

Is the UK sliding into state capture?

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By: Liz David-Barrett

Professor Liz David-Barrett delivered the keynote speech at The Constitution Society's conference 'Executive Power and the UK Constitution'.

Is the UK sliding into state capture? This is the question that I will seek to address. I will first describe the phenomenon of state capture and provide a model for thinking about it as influence over three spheres. I'll talk about how it manifests in countries around the world. And, finally, I'll consider whether the UK is sliding into capture.

State capture is a concept that I first came across at the beginning of my career, when I was a journalist in eastern Europe in the late 90s.

It is a kind of high-level and systematic corruption. So, it is different to classic bribery or what is sometimes called administrative or petty corruption. In administrative corruption, someone pays a bribe to influence a decision about the implementation of rules or policy. Say, a property developer pays a bribe to get permission to build on a piece of brownfield land – a one-off benefit that distorts how the existing rules are implemented.

State capture is also about improperly influencing those in power, but it's about influencing not just the way they implement the rules, but

changing the actual rules themselves. Going back to our previous example, it would be capture if the property developer gave a big donation to a political party in exchange for a government minister initiating a change in the rules about what kinds of property could be built on brownfield.

The defining feature of state capture then relates to process – the political process in which laws and policy are formed is distorted because narrow interest groups have too much control over it. So it departs from the pluralist democratic model in which many interest groups compete for influence fairly and those which are best able to build broad coalitions gain the power to shape laws.

In state capture the competition among interest groups is not fair. Captor groups gain influence because they have personal connections to those holding political power, and those holding political power are prepared to abuse it by making secret deals in which they provide influence and do so in exchange for various kinds of 'loyalty' from the captor group.

This loyalty can take many forms. It can involve the use of violence to quieten political opposition, influence over key bodies of voters through trade unions or regional vote-buying, or donations to political parties or individuals.

State capture has a longer term impact than administrative corruption. After influencing the law or policy in that way, the developer could get access to a whole new landscape of opportunity. Rather than influencing one decision, they've changed the whole rules of the game. When they build on brownfield in the future, they're not breaking any laws. They don't need to. They've already changed the law and baked in their advantage. State capture tends to exacerbate inequality. Those groups that gain economic power through state capture are better able to influence political leaders in the future, further shaping the laws to their own benefit, and consolidating their dominance in a self-perpetuating dynamic.

The term state capture was used a lot to describe the first decade of transition in the former Soviet Union and Eastern Europe. Then, the captors were typically businesspeople with good political connections. They came to be known as oligarchs as their control over vast swathes of the economy grew. But their method was pretty simple – they purchased influence through personal connections to the individuals and parties holding political power, sometimes through direct kickbacks, and the people in office were prepared to sell their influence over policy

formation. And by using state capture to change the laws not just their implementation, they made sure that their actions afterwards were legal, their power was consolidated. Indeed, that is the basis for much of what we are debating today as we seek to go after their corrupt gains and use instruments such as Magnitsky sanctions.

At the time, state capture was driven by business interests, or assumed to be. The political sphere was seen as vulnerable to this exploitation, *complicit* in it, but not an active agent.

But in the last two decades, we have seen a new type of state capture emerge in which politicians are driving the process. In Hungary, Turkey, Brazil, leaders have got into power through elections but then radically changed the rules of the game in ways that entrenched their power and made it more difficult to challenge them, let alone hold them to account.

This politics-led state capture is, if you like, a mutation from the original virus and it is a more serious variant. It still involves capturing the process by which laws are formed. But it also spreads into two other spheres. The second sphere is the implementation of policy. Captor groups want to control all of the opportunities for decision making as much as possible, so rather than allowing the bureaucracy to be a neutral implementer of its captured laws, they appoint cronies to key positions in ministries and implementing agencies. If they have extensive power to appoint allies to key jobs in the public administration, and ideally to fire people if necessary, this makes it easier for those at the top to influence the decisions that officials make, over how grants or contracts are allocated or over how much money flows to particular ministries, for example.

The third sphere of capture involves *disabling the accountability institutions*. This is where captor groups try to close down or disable potential checks on their power. The key constitutional checks on executive power are of course parliament and the judiciary.

Parliament can often be neutralised if the executive has a large majority, but this process is smoothed by using procedures that diminish the time for parliamentary scrutiny of proposed legislation or allow for skeleton laws to be passed that delegate much of the detail of regulation to civil servants.

The independence of the judiciary can be compromised by politicising the appointment process or the method for allocating cases to judges.

Other institutions that are supposed to check administrative power can also be undermined. You can appoint a crony to head the supreme audit institution for instance or cut its budget.

The media can be de-fanged in many ways, including by denying broadcast licences to outlets that are seen as critical of government or withdrawing government advertising and hence cutting off a significant revenue stream. Likewise, civil society groups can be squashed through repressive laws and smear campaigns.

These extra dimensions of capture become possible and likely when political elites drive the process. They become *possible*, because political elites typically hold formal power over the bureaucracy as well as in relation to institutions such as the judiciary, the supreme audit institution and the media, whether through the ability to determine appointments (or fire existing staff), cut their budgets or withhold operating licences.

And such patterns are *likely* because these captor groups see these accountability institutions as a threat to their power. An independent and expert bureaucracy can prevent government from using state resources for political ends, for example, and hold it to due process. And the accountability institutions, through upholding the rule of law, revealing misconduct and maladministration and informing the public, can expose wrongdoing and elicit popular demand for change.

Hence, there is a clear logic to captor elites exerting power over these second and third dimensions – capturing not just policy-making but also its implementation and the accountability institutions that are supposed to hold the executive to account. In the short term, this facilitates the unchecked stealing of state funds and assets, and longer term, it helps ensure that the captor elites stay in power by undermining any potential challengers.

Hungary under Viktor Orbán is a prime example. Orbán was elected in 2010 with a two-thirds majority in parliament, which gave him the right to change the constitution. He did so in a number of ways that strengthened his own power and weakened checks and balances that were supposed to hold the executive to account.

Just a few examples. Orbán started with the judiciary. He appointed a crony as chief prosecutor, changed the way judges were appointed and restricted the jurisdiction of the constitutional court.

He then silenced the media. He restructured the media regulator, appointed another crony to head it, and then channelled all the state-advertising contracts to friendly outlets. There is virtually no free media in Hungary today.

He even changed the rules for getting elected. Orbán redrew electoral boundaries, and granted votes to huge diaspora communities outside Hungary's borders. He also used COVID emergency powers to curb public funding for opposition-led municipalities in the last couple of years before the recent election. Of course, this is all relatively subtle. In other countries, leaders re-write the constitution to extend term limits, and surf between the presidency and premiership to hold onto power.

So, Orbán was an innovator in state capture, but he was also extremely systematic about it. In a decade, Hungary went from being seen as the frontrunner of democratisation in central Europe to describing itself as a pioneer of illiberal democracy,

So, just to recap on the three spheres of this new type of politically-driven state capture.

In sphere one, the formation of law and policy, the key targets of capture are the constitution, elections, the legislature – bodies that set the rules of the game. But I would also add here sources of physical and economic power. It is highly beneficial for captor elites to be able to control the state's instruments of physical violence, the military and police, in order to suppress opposition. And control over strategic economic assets, particularly natural resources and utilities, particularly through state-owned enterprises allows for more money to be easily channelled out of the state, e.g. through privatization and procurement.

But it is in sphere two, implementation, that captors are best able to ensure that state funds are allocated to their preferred recipients. The key targets of capture here are public appointments, budgets, government contracts and regulatory decisions. Make sure you control the ministries which spend most money, and then you can control the way they spend it. This is where you see a lot of the corruption and embezzlement.

And then control over sphere three, the accountability ecosystem, is critical to disable any checks on power that might get in your way. That means undermining the autonomy of the judiciary by controlling appointments or disciplinary systems or even the way that cases are allocated. It means curbing the powers or independence of the supreme

audit institution. It means undermining the free media, or investing heavily in creating new media that propagate positive stories about the governing elite. They may also intimidate journalists who criticize the government or withdraw government advertising revenue, removing a key funding source for media outlets that do not toe the government line. And it means undermining civil society groups that play a watchdog role over government, often with the technical expertise to compile and communicate evidence about corrupt practices. In state capture, governments clamp down on these groups by changing the laws that allow them to access funding (e.g. by banning foreign donations), making the rules for their registration restrictive and burdensome, and seeking to smear their reputations or undermine their reports.

And some captor networks also seek to purge academics that criticize the government, by defunding universities that do not support the government line, explicitly firing academics or undermining academic independence through culture war rhetoric.

In examples of state capture around the world today, we see many of these patterns playing out. In Europe, we have seen this not just in Hungary but also in Serbia, and some elements of it in Poland and Slovenia. It is very much characteristic of Turkey under Erdogan. Further afield, Putin's Russia, Modi's India and Bolsonaro's Brazil are also examples of democratically elected leaders that have moved in this direction. Sri Lanka is a fascinating case where the state has been captured by one family, although recent protests have started to unravel that.

In captured states, business and political elites exist in a relationship of co-dependency. The boundaries between government and business are often blurred, and sometimes deliberately so.

But what about Britain? Is Britain sliding into state capture?

The Johnson government's attacks on the accountability institutions – so the third sphere – are most numerous.

First, take the judiciary. The current government has openly questioned the impartiality of judges and called for political oversight of judicial appointments. It also plans a new mechanism that would allow it to 'correct' court judgements that ministers believe are *incorrect*. This hatred of the judiciary stems in part from the fact that it has curbed some of the government's attempts to expand executive power. Most prominently, the supreme court ruled unlawful Boris Johnson's decision

to prorogue parliament in 2019, which itself seemed motivated to undermine parliament's role in scrutinising Brexit policy.

Then there is the media. The government has launched an ongoing attack on the BBC, a highly trusted public service broadcaster, by questioning its neutrality and weakening its funding base. The government's decision to privatise Channel Four also threatens to remove a key independent check on the executive. And its efforts to install a crony as media regulator, albeit a failed attempt, were also worrying.

It has also undermined a number of regulatory bodies that are important in this accountability sphere. It is, in the Elections Bill, seeking to remove the Electoral Commission's power to prosecute those who break election rules – opening the door to abuse of campaign finance rules.

The government has also shown disregard for the decisions of bodies who regulate conduct in public office. The Prime Minister ignored the independent adviser on ministerial interests when it was found that Priti Patel had breached the ministerial code. He disregarded the House of Lords appointments commission when it recommended against conferring a peerage on Tory donor Peter Cruddas. He has failed to take action concerning a number of other allegations of misconduct relating to his cabinet, where he is the only one who can initiate an investigation. And in November, when Owen Paterson, one of the government's own MPs, was to be disciplined by parliament for egregiously breaking the rule that MPs must not engage in paid advocacy, the government blocked the process and sought to overturn the whole system for regulating parliamentary misconduct. Boris Johnson has himself breached the Code of Conduct for MPs many times, in nine different ways in 2018 alone, and been accused of breaching the Ministerial Code many times too. He repeatedly fails to declare hospitality, gifts, interests, whether relating to flat refurbishments, holidays in the Caribbean, or jobs on the side. And of course then there is Partygate, his police fine, and this week's parliamentary vote.

This is not yet Orbán territory. Most of these attacks have been in the third sphere – they are efforts to weaken and undermine the institutions that would hold him to account. But then again, Britain is a much more mature democracy than Hungary. Starting by disabling accountability institutions would be a necessary step if you intended to capture the other two spheres, otherwise they would get in the way of state capture. Indeed, there may well be a difference in the sequencing of the three

spheres of capture in different countries, depending on how strong the institutional checks are and how quickly they can be subverted.

But let's also look at how Britain under Johnson fares in the other two spheres. Let's look at the ways that he has sought to increase his control over the implementation of policy. There have been a number of efforts to install political allies in key public appointments – indeed, the public appointments commissioner has raised concerns about practices here. There was of course the abuse of the covid emergency to set up a VIP lane for covid contracts, allowing ministers to recommend their friends, and with evidence from the NAO finding that those in this channel were ten times more likely to win contracts. And we have seen many examples of lobbying by insiders to influence decisions. The Greensill affair was quite extraordinary for the blatant way in which a former prime minister sought to use his insider status to lobby for a company that was paying him a hefty fee, and also revealed that a very senior civil servant – quite incredibly – had been paid by Greensill for three months while still working in the Cabinet Office.

Then there is the first sphere, influence over the formation of laws and policy. The British executive is of course able to wield great influence over the legislature in any case, as long as it has a large parliamentary majority. The payroll vote and party whip help to ensure that parliament is a fairly muted check on executive power and there are many ways that parliamentary power has declined, as detailed in Hannah White's new book. But here again, the government has explicitly sought to reduce parliament's opportunities for scrutiny, in particular by excessive use of secondary legislation, for example.

So, overall, what is my take? Is the UK sliding into state capture?

I have set out here some evidence that this is indeed happening. It is particularly evident in a series of attacks by this government on the institutions that are supposed to hold them to account.

But there has also been a robust response to a number of these attempted encroachments – British accountability institutions are fighting back and they have managed to fend off attacks in a number of cases. The accountability ecosystem is not yet captured and it is asserting its independence in a number of ways.

Moreover, if we wanted to talk about Britain as a captured state, we would need a clearer idea of who the 'captor' group is and to what end they engage in capture. Potentially this might be a small faction of

politicians in the Conservative party with an ideological motivation. But it is difficult to see many of the encroachments on power outlined above as part of a carefully planned and orchestrated strategy. More often they seem like impulsive and reactionary moves to fend off criticism by a government stumbling and U-turning its way through life.

The Johnson government will certainly leave a worrying legacy in the way that it has shamelessly broken norms and violated conventions, making it easier for those who come next to do the same and go further. Britain might therefore be more vulnerable to future capture if a more organised captor group were to gain power. Once you've made these kinds of changes to checks and balances, it's very easy for a narrow interest group to become dominant and to abuse its power to serve itself to the exclusion of others. And once such a group has converted political power into economic power, it's very difficult to turn back that process.

Another way of looking at it though is to consider how the recent developments have already been underpinned and facilitated by changes in the way that government functions over previous decades. There is an increasingly close relationship between business and politics, and in particular, a few large businesses seem to have considerable influence.

Large donations explicitly buy access to the ear of ministers in today's Britain as well as to honours and peerages, and party finance reform, while long overdue, is going nowhere. The revolving door between public and private roles is well oiled and still barely regulated, despite repeated calls for tougher rules. We have seen that many MPs have very lucrative and time-consuming second jobs, and cases like the Paterson affair reveal the risks that this brings in terms of improper influence. And the extensive use of consultants in government gives a few large businesses considerable opportunities for influence over the implementation of large swathes of public spending in a world where so much public service provision is outsourced.

Thinking back to post-Soviet Russia, an academic called Janine Wedel described how in those Wild West times there were many *institutional nomads* – these were individuals who strategically moved between public-sector and private-sector roles, depending on where they could best access advantages. By surfing on the rules applying to different sectors in this way, they effectively operated in a world where able *either* to influence the rules or to make themselves immune to them by shifting their shape. They effectively existed above and outside legal and regulatory frameworks.

Seen from this perspective, Britain *is* a state that is becoming more vulnerable to capture. It is far from a post-Soviet-style oligarchy and nowhere near the illiberal democracy of Hungary under Orbán. But the institutional protections against capture are becoming weaker, and the underlying conditions of blurred lines between business and politics are definitely there. We have a tendency to see corruption and bribery as something that only happens in poor countries, but that is a kind of Orientalism.

There was a time when Hungary was regarded as the frontrunner of democratisation in Eastern Europe. It was known for the way that the end of communism and the new constitutional set-up had been calmly negotiated, for having had several peaceful changes of power, for having opened up its economy to investment in a way that seemed destined to entrench integration into a liberal market model.

In Britain, let's not assume that we are somehow immune to this kind of slide. Let's shore up the checks and balances on executive power, and let's do a better job of policing conflicts of interest between business and politics. I used to see democratisation as a journey from A to B, but I've come to realise that it's more like trying to climb a hill in a creaking carriage. You might make it to the top, but you're always at risk of sliding back down the hill. And once the carriage starts sliding, it is quite literally an uphill struggle to push it back. But it's critical that we stop it from gaining momentum.

Liz David-Barrett is Professor of Governance and Integrity at the University of Sussex where she is also Director of the Centre for the Study of Corruption.