

State Capture:

On Kenya's Inability to Fight Corruption

Gladwell Otieno

Interview

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

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

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

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

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

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



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

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

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

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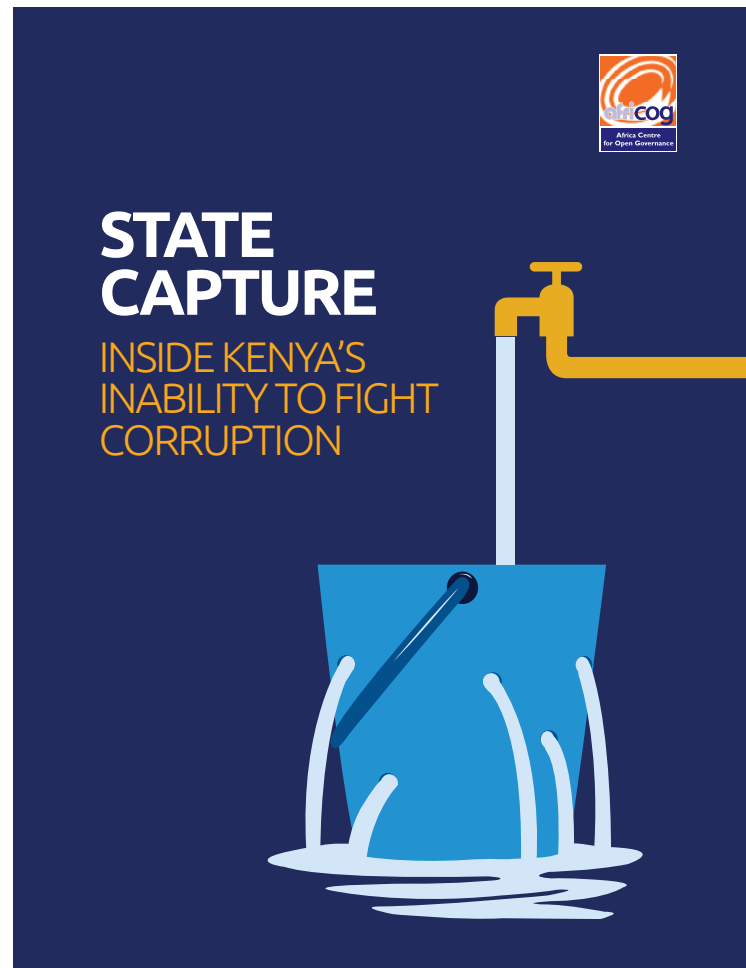
Also, our analysis of the techniques of state capture, including capture of the electoral management body, drives home to Kenyans the lessons that were becoming increasingly clear after the last elections: it is not enough to elect corrupt politicians and then hope that they will "do the right thing".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

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

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

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

Rather than simply abusing access to power and information or



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

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

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

Cover of AfriCOG's state capture report.

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

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

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

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

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

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



Eurobond, which, ironically, purportedly necessitated the repayment of Anglo Leasing “debts” to “ghost companies” to attain international confidence. Essentially, the Kenyan taxpayer was mugged twice, paying for corrupt contracts that produced nothing of value in order to facilitate the next round of plunder, which became apparent when Kenyatta’s government was unable to credibly account for at least USD1 billion from Eurobond proceeds. Clearly, that level of funding should leave tangible evidence of projects on the ground, but the government could point to very little, if anything. The suspicion was that this sum had gone to replenish the ruling party’s election coffers, just as Anglo Leasing proceeds had gone to help Kibaki face his former political allies in a referendum in 2005 and the general election of 2007 after he had betrayed a power-sharing deal with them reached before he became president.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What's next for your organisation?

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

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

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