instruments and techniques. As such, it involved techniques of governance more than of government. Like the new techniques of outsourced government such as public/private partnerships, the state capture operation was one of networks not of hierarchies, bureaucracies, or command and control. The second reason is that the state capture project is shown as involving at its centre, not the Guptas, but rather Jacob Zuma, a person occupying the Presidency of the country, as well as of the governing party. It would appear that the character of the state capture project cannot thus be delinked from its exercise of at least a portion of the power of the office-holder of the most powerful office in the land. Indeed, this overlap with formal state power is a consistent theme in the SCRP literature. The state capture project is sourced as beginning with the Parliamentary passage of the 2010 version of the Protection of State Information Bill in 2011.¹⁹

The literature uses the term “shadow state” – a concept which appears to be the obverse of the constitutional state. The two are a zero sum. In its own terms, the SCRP states “the political project, which is state capture, extends beyond just looting of the state – it is also about the corruption of collective values and the mutating of political ideals...cannot be read directly from the printed letters in the pages of the Constitution, but are discovered by reading between the lines and reside in the spirit and principles on which this document is founded.”²⁰ The aim of the state capture is defined as a political project which aims “to continue, grow, and ultimately replace the current socio-political compact as laid out in the Constitution.”²¹ This characterisation again draws much of its force from the position of Zuma as both President of the Republic and as a participant in an informal, but obviously powerful, network.

In July 2019, Swilling described state capture as “... a form of grand corruption. In the case of South Africa, it can be defined as the formation of a shadow state, directed by a power elite. This shadow state operates within – and parallel to – the constitutional state in formal and informal ways.”²² In similar vein, Michelle le Roux and Dennis Davis say that state capture is: “[t]he construction of a parallel state utilizing existing organs of state, state-owned enterprises and constitutionally mandated institutions for corrupt objectives, primarily by deploying leaders to those organisations that display a firm commitment to subverting accountability or diverting them from their lawful mandates and a resolute determination to ignore the consequences of their conduct for the people they serve.”²³

Civil Society and Anti-State Capture Litigation

¹⁹ Chipkin and Swilling, *Shadow State*, 2–3.

²⁰ Foley and Swilling, “How One Word Can Change the Game: Case Study of State Capture and the South African Social Security Agency,” 1.

²¹ Foley and Swilling, 3.

²² Swilling, “State Capture Commission Awaits a Star Witness – Jacob Zuma.”

²³ Michelle le Roux and Dennis Davis, *Lawfare: Judging Politics in South Africa* (Jonathan Ball Publishers, 2019), 267.

An extraordinary wave of mobilization against the state capture phenomenon dating from the firing of Finance Minister Gordhan and Ramaphosa's narrow victory for the Presidency of the ANC in December 2017 resulted in Zuma's forced resignation from the Presidency in February 2018. Even before these events, one important initiative of political mobilization began as soon as August 2016 -- Siphon Pityana's speech at Makhenkesi Stofile's funeral – the founding and initial operations of the campaign SAVE-SA.²⁴

In the SCRP literature, the mobilization against state capture has been analysed as consisting of four tactics: litigation, social mobilisation, political mobilisation, and unsettling hegemony.²⁵ Beginning with the first tactic – litigation – but examining also its interconnections to the others, this section initially presents further background on civil society's mobilization against corruption and state capture. Arguably new elements of this mobilization were the participation of business, the participation of a new generation of public interest law organisations, and a new theme, viz., the call for an efficient public administration. The remainder of the section outlines two examples of lengthy litigation against state capture: the legal fight against partiality in the post of the National Director of Public Prosecutions and the lawsuits against corruption and maladministration in the payment of social grants.

The political mobilization against state capture was diverse and included some organizations and grouping that were new to civil society. Organisations representing business were prominent new members in this wave of civil society activism. One particularly important actor is Business Leadership SA (BLSA) which represents the country's largest corporations. At the time of their mobilisation, other civil society actors thought the entry of the business sector into the political sphere was tardy. Moreover, the direct participation by business in collective legal mobilization was fairly short-lived. From the point which Ramaphosa emerged as the President of the ANC, the available evidence suggests that the business sector largely has returned to more individualized pursuit of redress for corruption or to a more accommodative stance in its relationships with both state departments and state-owned entities. Once the immediate risk of state capture appeared countered, business organizations no longer initiated funding or in some cases withdrew civil society funding already in the pipeline.

Much of the mobilisation against state capture was facilitated through well-established organisations some of which had a direct history of anti-apartheid protest. For instance, Section 27 played an important role in mobilizing opposition apart from instituting litigation against the state. It had partnered with the Public Affairs Research Institute (PARI) in organising a protest demonstration at Pretoria's Church Square following the long-feared move against Minister of Finance Gordhan. Section 27's tradition of constituency mobilisation against HIV/AIDS itself having drawn upon anti-apartheid protest traditions was clearly helpful

²⁴ "TEXT: Siphon Pityana Speech at Stofile Funeral | News24," accessed October 10, 2018, <https://www.news24.com/SouthAfrica/News/text-siphon-pityana-speech-at-stofile-funeral-20160826>; Siki Mgabadel, "The Campaign to 'Save South Africa,'" *The Media Online* (blog), October 25, 2016, <http://themedialonline.co.za/2016/10/the-campaign-to-save-south-africa/>.

²⁵ Chipkin and Swilling, *Shadow State*, 12.

experience in the mobilization against state capture.²⁶ But some organisations (including PARI) facilitating the mobilization against state capture, did not have a direct history of anti-apartheid protest.

The themes and content of the political mobilization against state capture also pushed boundaries for South African civil society. As Ivor Chipkin noted at the time, “civil society activists in South Africa have ... taken up issues of state building, and even more surprisingly, of public administration. For the first time, there is appreciation for the fact that the immediate victims of tyranny in South Africa have been honest civil servants committed to a ...[professional]...public service ethos.”²⁷ This theme, and its reception and articulation added nuance to the public denunciation of corruption, inflecting it with a defence of the values of the Constitution and the institutions and structures it establishes.

A great part of this political mobilization occurred in, and through, legal processes. As one early analysis observed “[t]he growing lawlessness of the government ... made litigation an often powerful tool. The high courts ... overwhelmingly safeguarded their independence, and civil society groups ... [have been able to]... successfully challenge illegal government decisions and appointments. This has ranged from challenging the president’s appointments of heads of key state institutions (the state prosecuting authority and the police), to reinstating criminal charges against the president himself, to upholding the independence of state organs, to insisting on the rule of law of constitutional principles, and to further developing the jurisprudence on public law.”²⁸

The direct use of law in civil society mobilization is not new in South Africa. A direct link may be made from the legal mobilization against state capture to South Africa’s history of legal mobilization against apartheid. One key text for understanding that mobilization during the fertile and fermented decade of the 1980s is Richard Abel’s book, *Politics by Other Means*.²⁹ This tradition includes early episodes such as the 1952 “Coloured” voting cases as well as the significant use of the law by the trade union movement from (what is called) the Durban Moment onwards.³⁰

In the early post-apartheid legal actions, the most significant may well be the actions focused around corruption in the Arms Deal. Lawyers for Human Rights, an anti-apartheid organization founded in the late 1970s, was a key organisation promoting this litigation. On the whole, the Arms Deal cases were unsuccessful because they were able neither to prevent the

²⁶ Steven L. Robins, *From Revolution to Rights in South Africa: Social Movements, NGOs & Popular Politics After Apartheid* (Boydell & Brewer Ltd, 2008).

²⁷ Chipkin, “The End of Tyranny: How Civil Society in South Africa Fought Back,” 109.

²⁸ Chipkin, “The End of Tyranny: How Civil Society in South Africa Fought Back.”

²⁹ Richard L. Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (Taylor & Francis, 1995).

³⁰ Johann Maree, “The Durban Moment: Turning Temporary Worker Action into a Permanent Democratic Trade Union Movement ... and Then ... ?,” *Transformation: Critical Perspectives on Southern Africa* 100, no. 1 (2019): 53–77, <https://doi.org/10.1353/trn.2019.0022>.

corruption involved nor to recover the proceeds, nor did they succeed in uncovering the truth of what happened. Although one Arms Deal court case did lead to the appointment of a judicial commission of inquiry, called the Seriti Commission. This inquiry took place during the period of state capture but was widely regarded as a whitewash and has been judicially set aside.³¹

The most direct successful precedent for the legal actions against state capture arguably consists of the three Glenister cases.³² This litigation was initiated and financed by a businessman, Bob Glenister. Positioned outside of established civil society, and prompted by the dismantling of the Scorpions, an elite and successful postapartheid police/prosecutions division, the action was taken in the wake of the limited mobilization against the Arms Deal. The demise of the Scorpions will be considered an instance of one of the seven state capture typical activities, viz., “securing control over strategic procurement opportunities by intentionally weakening key technical institutions and formal executive processes.” The Glenister litigation also fits easily in the Shadow State versus Constitutional State narrative. As the legal activist Paul Hoffmann has observed, “the Glenister cases ... spawned imaginative judicial interventions based on the notion that failure to take appropriate measures to combat corruption is regarded as a violation of human rights in South Africa.”³³

Much of the litigation directed against state capture was driven by opposition political parties. Perhaps the most prominent was the cause launched by the EFF against President Zuma over the Nkandla issue.³⁴ Another important case was the legal action taken by the Democratic Alliance against the dropping of corruption charges dating from the Arms Deal against Jacob Zuma.³⁵ As of mid-2020, this case is still live and may yet lead to some further transparency regarding the Arms Deal. By one count, there were at least 48 cases opened in front of the judiciary against state capture.³⁶ These litigation campaigns were significant and each is deserving of further attention. However, they are not the focus of this analysis. Instead, we turn to the organizers of this litigation.

³¹ “Politicsweb - Why We’re Withdrawing from the Arms Deal Inquiry - Feinstein, Holden and Van Vuuren - Top Stories,” Politics Web, accessed August 29, 2014, http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=700830&sn=Marketingweb+detail&pid=90389&utm_source=Politicsweb+Daily+Headlines&utm_campaign=06d3dc4cdf-DHN_Aug_29_2014&utm_medium=email&utm_term=0_a86f25db99-06d3dc4cdf-130040921; Andrew Feinstein, *After the Party: Corruption, the ANC and South Africa’s Uncertain Future* (Verso, 2010).

³² *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011), accessed May 23, 2017.

³³ Paul Hoffman, “Combating Corruption at the Coalface in the Courts: Jurisprudential Gems Mined in Braamfontein,” n.d.

³⁴ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), accessed September 27, 2016.

³⁵ *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012), accessed January 27, 2017.

³⁶ le Roux and Davis, *Lawfare*, 273–76.

Legal mobilization was often facilitated by intermediary organisations, including those with links to, or even existing within, the legal sector. Such organisations consisted in some significant part, but by no means exclusively, of law firms and public interest law organisations. To some extent, this may have continued the practice used in the Glenister litigation. Personnel at a number of the leading Johannesburg corporate law firms were called upon - or took the initiative - to provide legal arguments that could be undertaken by business organizations against aspects of state capture. This creative and innovative lawyering also took place in intermediary spaces such as the public interest-oriented advocates at the Bar. This resulted in the engagement of the university-based Centre for Applied Legal Studies (CALS) in an interesting hybrid litigation in partnership with both Black Sash and Corruption Watch. In this telling, the lawyers may come off rather well, but perhaps only in comparative terms.³⁷ And of course, this story is not entirely positive for organisations and numerous individual professionals in the legal sector. At least as a footnote, it is necessary to record the fact that one law firm joined the ranks of the captured or even the captors – Hogan Lovells.³⁸ This said, the firm appears not to have survived this action, at least not in its previous form.

What might be termed a ‘second generation’ of post-apartheid public interest law organizations were founded or began to engage in litigation in the public interest around 2010.³⁹ This group includes organisations established after the ending of apartheid such as the Centre for Constitutional Rights, the Centre for Accountability, and the Helen Suzman Foundation, as well as a set of newly minted civil society groups like Corruption Watch (CW), the Council for the Advancement of the South African Constitution (CASAC), Organisation Undoing Tax Abuse (OUTA), and Freedom Under Law (FUL) which were established around 2008-2012.

These second generation of public interest law (PIL) organizations differ in at least three ways from the previous generation. First, the earlier ones – including the Centre for Applied Legal Studies, Lawyers for Human Rights, and the Legal Resources Centre – often have walk-in clinics or offer legal services to individual members of the public.⁴⁰ By contrast, these new PIL organisations do not have such direct client services – although, arguably, Corruption Watch is an exception, with significant direct outreach and use of interactive social media portals.

³⁷ Open Secrets, “The Enablers: The Bankers, Accountants and Lawyers That Cashed in on State Capture,” February 2020, 39–45, https://www.opensecrets.org.za/site/wp-content/uploads/TheEnablers_web.pdf.

³⁸ Pauli Van Wyk, “Hogan Lovells Went out of Their Way Not to Investigate SARS’ Jonas Makwakwa, Documents Show,” *Daily Maverick* (blog), accessed May 19, 2018, <https://www.dailymaverick.co.za/article/2018-05-15-hogan-lovell-went-out-of-their-way-not-to-investigate-sars-jonas-makwakwa-documents-show/>; Pauli Van Wyk, “SCORPIO ANALYSIS: KPMG and Hogan Lovells Still Have Much SARSplaining to Do,” *Daily Maverick* (blog), accessed May 27, 2018, <https://www.dailymaverick.co.za/article/2018-05-24-kpmg-and-hogan-lovell-will-still-have-much-sarsplaining-to-do/>.

³⁹ There is a considerable literature on public interest lawyering in South Africa: see e.g. Jason Brickhill (ed), *Public Interest Litigation in South Africa* (1st edn, Juta 2018) and Jonathan Klaaren, Jackie Dugard and Jeff Handmaker, ‘Public Interest Litigation in South Africa: Special Issue Introduction’ (2011) 27 *South African Journal on Human Rights* 1.

⁴⁰ Jonathan Klaaren, “South Africa: A Profession in Transformation,” in *Lawyers in 21st-Century Societies: Vol. 1: National Reports*, ed. Richard L. Abel et al. (Bloomsbury Academic, 2020), 535–46.

Second, the new groups are more aligned to the establishment agenda than the established groups, with seemingly greater overlap of personnel and funding sources, especially into the business sector. Indeed, several of the new PIL groups do not have much, if any, staff beyond a single director (e.g. FUL and CASAC). In terms of the political spectrum, while CASAC is a self-avowedly progressive organisation and CW is aligned with the broad trade union movement, FUL has establishment lawyers, ex-judges and business persons on its board, and HSF and OUTA are clearly not aligned with the ANC but are within mainstream business and Democratic Alliance (DA) non-racial politics. In December 2017, the HSF and Magda Wierzycka, the chief executive officer of a financial services firm, embarked on litigation against President Zuma and 74 other persons for breaches of the Prevention of Corrupt Activities Act.⁴¹ As noted above, the interest of business in funding NGO activities is somewhat capricious.

Finally, the first generation evinced a socio-economic rights agenda and displayed a set of organisational mandates; the newer groups are firmly mandated to deal with civil and political rights as well as governance issues clearly located within a rule of law agenda.

On the whole, it may be more accurate to term these new organizations less as human rights or public interest law organizations, and more as lobbying groups. In this sense, their appearance and action would fit with the recent appearance of other lobby groups, including AfriForum, a group aligned with conservative and racial white politics.⁴² These developments may well point to the emergence of a new type of politics, lobbying politics which is precisely the opposite of state capture politics. This is because influence is mobilized not to capture state power, but rather to influence the holder of state power, without regard to the identity of that holder of state power. This phenomenon within civil society may form part of the emergence of regulatory politics in post-apartheid South Africa.⁴³

Litigation Forays Against State Capture: Two Cases

This section outlines two instances of litigation, undertaken at least in part by this second generation of post-apartheid public interest law organisations. These are the lawsuits against partiality in the post of the National Director of Public Prosecutions and the lawsuits against corruption and maladministration in the payment of social grants. The singling out of these does not suggest that they were more significant than other legal campaigns, though the two were central and were broadly representative of the litigation undertaken.

⁴¹ Marianne Thamm, "State Capture: Helen Suzman Foundation and Magda Wierzycka Sue President Zuma and 74 Others," *Daily Maverick*, accessed August 25, 2018, <https://www.dailymaverick.co.za/article/2017-12-15-state-capture-helen-suzman-foundation-and-magda-wierzycka-sue-president-zuma-and-74-others/>.

⁴² Steven Friedman, "Trump's Comment about South Africa Is a Reminder That Race Still Matters," *The Conversation* (blog), accessed September 1, 2018, <http://theconversation.com/trumps-comment-about-south-africa-is-a-reminder-that-race-still-matters-102212>.

⁴³ Jonathan Klaaren, "Regulatory Politics in South Africa 25 Years After Apartheid," *Journal of Asian and African Studies*, 2020.

The first litigation is nearly entirely associated with CASAC. As noted, CASAC describes itself as “a project of progressive people who seek to advance the South African Constitution as the platform for democratic politics and the transformation of society. It embraces the contestation of ideas, and encourages debate on how best to build a just and equal society in which people can live securely and with dignity.”⁴⁴ Two key figures in initiating the organisation were Lawson Naidoo, the former deputy of the Ginwala Commission of Inquiry⁴⁵, and Sipho Pityana, the former Director-General (DG) of the Department of Foreign Affairs from 1999 to 2002 and earlier DG of the Department of Labour. At the time of CASAC’s founding, Pityana was a prominent businessperson and as noted, in August 2016, he made a decisive speech at Makhenkesi Stofile’s funeral. Naidoo would become CASAC’s executive secretary and Pityana would become its Chairperson.⁴⁶

In July 2013, CASAC filed papers in the Constitutional Court in order to compel the appointment of a permanent NDPP, when an acting appointment was perceived to be compliant to then-President Jacob Zuma’s wishes. The Court was asked to declare that the President had failed in his constitutional obligation to appoint a prosecutions chief “diligently and without delay”. That case was withdrawn after prompting the appointment of Mxolisi Nxasana as a permanent NDPP.⁴⁷ A successor case was later filed challenging the golden handshake removal of Nxasana, coupled with a challenge to Zuma’s appointment of Shaun Abrahams. This second case was eventually decided in mid-2018 in CASAC’s favour, with an order that now-President Ramaphosa appoint a National Director of the National Prosecutions Authority (NPA) within 90 days of 13 August 2018.⁴⁸ The case had four of the five “new” public interest law organisations participating with three applicants as CW, FUL, and CASAC and HSF playing a role as *amicus curiae*.

The case has at least two significant institutional dimensions that went beyond the important immediate consequence that Abrahams needed to vacate the position. First, the Constitutional Court struck down two significant aspects of the statutory framework structuring the NPA. The court voided the section of the Act providing for an National Director of Public Prosecutions (NDPP) in terms of the President’s discretion to continue to serve past retirement

⁴⁴ “About CASAC | CASAC,” accessed August 25, 2018, <https://www.casac.org.za/about-casac-2/>.

⁴⁵ “Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of National Director of Public Prosecutions (Ginwala Report),” November 2008, https://www.gov.za/sites/default/files/gcis_document/201409/ginwalareport1.pdf.

⁴⁶ In late 2017, Pityana resigned from the Council, noting a complaint made by seven civil society organisations earlier in the year and alleging a conflict of interest on the part of Naidoo. Pityana stated that the conflict amounted to a “direct leveraging of a political campaign for commercial gain”. Linda Ensor, “Sipho Pityana Leaves Council over Marikana Report,” December 15, 2017, <https://www.businesslive.co.za/bd/national/2017-12-15-sipho-pityana-leaves-council-over-marikana-report/>.

⁴⁷ ‘Casac Welcomes Zuma’s NDPP Appointment Deadline’ (*The Mail & Guardian*, 25 July 2013) <<https://mg.co.za/article/2013-07-25-casac-welcomes-zumas-intention-to-appoint-ndpp/>> accessed 20 December 2020.

⁴⁸ *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018), accessed August 25, 2018.

age. And Parliament was ordered to make changes to the framework allowing the President to suspend an NDPP for an indefinite period with no pay. These are fairly significant changes to the Act and more changes to the appointment and removal provisions may follow as part of the legislative consideration needed.⁴⁹

President Ramaphosa's implementation of this order has created the second institutional consequence. While not required to do so, Ramaphosa has opted to set up a panel of persons to recommend to him 3 to 5 candidates for the post of NDPP. This mechanism parallels that set up in the Constitution to propose judges for the Constitutional Court, subject to the final choice of the President from the four candidates identified by the Judicial Services Council (JSC). While this mechanism cannot yet be said to be an institution, it is an interesting consequence that would not likely have been put into place without the litigation.⁵⁰

The second instance of a lawsuit begun against state capture occurs in the social grants payment sector. At least for present purposes, the first lawsuit in this sector may be traced ironically to an action launched by Cash Paymasters System (CPS), later to be itself the target of several lawsuits. At this point in the story, SASSA had been created by legislation in 2006 as a national agency to manage social grant payments, taking over that function from the provinces. In early 2007, SASSA issued a request for proposals (RFP) for a national system of paying grants. In late 2008, it was forced to withdraw this tender and issue a Narrative Report in early 2009 explaining the reasons for the withdrawal. In the meantime, the continuing provincial distribution contracts to CPS and other payments companies continued and were extended by SASSA with the concurrence of National Treasury. In explaining the background to the Narrative Report, the then-Minister of Social Development, the well-respected Zola Skweyiya, stated that "[t]he Minister and SASSA are also concerned about the fact that certain service providers have dominated the social grants payment market since the service was opened up. In the current bid process, instead of looking for one service provider to ensure uniformity of services nationwide, SASSA decided to subdivide the bid into nine provincial tenders. This will prevent the development of a monopoly and allow opportunities for new entrants into the market."⁵¹ This was an example of the philosophy of dynamic competition, where a regulator or state agency applies the principle of competition policy in order to structure a well-functioning and competitive market, in this case attempting to avoid a monopoly over social grant payments. Sadly, this was not the approach followed under Skweyiya's successors.

⁴⁹ Florencia Belvedere, "Appointments and Removals in Key Criminal Justice System Institutions" (Public Affairs Research Institute, April 2020); Glynnis Breytenbach, "We Should Be Considering Constitutional Amendments to Ensure an Independent NPA," *Daily Maverick* (blog), accessed October 11, 2018, <https://www.dailymaverick.co.za/article/2018-08-21-we-should-be-considering-constitutional-amendments-to-ensure-an-independent-npa/>.

⁵⁰ Karyn Maughan, "Cyril Ramaphosa in Major Shift Asking Panel to Help Find Shaun Abrahams's Replacement," October 10, 2018, <https://www.businesslive.co.za/bd/national/2018-10-10-cyril-ramaphosa-in-major-shift-asking-panel-to-help-find-shaun-abrahams-replacement/>.

⁵¹ Foley and Swilling, "How One Word Can Change the Game: Case Study of State Capture and the South African Social Security Agency."

In this light, it may not be surprising that CPS fired the first legal salvo, attempting to void a letter of agreement between SASSA and the South African Post Office. The letter of agreement recorded an intention to develop an inter-government agency relationship between these two public entities in order to develop a public payment system for social grants. Ironically, the legal basis for the litigation to void this letter was that it violated procurement policies. The case proceeded through the High Court (October 2009) with an interim win for CPS and then concluded in the Supreme Court of Appeal (March 2011) with a reversal.⁵² The reasoning in this SCA case was itself a precedent for the later reasoning of the Constitutional Court.⁵³

Further litigation took place after the next tender – the request for proposals for which had been released in April 2011 and then infamously “clarified” in a last-minute change that heavily favoured CPS in June 2011 – had been awarded to CPS on 17 January 2012. It was not litigation undertaken in the public interest. A collective of losing bidders, including the other provincial payment service providers, sued the Department of Social Development, SASSA, and CPS. This is the beginning of litigation, known as AllPay, a case that remains live and open before the Constitutional Court. In August 2012, the High Court found against CPS but declined to set aside the tender as a matter of remedy and in March 2013, the SCA upheld the cross-appeal of CPS, making the tender award valid.⁵⁴

At this point, AllPay approached the Constitutional Court where Corruption Watch and the Centre for Child Law became *amicus curiae* in the case. The Constitutional Court ruled on 29 November 2013 that the tender was invalid.⁵⁵ On 17 April 2014, the Constitutional Court suspended the order of invalidity.⁵⁶ The action of the Court was premised on SASSA issuing a new tender within a proper procurement process, with the CPS contract coming to an end in early 2017.

As the State Capacity Research Project has detailed, a new Minister for Social Development (DSD), Bathabile Dlamini, influenced this procurement process (for the post-CPS 2017 onwards contract) in a manner to benefit CPS and the state capture project. Part of this contestation featured the entrance into the litigation sphere of the Black Sash Trust with the Centre for Applied Legal Studies (CALS) as its lawyers in order to safeguard the data protection

⁵² CEO of the South African Social Security Agency N.O and Other v Cash Paymaster Services (Pty) Ltd (90/10) [2011] ZASCA 13; [2011] 3 All SA 233 (SCA); 2012 (1) SA 216 (SCA) (11 March 2011), accessed August 29, 2018.

⁵³ Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (November 29, 2013).

⁵⁴ AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others (678/12) [2013] ZASCA 29; [2013] 2 All SA 501 (SCA); 2013 (4) SA 557 (SCA) (27 March 2013) (March 27, 2013).

⁵⁵ Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).

⁵⁶ Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) (April 17, 2014).

and privacy rights of social grant beneficiaries. This was important because they were often subject to coercive marketing of financial and other services by CPS-linked companies. In some instances, this meant that social grant recipients in fact received no net funds from their social grants. The Black Sash contested the initial RFP issued in December 2014, leading to a revised RFP being issued after a Constitutional Court order made on 24 March 2015.⁵⁷

The continued influence of state capture led to the third major Constitutional Court judgment in this legal campaign. The flashpoint was the expiration at the end of March 2017 of the invalid, but temporarily valid, contract for CPS. The Court had discharged its initial supervisory jurisdiction over SASSA on 25 November 2015.⁵⁸ Here, in widely televised and compelling proceedings, the Constitutional Court on 17 March 2017 again extended the validity of the CPS contract ensuring the delivery of the social grants. Just as significantly, the Court held the Minister to account, initiating a separate process for determining her personal liability for the crisis and attempted to ensure that CPS did not profit from the further extension.⁵⁹ One of the second generation PIL organisations, FUL, intervened in this action. This March 2017 Court hearing was followed by a nationwide televised audience and was undoubtedly part of the turning of the tide against state capture.

Other directly relevant litigation has perhaps been overshadowed by the dramatic Constitutional Court litigation. Two further cases are significant here for understanding the full scope of the legal mobilization against state capture in the social grant payments sector. First, Black Sash took the DSD to court over matters related to the data protection and privacy rights of the social grant beneficiaries. Second, Corruption Watch took SASSA to court over an allegedly corruption extra payment by SASSA to CPS for the re-registration of beneficiaries in the amount of approximately R300m. The High Court decided in favour of Corruption Watch in early 2018.

It should be clear that the foregoing did not engage with the content of the law against state capture itself. Rather, the discussion was concerned with the historical precedents of legal actions, with the collective mobilization against state capture engaged in by various firms and networks through legal action, and with the rising number of anti-corruption legal actions evident before and during the height of state capture. These may be understood as legal channels in the institutions of justice in which social and political forces mobilized against state capture flowed.

The discussion focused on two slices of the litigation that was part of the mobilization against state capture. The first was the “unfit for public office” line of cases pursued by the CASAC, Corruption Watch and several other of the new civil society groups emerging around

⁵⁷ AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others, [2015] ZACC 7 (2015).

⁵⁸ Foley and Swilling, “How One Word Can Change the Game: Case Study of State Capture and the South African Social Security Agency,” 26.

⁵⁹ Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening) (CCT48/17) [2017] ZACC 8 (17 March 2017), accessed April 4, 2017.

2011/2012. The second was the litigation in the social grants sector that attempted to avoid disruption to the delivery of these grants (socio-economic rights in South Africa in terms of the Bill of Rights) to around 15 million of the poor.

The Place of Law in the Mobilization Against State Capture

With the above understanding of the state capture phenomenon as conveyed in Section One and the overall portrait of litigation and its place in the mobilization against state capture as conveyed in Sections Two and Three, this section uses legal-mobilization theory to explore in further depth the place of law in the mobilization against state capture. Here, it is significant to make an essential distinction between institutional anti-corruption mechanisms and collective mobilization against state capture. The section discusses also the distinction between individual and collective action in the face of corruption.

The use of law as part of collective legal mobilization is rare. Most commonly, the direct employment of law takes place within individualized actions – often ending in settlement or the resolution of the dispute upon payment of relatively small amounts.⁶⁰ Indeed, one might easily argue that law is most often employed to frustrate collective mobilization. For instance, employment discrimination litigation in the US demonstrates the general phenomenon whereby legal jurisdiction may be used to extend jurisdiction without providing an effective remedy.⁶¹ This analysis of law's anti-mobilizing effect has long been championed by critical legal studies.

This observation is relevant to the use of law against corruption and state capture in South Africa. The use of law against corruption as part of a larger project of collective legal mobilization against the phenomenon is also rare. Numerous individual cases against fraud and corruption have been opened and processed in South Africa without forming part of a broader social movement.⁶² This makes the centrality of law and legal organisations with the South African mobilization against state capture all the more demanding of explanation.

To do so, the distinction between collective legal mobilization and institutional anti-corruption mechanisms is helpful. There is a world of difference between anti-corruption mechanisms and collective mobilization. The existence of an institution such as the police complaints directorate such as IPID does not at all entail the working of an effective social movement against police abuse and corruption. Law was used within collective mobilization to oust state capture, not to reform a specific anti-corruption institution.

⁶⁰ Bryant G. Garth and Mauro Cappelletti, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective," *Buffalo Law Review* 27 (1978): 181–292.

⁶¹ Laura Beth Nielsen, Robert L. Nelson, and Ryon Lancaster, "Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States," *Journal of Empirical Legal Studies* 7, no. 2 (June 1, 2010): 175–201, <https://doi.org/10.1111/j.1740-1461.2010.01175.x>.

⁶² Chipkin and Swilling, *Shadow State*, 46–48; Klaaren, "Social Grant Payments and Regulatory Responses to Corruption in South Africa," 93–96.

Yet, there are connections as well. Ordinary day to day actions taken by both individuals and by organisations against corruption is often facilitated by institutions and mechanisms.⁶³ Some recent work of constitutional scholars focusing on the building of constitutional infrastructures fits with this set of questions. Heinz Klug has pointed out how the existence of a combination of "integrity institutions" (including the Public Protector) was a major factor in the ability of individuals, non-government organizations, and opposition political parties to "temper" the abuse of power that had begun to undermine the post-apartheid democracy.⁶⁴ Aiming at 'self-dealing' by elected public representatives that threatens the republican institutions of democratic self-government, Firoz Cachalia has found in recent decisions of the Constitutional Court a precautionary anti-corruption principle, justified on political process grounds.⁶⁵ The articulation and validation of such a principle by the highest court in the land can have significant encouraging impact on individuals and organisations within civil society. More generally, James Fowkes has theorized the crucial role of infrastructures – mechanisms for implementing judicial decisions – in the building of South Africa's constitution by the Constitutional Court. In his view, "where the official institutional infrastructure cannot, for one or other reason, be relied on to some degree, the presence of civil society groups can be vital because they can serve as temporary infrastructure."⁶⁶ Given the ascendancy of the shadow state over the official bureaucracy, civil society played a vital and interactive role with the courts.

As shown by the sections above, the character of collective legal mobilization against state capture goes beyond the paradigm of impact litigation.⁶⁷ The actors in the legal campaigns described above did not see the state as an obstacle, requiring those actors to adopt the stance of a combatant with the state. Instead, the state was temporarily absent. Indeed, the actors saw the need (in Fowkes' terms) to restore the permanent infrastructure of the state.⁶⁸ This allowed the PIL organisations to readily adopt creative and collaborative strategies to (either tacitly or explicitly) join up with those elements of the bureaucracy able to participate. These collaborations with state officials were key to the campaigns' successes in litigation. This use of litigation within mobilization is properly understood as collective action beyond impact litigation.⁶⁹

For the purpose of this chapter, attention to the research of Charles Epp on law reform campaigns is helpful. A political scientist working in socio-legal or law & society studies, Epp

⁶³ "National Anti-Corruption Strategy: What's It About?," Corruption Watch, July 5, 2018, <https://www.corruptionwatch.org.za/national-anti-corruption-strategy-overview/>.

⁶⁴ Heinz Klug, "Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post- Apartheid South Africa," *Buffalo Law Review* 67, no. 3 (May 2019): 701–42.

⁶⁵ Cachalia, "Precautionary Constitutionalism, Representative Democracy and Political Corruption."

⁶⁶ James Fowkes, *Building the Constitution* (Cambridge: Cambridge University Press, 2016), 206.

⁶⁷ Jonathan Klaaren, Jackie Dugard, and Jeff Handmaker, "Public Interest Litigation in South Africa: Special Issue Introduction," *South African Journal on Human Rights* 27 (2011): 1–7.

⁶⁸ Antina von Schnitzler, *Democracy's Infrastructure: Techno-Politics and Protest after Apartheid* (Princeton University Press, 2016).

⁶⁹ Steven Friedman, *Power in Action: Democracy, Citizenship and Social Justice* (NYU Press, 2019); Klaaren, "Regulatory Politics in South Africa 25 Years After Apartheid"; Fowkes, *Building the Constitution*, 208–9.

focuses on the classic instances of campaigns for change led by or conducted on behalf of vulnerable mostly identity-based groups targeting courts.⁷⁰ Epp has argued that “[i]n recent decades, the development of institutional support for social reform litigation and professional networks whose central ideology incorporates legal responsibility have enhanced courts’ capacity to influence longer-term policy change.”⁷¹ The power of the courts lies not entirely (or perhaps not even primarily) in their own institutional strength but rather in the impact that the courts and their surrounding infrastructure (including the legal profession) may jointly produce. Along these lines, Epp notes that “if classic implementation studies focused on judicial power and bureaucratic evasion, a more recent body of research has focused on more diffuse signals from the judiciary in generating law-related perceptions and norms, and their role in mobilizing advocacy coalitions and in generating pressure for normative conformity among other agencies and organizations.”⁷² Collective legal mobilization against state capture in South Africa fits within the above paradigm.

It is further an example of the Epp proposition that, in line with these more recent studies, “court-structured law may have a broader social-reform impact than once thought.”⁷³ Epp has noted that “the more fragmented and porous the institutional structure of a governing system, the greater the incentives for groups to turn to courts to achieve policy goals; the litigation strategies of disadvantaged groups, like other groups, reflect these incentives.”⁷⁴ The weak institutional capacity of the South African state to counter corruption forced -- or caused -- the turn to court-based litigation by forces wishing to counter the state capture and to tackle the problem of corruption. And policy goals in the form of specific institutional anti-corruption mechanisms have been achieved - and they continue to be so. More rarely and exceptionally, a brief extraordinary period of collective legal mobilization was also facilitated.

Conclusion/Reflections

This concluding section offers some reflections specifically leading to the identification of topics for further research, organizing itself in four points.

First, a significant topic of this chapter has been the place of business in civil society mobilization. It is a topic larger than this current piece to track the history of organized business’s policy stance towards corruption. One episode within that history would comprise the corruption uncovered by the competition authorities in the construction of stadia for the South Africa’s hosting of 2010 World Cup. Particularly given the significance of the business sector within the South African political economy as well as within dominant narratives

⁷⁰ Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998); Charles R. Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (University of Chicago Press, 2010).

⁷¹ Charles R. Epp, “Law as an Instrument of Social Reform,” in *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008), <https://doi.org/10.1093/oxfordhb/9780199208425.003.0034>.

⁷² Epp.

⁷³ Epp.

⁷⁴ Epp.

constitutive of South African politics, this research is worth pursuing.⁷⁵ Indeed, the mobilization against and the phenomenon of state capture itself raise interesting questions concerning the dividing line between public and private. From both directions, it appears that there is a significant blurring of this line. This appears to be a significant feature of the operation of the political economy in the Global South,⁷⁶ which may lead to other lines of research as well, even in fields as distinct as innovation studies⁷⁷ and political party coalitions.⁷⁸

A second reflection begins with the observation that the more traditional PIL groups (such as those represented at PILG) were much more on the sidelines than the frontlines of the state capture fight. A significant theme of this paper has been to note the emergence of new civil society actors and their participation in effective coalitions.⁷⁹ In the fight against state capture, the mobilizing public interest organisations were largely the proverbial new kids on the block and not the anti-apartheid stalwarts. This leads to several questions. Did the emergence of new public interest law organisations lead to an unspoken division of labour within the public interest law firm sector? What degree of direct influence did members of the eventual collective mobilization such as firms in the business sector exercise over these new actors? How did the effective hybrid coalitions, such as that between FUL, CALS, and Black Sash come together?⁸⁰ On one understanding of the rule-of-law concept – seeing it as a historical complex specifically engendered by the actions of those inside and outside the legal sector – the culture of the rule of law may be credited with catalysing some of the litigation undertaken against state capture: does the litigation undertaken by the new kids on the block represent a significantly new phase in the construction of the rule of law in South Africa?

Third it is important to record that one specific institutional anti-corruption mechanism has been proposed. This is an Integrity Commission at the level of a Chapter Nine institution.⁸¹

⁷⁵ Jonathan Klaaren, “Laying the Table: The Role of Business in Establishing Competition Law & Policy in South Africa,” *International Review of Applied Economics*, 2019.

⁷⁶ Navroz K. Dubash and Bronwen Morgan, *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford University Press, 2013).

⁷⁷ There may be a parallel worth exploring between the (arguably pragmatic) mixing of public and private in development discourse and the horizontal application of human rights in the South African discourse. In introducing the concept of frugal innovation, proponents also blend public and private elements. Peter Knorringa, “A Balancing Act: Private Actors in Development Processes,” November 4, 2010, <https://repub.eur.nl/pub/22268/>.

⁷⁸ The substance of political coalitions put together in this mode looks more and more like the form of a transaction. No doubt the skills of competition lawyers will be put to good use here in engineering powerful and relatively lasting coalitions. Mike Law and Richard Calland, “South Africa Is Learning the Ropes of Coalition Politics - and Its Inherent Instability,” *The Conversation* (blog), accessed May 14, 2018, <http://theconversation.com/south-africa-is-learning-the-ropes-of-coalition-politics-and-its-inherent-instability-96483>.

⁷⁹ Sarah Bracking, “Corruption & State Capture: What Can Citizens Do?,” *Daedalus*, July 1, 2018, https://doi.org/10.1162/daed_a_00509.

⁸⁰ Shauna Mottiar and Tom Lodge, “‘Living inside the Movement’: The Right2Know Campaign, South Africa,” *Transformation: Critical Perspectives on Southern Africa* 102, no. 1 (2020): 95–120, <https://doi.org/10.1353/trn.2020.0004>.

⁸¹ Marian Thamm, “Anti-Corruption Watchdogs Call for Integrity Commission for the Hawks | Daily Maverick,” accessed September 27, 2018, <https://www.dailymaverick.co.za/article/2018-09-27-anti-corruption-watchdogs-call-for-integrity-commission-for-the->

Arguably, this was mandated by the Glenister litigation, as a consequence of its finding that the Hawks in its initial version lacked the constitutionally-requisite degree of institutional independence. Propounded by the Centre for Accountability, this proposed institutional form is worth consideration. Still, such an innovation would require a constitutional amendment and, perhaps most pertinently the South African Human Rights Commission already has constitutional competence in this area.⁸²

Finally, it is also worth noting that the depiction of the role of law in collective legal mobilization is often optimistic and positive – fostering political mobilization. This differs from accounts of the role of law that emphasize their character as lawfare – a never-ending slog of expensive and time-consuming litigation. Both accounts can be equally valid. A recent study of instability in a South African municipality has observed that “actions that advance factional ends are often undertaken through legalistic appeals to legislation, regulations and administrative protocol, seeking to bestow particular courses of action with the legitimacy of an ‘action of state’.”⁸³ The careful investigation of the role(s) of law in countering and advancing both the phenomenon of corruption and the political project of state capture is an important task.

hawks/?utm_medium=email&utm_campaign=Zapiro%20Thing%20Thursday%2027%20September%202018%20Blackstone&utm_content=Zapiro%20Thing%20Thursday%2027%20September%202018%20Blackstone+CID_cd74bf67e37b40fceb8127d738f6783&utm_source=TouchBasePro&utm_term=Anti-corruption%20watchdogs%20call%20for%20Integrity%20Commission%20for%20the%20Hawks.

⁸² Jonathan Klaaren, “South African Human Rights Commission,” in *Constitutional Law of South Africa*, ed. Stu Woolman, 2nd Revised & enlarged edition (Kenwyn, South Africa: Juta Legal and Academic Publishers, 2005), 24C – 1 to 24C – 19.

⁸³ Mosa Phadi, Joel Pearson, and Thomas Lesaffre, “The Seeds of Perpetual Instability: The Case of Mogalakwena Local Municipality in South Africa,” *Journal of Southern African Studies* 44, no. 4 (July 4, 2018): 593–611, <https://doi.org/10.1080/03057070.2018.1464301>.