

A Normative Approach to Exploring Political Settings for Constitution Capture

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Abstract: Although the body of literature on the phenomenon of state capture has been growing more prominent since 1999, some academics have still struggled to determine even the apparent manifestation of state-capture political settings at a definitional and operational level. The main reason for this is that they seem to have unwarrantedly confined to economic explanations, or Hellman and his colleagues' original definition and conditions of exploring the phenomenon in which the outside business actors of the state with monetary interests are only recognized as the main active captors of the state, among other conditions. Therefore, it is theoretically necessary to develop an analytical framework for an understanding of state capture, which helps us examine how the inside political actors of the state can also involve themselves in capturing the state for their political interests. In discussing definitional and operational issues on the original and current understanding of the phenomenon, we attempt to identify some key factors and normative elements in the nurturing of such an analytical framework. It is reasonable to conclude that to enhance our ability to fully explore state-capture political settings in the established elements of a constitution or legislation, the occurrence of shaping 'the formation of the basic rules of the game' should conceptually and empirically be recognized as a typology of the phenomenon of state capture, namely 'constitution capture' while shifting our research focus from the activity-politics (the political life) of the state to the sphere-politics (the idea) of the state in a way that the locus of the phenomenon and its profound consequences are to be explained in terms of the sphere-politics.

Keywords: State capture; Constitution capture; Political corruption; Constitution decision-making process

I. INTRODUCTION

Since the emergence of the body of literature on the phenomenon of state capture as a typology of political corruption in 1999, it appears that many have exhibited a general tendency to follow the original explanation and conditions by Hellman and his colleagues' seminal works on the phenomenon.¹ Over the past two decades, a large body of research has examined the phenomenon of state capture. Now it has become a lively topic for criminologists and

practitioners in criminal justice and media personnel with much legal debate, media reports, and documentaries, as seen in the ongoing Judicial Commission of Inquiry into Allegations of State Capture in the jurisdiction of South Africa since 2016 concerning the Zuma-Gupta case.² Overall, their original explanation has offered an interesting insight into how the financially powerful business community can play as the main captors of the state or its constitutional decision-making process to enshrine their business or corporate interests in legislation to be enacted.

Evidently, some scholars have rigidly been stuck to the original explanation and conditions of Hellman and his colleagues' seminal works, and they have failed to explore even the obvious manifestation of state-capture political settings of a polity. For example, in the very same political settings of the 2016 Zuma-Gupta case in the very same South African context, some scholars like Lodge (2018) have hesitated to recognize the existence of state-capture political settings, while others like Southall (2018) have recognized the phenomenon even in the same academic volume, *i.e.*, Meirotti & Masterson (ed. 2018). Therefore, it is necessary to adopt an alternative approach to understanding the phenomenon of state capture. We should theoretically and empirically be able to discern the manifestation of political settings for state capture in the established elements of a constitution or legislation in question.

Accordingly, the main task of this paper is twofold: (1) to identify definitional and operational issues surrounding Hellman and his colleagues' original explanation and the scope of the current understanding of the phenomenon of state capture so as to find a notable lack of its theoretical and empirical understanding, and (2) to provide a theoretical insight into the development of a normatively-based analytical framework for determining state-capture political settings in the established elements of a constitution or legislation of a given polity beyond à la Hellman and his colleagues' understanding and conditions. In essence, our approach is to explore the profound consequences of the phenomenon of state capture by reference to the sphere-politics (*i.e.*, the idea) of the state in the way of determining the fullest possible

¹ In general, the seminal works on the state capture concept can be referred to as the empirical works by the European Bank for Reconstruction and Development (EBRD) Transition Report (1999, 2000) and World Bank (2000) along with Hellman, Jones, & Kaufmann (2000a, 2000b, 2000c), Hellman, Jones, Kaufmann, & Schankerman (2000a, 2000b), Hellman & Schankerman (2000), and Hellman, Jones & Kaufmann (2003), *etc.* Hereinafter, the whole aforementioned works by Hellman and his co-author/s are collectively named Hellman and his colleagues' works.

² For example, *vide* Meirotti & Masterson (ed. 2018); Bhorat et al. (2017); The 2016 Report of Public Protector of South Africa; the recently published series of Judicial Commission of Inquiry into State Capture Reports (2022).

picture of the real locus of the phenomenon with the employment of a common denominator in the *sui generis* nature of the state and *retroductive* reasoning method.

The data of this paper were secondary data collected from online-data bases and digital libraries addition to some online newspaper articles. Mainly, we examined the current body of literature on the phenomenon of state capture while typically looking to some normative principles of several theories from the realms of jurisprudence, political philosophy and constitutional political economy, namely, John Rawls' ([1971] 1999) *Veil of Ignorance*, James Buchanan and Gordon Tullock's ([1962] 1999) *Constitutional Choice*, and Jon Elster's (1977, 2000, and 2003) *Constitutional Precommitment* as well as *social contract theory* and the *public trust doctrine* so as to develop our analytical framework for *state capture* or *constitution capture* with a tentatively-proposed common denominator in the *sui generis* nature of the state.

II. THE GENESIS AND THE NATURE OF STATE CAPTURE

The phenomenon of *state capture* has become a new typology of political corruption since 1999 following the collaborative research projects conducted by the World Bank and the European Bank, together with the pioneer works of Hellman and his colleagues³. All seminal works on the phenomenon were exclusively based on the 1999 Business Environment and Enterprise Performance Survey (*hereinafter* the BEEP Survey⁴). The BEEP Survey was designed to assess public institutions and policies (macro-dimensions) and bureaucracy, state intervention, and corruption (micro-dimensions), particularly in the context of the transition economies of the post-communist countries of Central and Eastern Europe and the former Soviet Union⁵ after the collapse of the blocks of socialist Soviet Union.⁶ As such, the current understanding of

the phenomenon of state capture was originally developed in the context of those transitional states⁷ during the early stage of their political and economic transition from a centrally-planned socialist economy to a free-market-oriented capitalist economy⁸.

In other words, despite undertaking the examination of state capture being first published in the 1999 European Bank for Reconstruction and Development Transition Report (World Bank 2000: ix), the aforementioned Hellman and his colleagues' original works⁹, solely focused on the context of transition economies, have automatically been embraced as the bedrock of the current understanding of the phenomenon of state capture. It was because, after the submission of their final draft (*i.e.*, Hellman, Kaufman, & Jones 2000a) in April 2000, they used the same 1999 BEEP Survey¹⁰ results to continue to publish a series of other research papers with more detailed explanations establishing a new body of literature on state capture by distinguishing it from its adjacent forms of corruption¹¹. Empirically, Hellman and his colleagues (for

phenomenon of state capture from its adjacent phenomena like influence and public procurement.

⁷ In making a Submission to 'the Judicial Commission of Inquiry into Allegations of State Capture, Corruption, and Fraud in the Public Sector including Organs of State' of South Africa, established in January 2018, Joel Hellman and Daniel Kaufmann described how they began to observe the phenomenon of state capture while attempting to define it and provide a summary of the implications of state capture in the development trajectories of different states around the world, among other their objectives.

'...Though it was common at the time to compare countries by different levels of corruption, we observed that there were many different forms of corruption across the 27 countries that emerged from the former Soviet bloc. Moreover, we observed that these different forms of corruption appeared to have very different impacts on the pace and direction of the transition to market economies and democratic polities across the region. With these observations in mind, we sought to develop a new typology of corruption and to base this typology not just on theories of corruption but on the actual measurement of different forms of corruption through extensive comparative survey research across the countries of the Soviet Union and Eastern Europe.' (Hellman & Kaufmann n.d. 2, original emphasis).

⁸ The 1999 BEEP Survey utilized by Hellman and his colleagues was conducted at a time when those transition countries' political and economic status quo had already started to change by wholesale political and economic reforms to transit a democratic system with the capitalist economy from their more or less half-century-long experience of a Communist system with the planned economy. At the same time, those countries were ideologically and pragmatically engaged in a new confrontation with major challenges to redefine the relationship between the state and private firms in the wake of such wholesale political and economic reforms, including the unprecedented process of privatization of state-owned industries/corporations (vide, Boycko, Shleifer, & Vishny, 1995, in the case of Russia, for example).

⁹ Vide supra note 1.

¹⁰ The 1999 BEEP Survey included a range of questions seeking to explore the phenomenon of state capture, among other questions, and relied on the firms claiming direct experience of it rather than subjectively external observations. (vide, the EBRD Report 1999; Hellman, Kaufmann, & Jones 2000a; Hellman et al. 2000a).

¹¹ For example, Hellman, Kaufman, & Jones (2000a) and Hellman et al. (2000a) distinguish state capture from the form of administrative corruption along with public procurement corruption (or public procurement-related kickbacks), while Hellman, Jones, & Kaufmann (2000c) make efforts to better understand state capture differentiating it from administration corruption and influence. Hellman, Jones, & Kaufmann (2003) mainly focus on the differentiation between state capture and influence with more detailed explanations, whereas in Hellman et al. (2000a, 2000b), patronage and petty

³ Vide supra note 1.

⁴ The BEEP Survey was a collaborative research project under the supervision of Joel Hellman and Daniel Kaufmann (World Bank 2000: ix), conducted by the World Bank, the Policy Studies Program of the EBRD, Inter-American Development Bank, and the Harvard Institution for International Development. This was regarded as the first step of a worldwide survey of corporations on the obstacles in the business environment around the world (Hellman, Jones, & Kaufmann 2000c: 3).

⁵ Those transition countries surveyed were Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Poland, Romania, the Russian Federation, the Slovak Republic, Slovenia, Ukraine, and Uzbekistan (Hellman, Jones, & Kaufmann 2000c).

⁶ After a decade of the transition from the socialist state-centered planning political and economic system to the capitalist free market system in those transition economies, Joel Hellman and Daniel Kaufmann, who worked as a senior political counselor for the European Bank of Reconstruction and Development and as a senior manager at the World Bank, respectively, made a casual observation at that time about different levels and different forms of corruption across those 27 transition countries, and about the different level of impacts of such different forms of corruption on the pace and development trajectories of the transition to market economies and democratic polities around the region (Hellman & Kaufmann n.d.: 1-2). Their observation led to unbundling the existing understanding of political corruption, keeping the

example, Hellman et al. 2000b; Hellman, Kaufman, & Jones 2000a; Hellman, Jones, & Kaufmann 2003) attempted to measure and separate *grand corruption* into three forms of corruption, i.e., *state capture*, *administrative corruption* (together with *public procurement corruption*), and *influence* for the first time in the political corruption literature. In doing so, they, therefore, suggested a shift from the traditional definition of corruption that terms ‘*the abuse of public office for private gain*’ or from public officials’ ‘*grabbing hand*’ explanation of corruption’ to the ‘attention to the role of firms’ to refine the understanding of corrupt strategies of interactions between the state and firms (Hellman, Kaufmann, & Jones 2000a: 4-5).

Considering the conceptual ideas that facilitated the original understanding of state capture, as described by Hellman, Jones, & Kaufmann (2003: 752), the model of ‘*protection for sale*’ developed by Grossman & Helpman (1994) in the literature on the political economy of trade policy formed the bedrock of the concept of state capture. In their model, what Grossman & Helpman (1994) attempted to explain was how particular interests groups involve in making political contributions in return for influence on the governmental trade policy choices and how the structure of such ‘*protection for sale*’ dominate the trade-off between politicians’ interests and the contributions by the policy-making driven from lobbyists (*cf.* Gawande & Bandyopadhyay 2000; Evans & Sherlund 2011). On the other hand, Hellman, Jones, & Kaufmann (2003: 752) acknowledge that Shleifer & Vishny’s (1994) bargaining model between politicians acted as the bedrock of the conception of *influence*. In their bargaining power model, Shleifer & Vishny (1994) examine how private and state firms’ behavior reflects in a situation where politicians attempt to influence to fulfill their political ends and how firm managers involve in bribing politicians when politicians regulate firms and use the process of granting subsidies to firms as a means of gaining their political ends.

As a whole, in most cases, state capture is a phenomenon arising in corrupt relationships (driven by political and/or monetary ends) between the inside political actors (elected and unelected power holders) of the state and the outside business actors (firms/individuals) of the state in the course of their business operation utilizing state power. In this case, exploring such a relationship between the inside political and the outside business actors of the state is nothing new to the literature body on political economy¹². For example, the concept of ‘*regulatory capture*’ and the ‘*theory of economic regulation*’ developed by Stigler (1971) explain such

relationships. Yet, according to Hellman & Kaufmann (*n.d.*: 2-3), albeit the similarity between *regulatory capture* and *state capture* while emphasizing the influence of certain corporations or industries on the enactment of preferred regulations that carry negative implications for the broader economy, the concept of regulatory capture is limited to the mere concern over the forming of regulatory rules that immediately affect the industries (also *vide* Stigler 1971).

The term ‘*state capture*’ has been long used in the realm of political science in terms of colonialism or foreign power’s invasion, political or military coup, or revolutionary capture, etc. Further, in the earlier literature on political corruption, the concept of how public officials or legislators could be bought by the outside actors of the state has been explained in terms of ‘*auto-corruption*’ as opposed to the mere sense of bribery practices in the public sector (*vide* Brooks 1909). Likewise, some essential ideas of some concepts like ‘*the appropriation of the wealth of a state by a few*’ had been developing in the early corruption discourse (*vide* Southall 2018; Lodge 2018; Theobald 1990; ed. Heidenheimer, Johnston & LeVine 1989). Its long-term loose or irregular usage has empirically been attempted to be categorized by the said Hellman and his colleagues’ works into a particular operational definition of a specific form of political corruption, making a distinction between *state capture* and its adjacent concepts, namely *influence* and *administrative corruption*.

However, it should be born in mind here that the phenomenon of state capture should not be merely confined to occurrences of corrupt relationships between the inside political and the outside business actors of the state. They attempt to gain their pecuniary and business interests for each other. As we will later understand, it is also the case where the inside (elected and unelected) political actors of the state can become the captors of the state or the constitutional decision-making process for non-monetary interests (*i.e.*, politically-ethnically-, racially-, religiously-, linguistically- etc. motivated interests) even without a connection with the outside business actors in a context where the original conditions of the occurrence of the phenomenon of state capture specified by Hellman and his colleagues’ seminal works cannot necessarily be required all the time.

III. DEFINITIONAL AND OPERATIONAL ISSUES ON THE ORIGINAL UNDERSTANDING OF STATE CAPTURE

Arguably, examining the phenomenon of state capture is an attempt to examine the grey area of political corruption in which the constitutional or legislative decision-making process of a state is shaped or captured by the inside political actors of the state with or without its outside actors. Political corruption can be understood from different perspectives. For example, an approach to explaining it can solely or collectively focus on its (active, passive, inside, or outside) actors or its (obvious or profound social, political or economic) consequences or its active actors’ purposes or the means involved (*cf.* ed. Theobald 1990; ed. Heidenheimer, Johnston

(administrative) corruption were measured to differ state capture from them, and Hellman & Schankerman (2000) mainly focus upon the nature of state capture and state intervention together with its related corruption.

¹² There are two strands of the literature on political economy related to the examination of the causes and consequences of corruption and regulatory capture. However, despite the clear overlap between corruption and capture, these two strands of the literature developed in parallel without an obvious connection between them (Hellman, Kaufmann, & Jones 2000a: 2-3).

& LeVine 1989; Amundsen 1999; Brooks 1909; Brooks et al. 2013). Hellman and his colleagues' original understanding of state capture exclusively focused on one of the active actors, *i.e.*, the outside business actors of the state, while mainly considering economic consequences. However, even though still there are several fundamental issues with their original understanding of state capture at the definitional and operational level, it is evident that Hellman and his colleagues' original explanation and their original conditions have informed a great many scholars in state capture to determine the existence of the phenomenon in a given polity (*vide, for example*, ed. Meirotti & Masterson 2018; Masterson 2018; Lodge 2018; Southall 2018; Bhorat et al. 2017; Akinduro & Masterson 2018). Thus, here we present a detailed discussion on the issues surrounding Hellman and his colleagues' original explanation of the phenomenon of state capture.

3.1 Definitional Issues on Original Definition

First, we shall briefly look into how Hellman and colleagues' seminal works have defined it. As noted earlier, Hellman and his colleagues initially separated *grand corruption* into three forms of corruption, *i.e.*, *state capture*, *administrative corruption* (together with *public procurement corruption*), and *influence*, based on the extent to which the interaction between the public office holders and firms or business actors shape 'the formation of the basic rules of the game' (*i.e.*, mainly legislative and executive process of the state). Then, Hellman and his colleagues maintain to differentiate *state capture* from its adjacent phenomena, namely *administrative corruption* and *influence*.

For them, *grand corruption* is construed as 'private payments to public officials to influence the content of the basic rules of the game (*i.e.*, legislation, rules, laws, or decrees)' (Hellman et al. 2000b: 21, *emphasis added*). Except for the first draft of their research paper, throughout their seminal works¹³, Hellman and his colleagues define the phenomenon of *state capture* as 'the efforts of firms to shape the formation of the basic rules of the game (*i.e.*, laws, rules, decrees, and regulations) through illicit and non-transparent private payments to public officials' (*e.g.*, Hellman, Jones, & Kaufmann 2003: 756; *emphasis added*).

On the other hand, *influence* is defined as 'the firm's capacity to have an impact on the formation of the basic rules

¹³ In their first draft of seminal works, Hellman, Kaufmann & Jones (2000a) only separated grand corruption into two forms, *i.e.*, state capture and public procurement corruption. They briefly defined state capture as 'the efforts of firms to shape the very institutional environment in which they operate' and 'public procurement corruption' as 'the payment of kickbacks for securing public contracts' (*ibid*: 1, *emphasis added*). However, in the same work, they briefly elaborated on the two concepts defining state capture as 'the capacity to influence the formation of the basic rules of the game (*i.e.*, laws, rules, decrees, and regulations) through private payments to public officials' (*ibid*: 4, *emphasis added*). This is meant to be that, initially, Hellman and his colleague did not attempt to define any form of influence distinguishing from state capture.

of the game without necessarily involving private payments to public officials (Hellman, Jones, & Kaufmann 2003: 755, *emphasis added*) while *administrative corruption* is defined as 'the extent to which firms make illicit and non-transparent private payments to public officials in order to alter the prescribed implementation of administrative regulations placed by the state on the firm's activities' (Hellman, Jones & Kaufmann 2000c: 7, *emphasis added*).

The essential elements in Hellman and his colleagues' original definition of state capture are, **a)** the nature of active actors of the phenomenon: *firms* (*i.e.*, the outside business actors of the state) act as the sole active actors in capturing the state; **b)** the nature of passive actors: *public officials* (*i.e.*, the inside elected/unelected political actors of the state) become the passive actors; **c)** consequences: obvious consequences of these active actors are to '*shape the formation of the basic rules of the game*' (*i.e.*, the constitutional/executive decision-making process) in business actors' favor; **d)** the nature of means involved is referred to as '*illicit and non-transparent private payments*' (*i.e.*, monetary involvement). As noted earlier, Hellman, Kaufmann & Jones' (2000a: 4; 2000c: 2) central claim is that they have shifted their '*attention to the role of firms*' from the traditional focus of the 'grabbing hand' explanation of corruption. In other words, they define the phenomenon of state capture from the standpoint of business actors' accounts or a firm-level perspective¹⁴.

A fundamental question here is that Hellman and his colleagues' original definition of the phenomenon of state capture is merely confined to economic aspects in the understanding of state capture and in differentiating it from its adjacent phenomena. Thus, it can be argued that such mere thought of economic approach has led their definition to a limited understanding of the phenomenon. According to their original definition, there are only one-side captors of the state, *i.e.*, the outside business actors of the state, which is given a meaning that the state is subjected only to the capture by economic interests or ends of the outside business actors of the state. They have disregarded the recognition of the inside political actors as the captors of the state in a similar manner as those outside business actors do but without any economic interest. Accordingly, Hellman and his colleagues' original definition is restricted by itself to (extend to) include a

¹⁴ Their study was considered the first-ever empirical effort to examine corruption from a firm-level perspective, as opposed to both traditional definition of corruption from a public official perspective or from the aspect of public interests, and the dominant tendency for the indices of cross-country corruption analyses, *i.e.*, the subject perception by experts and experts or offshore investors who do not really have practical experience of engaging in corruption. The BEEP Survey utilized two separate parts of a questionnaire given to the firms' managers or owners from the early mentioned transitions countries through the face-to-face interviews over nearly three months between June and August 1999. It covered about 3000 firms in the said transition economies, which included between 125-150 firms in each country apart from Russia, Ukraine, and Poland, where 552, 247, and 246 firms were interviewed, respectively, because of the implication of their higher samples (Hellman et al. 2000a). Later, Hellman & Kaufmann (2001), however, noted that nearly 4000 firms had to be surveyed in 22 transition economies for their research work.

situation where the inside political actors of the state can become the active actors of capturing the state (or the sole captors of the state) without the engagement with any outside business or economic actors of the state and without any monetary ends but for politically-motivated gains or interests.¹⁵

In other words, even the obvious manifestation of state-capture political settings in some constitutional elements can never be determined by the above original definition regarding the inside elected or unelected political actors who capture the state for their own political motivation or ends. A classic example of this is the cases of the constitutional elements of the Sinhala Only Act of 1956 of Sri Lanka and the 18th and 20th Amendments to the Sri Lankan Constitution of 1978, as well as the Twenty-fourth, Twenty-fifth, Thirty-eighth, Thirty-ninth, and Forty-second Amendments to Indian Constitution of 1949, enacted during Indira Gandhi's second consecutive term of office (1971-77). Therefore, the understanding of state capture cannot be merely confined to 'the efforts of firms' and monetary interests or to economic explanations.

Further, such limited economic explanations lead us to assume that the phenomenon of state capture occurs under the conditions of the involvement with *illicit and non-transparent private payments to public officials*. This gives two meanings. One meaning is that public officers' strong desire to maximize their financially-driven ends or personal welfare and the involvement of *illicit and non-transparent private payments* necessitate initiating state-capture political settings. In this regard, public officers' desire is considered by financially-driven interests. Thus, how public officers' politically-motivated overwhelming desire to gain and maintain political power is not fathomed out here. The other meaning is that such 'private payments to public officers' are necessarily engaged with 'illicit' and 'non-transparent' relationships. This type of thinking forces us to presuppose that 'licit' or 'legitimate' and transparent payment to public officers, for example, as seen in the course of 'legitimate lobbying,' cannot be seen as a real initiator of state-capture political settings even at some point. However, the constitutional or legislative elements concerned are expressively informed by the interests of certain (business) group/s.

In other words, as long as the payment for obtaining or buying a piece of legislation is made according to the law (on lobbying practice), we are blindly but theoretically ready to

accept any such practice that destroys even the underlying principles of the legislative power of the citizenry as 'legitimate practice' according to Hellman and his colleagues' definition of state capture rather than being ready to define it as real political settings for state capture.

It is arguable that the term '*illicit and non-transparent private payments*' in Hellman and his colleagues' original definition misleads us to distinguish between state capture and its adjacent concepts like *lobbying* and *influence*. For some like Fries, Lysenko & Polenac (2003), who attempt to draw the lines of demarcation between lobbying and state capture, lobbying practice is a 'legitimate form of influence'; thus, we are forced not to make any case for putting it into a state-capture basket. It is because such 'legitimate' forms of influence 'are exposed to open debate and to pressures from counter-veiling interests such as consumers or competitors' but state capture does transgress so-called such legitimate influence in which state capture is (inherently) involved in 'illicit and non-transparent' payments while operating 'through preferential access of private individuals and groups to state officials' and 'through undisclosed (or not widely understood) business interests of public officials, their relatives, and close associates' (Fries, Lysenko & Polenac 2003: 26).

Despite this, mainly in the context of the USA and western democracies, it has been evident that so-called legitimate lobbyists' undue influence can readily make it susceptible to state-capture enterprise to a greater extent (*cf.* ed. Welty et al. 2013; ed. Gelder 2011; McMillan 2012; Baumgartner et al. 2009). For example, a former Security and Exchange Commission (SEC) chairman of the USA, namely Arthur Levitt, testifying before the Financial Crisis Inquiry Commission in 2011, revealed how industry lobbyists have a powerful influence in shaping the USA legislative decision-making process. He stated that '*once word of a proposed regulation got out, industry lobbyists would rush to complain to members of the congressional committee with jurisdiction over the financial activity at issue*' (the Financial Crisis Inquiry Commission 2011: 53). Ironically, Levitt emphasized that the SEC, whose principal purpose is to enforce the law against market manipulation, would be then harassed by recurring letters by these Congressional members requesting to reply 'complex questions and appearances of officials before Congress, which resulted in the consumption of the SEC's time and in its discouragement of introducing regulations (*ibid*: 53). Levitt characterized it as "kind of a blood sport to make the particular agency look stupid or inept or venal" (cited in *ibid*: 53). This fully explains how the legitimate lobbying practice shapes the constitutional decision-making process. Notably, Transparency International (2009: 25) acknowledges how such legitimate lobbying can destroy the underlying principles of the constitutional decision-making process.¹⁶ Here is not a place to discuss lobbying practice in detail, yet what we need to emphasize is

¹⁵ Here the inside political actors of the state are interpreted as elected and unelected political actors who are within the purview of or at the heart of the constitutional or legislative decision-making machinery of the state. Further, the outside business actors of the state are construed as the business community who are outside the purview of such state decision-making process within or outside a country concerned. Thus, it should be emphasized here that 'the inside actors' or 'the outside actors' of the state should not be limited to the terms 'within a country' or 'outside a country' as defined by Transparency International (2009: 43) in relation to their explanation of state capture.

¹⁶ Transparency International (2009: 25) defines lobbying as 'any activity carried out to influence a government or institution's policies and decisions in favor of a specific cause or outcome. Even when allowed by law, these acts can become distortive if disproportionate levels of influence exist — by companies, associations, organizations, and individuals.'

that even legitimate lobbying helps us to understand the fact that seeking the involvement of licit or illicit and transparent or non-transparent payments does not make a case for determining the occurrence of state capture.

Now we take the issue with Hellman and his colleagues' distinction between *state capture* and *influence*. As noted earlier, they define *influence* as '*the firm's capacity to have an impact on the formation of the basic rules of the game without necessarily involving private payments to public officials*' (Hellman, Jones & Kaufmann 2003: 755, *emphasis added*). What they have claimed to differentiate *influence* from *state capture* is whether or not private payments are necessarily involved. What happens in the occurrence of *influence* is '*to have an impact on the formation of the basic rules of the game,*' but it is '*to shape the formation of the basic rules.*' By their definition, state capture is all about 'the efforts of firms to shape' it, while *influence* is all about 'the firm's capacity to have an impact on it'. However, when these two phenomena are defined in terms of the sphere-politics of the state and their profound consequences, it is clear that the consequences of the two phenomena for the state cannot fundamentally differ from each other. In both phenomena, the constitutional or legislative decision-making process is to be captured by specific interests of certain (business/political/religious, etc.) individual/s or group/s, inside or outside the state.

3.2 Operational Issues on the Original Definition

It could be argued that some operational issues have arisen due to a general tendency to confirm Hellman and his colleagues' original definitions and conditions. Combined with unnecessary conformity with the elements of the original definition, the unwarranted academic orientation towards the original conditions for the determination of state capture has constrained us to discover the manifestation of real state-capture political settings even in obvious elements of a constitution or legislation. Among such originally-set up conditions are 'the timing phrase' (of transitional reforms, *i.e.*, wholesale political/economic changes), 'the context phrase' (*i.e.*, democratic political and open economic settings: the concentrated political and economic power but with the lack of accountability), the only-single actor perspective (*i.e.*, only outside business actors of the state are considered as the captor/s) and the mere material interests (*i.e.*, the motivating force is only material interests) and so forth (*vide ed. Meirotti & Masterson 2018, for example*).

3.2.1 The Myth of Wholesale Political/Economic Changes

Hellman and his colleagues' original conditions work suggested that the occurrence of wholesale political and/or economic changes in a country is an essential factor in the emergence of state-capture political settings. Even though many scholars have still been trapped in the original definition and conditions, the nature of the states on which Hellman and his colleagues' seminal study was based is atypical. What became clear from those states was the fact that there were

wholesale political and economic reforms in which the former blocks of socialist states of the Soviet Union were led to a transition from a socialist economic and political system to capitalism within a short time immediately after the end of the Cold War. Nevertheless, some scholars have been deeply ingrained in such *transition timing phrases*. Hence, they were unable to determine the real existence of the phenomenon (*e.g.*, Lodge 2018), as seen in the 2016 Guptha Case in South Africa.

The *transition timing phrase* should not be considered a necessary condition for determining the manifestation of state-capture political settings because state capture can emerge even from a single element of legislation or a constitution in a given polity. A classic example of this is the constitutional elements of the 1956 Sinhala Only Act of Sri Lanka, in which the inside political actors of the state acted as its majority Sinhalese racial and Buddhist religious elements by shaping the constitutional decision-making process for their political ends. On the other hand, it is not logical to suppose wholesale political and/or economic transition that leads to a major or fundamental shift from one system to another. It should also be understood that such up-and-down transitions could obviously be historical events or circumstances on an occasional or a rare basis in a country.

3.2.2 The Motivating Forces: Material or Non-material Interests

It could be argued that political corruption is considered an illegal means where politics of a state are influenced or shaped not only by financial interests (Key 1936, cited in Della Porta & Vannucci 2012: 94) but also by non-monetary ends in return for votes or political party or specific ethno-political interests (*vide* Grzymala-Busse 2008; Rothstein & Varraich 2017; Edwards 2017). However, as noted earlier, concerning the nature of ends and means by both parties (captor/s and accomplice/s) involved in state capture, much attention has focused on merely material/financial interests or objectives driven by profit-making motivation. As such, at operational, main active captors' (the inside political actors') engagement with non-material or political interests/ objectives is not considered a crucial factor in or a condition for the determination of the manifestation of state-capture political settings.

Southall (2018: 30) correctly argues that the notion that a particular (political or business) groups or elites within a society are more likely to covertly or overtly attempt to (directly or centrally) exercise state power to gain or accumulate their individual '*material interests*.' The question here is whether or not the desire of the inside political actors to capture the state is merely driven by '*material interests*.' If our focus is solely placed on *material interests*, we are to risk losing a firmer grasp of the true meaning of the phenomenon of state capture. However, few scholars like Grzymala-Busse (2008) and Edwards (2017) have understood that the inside political actors (or elites) of a state are engaged in state capture in return for non-monetary interests such as gaining

and/or maintaining votes and/or political power in a pluralistic democracy or multiethnic political society.

3.2.3 Perception-based Model vs. Context Analysis

Hellman and his colleagues' seminal works were based on a perception-based model in which the phenomenon was understood from business actors' perspectives. Thus, their understanding of state capture is still a subjective approach. Although a perception-based model can raise the awareness of the severity of corruption, such subjectively-conducted measures, some critics firmly argue, are intrinsically liable to exhibit bias, thus being 'imperfect proxies' for measuring the real levels of corruption (*vide* Heywood 2015: 143).

Especially, Hellman and his colleagues' seminal works failed to consider even a single element of the legislation that arose due to state-capture political settings. Later scholars have also exhibited this tendency. We contend that understanding without such constitutional or legislative elements can impair our ability to grasp the real and profound consequences of the phenomenon for the sphere-politics of the state.

IV. THE SCOPE OF THE CURRENT UNDERSTANDING OF STATE CAPTURE

There seems to be a tendency for some academics verbatim to seek Hellman and his colleagues' original conditions to determine the occurrences of state-capture political settings (*vide* ed. Meirotti & Masterson 2018, *for example*). However, concerning the body of the literature on state capture, some definitional and operational issues have been directly or indirectly discussed to a certain extent to extend our understanding of the phenomenon (*e.g.*, ed. Meirotti & Masterson 2018; Grzymala-Busse 2008; Transparency International 2014; Fiebelkorn 2019). Nonetheless, the existing conceptual framework for state capture still appeals to a normative framework which can explain how the constitutional decision-making process of a state can be captured by the inside political actors of a state for their own political ends or the betterment of a certain selected group/s of the society in combination with the outside non-business (*e.g.*, ethnic, racial, religious, etc.) interests.

We shall briefly discuss in this section how definitional and operational issues on Hellman and his colleagues' original definition have been discussed in the growing body of literature on state capture. Then, we will look at how some academics have struggled to diagnose state-capture political settings at an operational level. The essence of the discussion of this section will help to fathom the extent to both our ability and inability to explain the phenomenon and diagnose the manifestation of state-capture political settings even in a single element of a constitution or legislation of a given polity.

At the outset, it is worth looking at several definitions offered by several academics. For Grzymala-Busse (2008: 638), state capture is a political process of '*the extraction of private benefits by [the] incumbent of office holders from the*

state' in which the inside political actors or incumbent political elites of the state act as the active captors of the state, not only for private benefits but also for political (*emphasis added*).

Grzymala-Busse (2008: 638) explained that incumbent rulers tend to choose two options in state capture: 'whether to share rents with potential constituencies in exchange for their support' or 'whether to allow competition' due to the act of 'contestation affects the levels of rent-seeking.' Consequently, such 'rent distribution and competition' leads to a '*configuration of state capture: clientelism, predation, fusion, exploitation, and the formation of specific state institutions and capacities*'. As such, Grzymala-Busse (*ibid*) recognizes it as 'elite state capture.' She defines elite state capture as '*the appropriation of state resources by political actors for their own ends: either private or political benefit*.' (*ibid*: 641). Thus, she explains how the political settings clientelism, predation, fusion, exploitation, and the formation of particular state institutions and capacities can become strategies of state-capture political settings¹⁷ by analyzing the activity-politics of the state by incumbent rulers, *i.e.*, the inside political actors of the state. Understood in this way, Grzymala-Busse (2008) provides a better understanding of the phenomenon of state capture while identifying that the inside political actors of a state inevitably become the active captors of the state by initiating state-capture political settings to gain their private or political ends.

Meanwhile, Transparency International (2009: 43) defines state capture as '*a situation where powerful individuals, institutions, companies, or groups within or outside a country use corruption to shape a nation's policies, legal environment, and economy to benefit their own private interests*.' However, the term 'powerful individuals' does not necessarily indicate the inside political actors of the state. Thus, they may be the only influential actors outside the state. In its definition, despite the reorganization that such powerful individuals reside within or outside a country, the distinction between the inside political actors and the outside business actors of a state is not made to mean that the inside political actors can also become the active captors of the state.

Following the above Transparency International's (2009) definition, Martini (2014: 2) understands the phenomenon of state capture in a broad way as '*the disproportionate and unregulated influence of interest groups or decision-making processes, where special interest groups manage to bend state laws, policies, and regulations through practices such as illicit contributions paid by private interests to political parties and for election campaigns, parliamentary vote-buying, buying of presidential decrees or court decisions, as well as through illegitimate lobbying and revolving door appointments*.'

¹⁷ Cf. Chayes (2015), Stokes et al. (2013), Galbraith (2008), and Johnston (2005), for example.

Simultaneously, for Fiebelkorn (2019: 11), the examination of state capture should be referred to as ‘*both de jure measures of state capture (regulations) and de facto measures of state capture (actual practices)*.’ Adopting Lipsky’s (1980) explanation of the interaction between political actors and business actors of a state, Fiebelkorn (2019: 11) argues that the analysis of state capture should also identify both levels of those actors’ interaction with the state: the policy-making level where state policies are formally planned or determined, and the policy-implementation level where the adopted state policies are implemented. In this sense, the ‘*to shape the formation of the basic rules of the game*’ term associated with Hellman and his colleagues’ original definition is further extended to include political actors’ commission or omission of policy implementation.

The World Bank (2017) defines state capture as ‘*the exercise of power by private actors — through control over resources, the threat of violence, or other forms of influence — to shape policies or implementation in service of their narrow interest*’ (cited in Fiebelkorn 2019:1). In this definition, only outside private actors are recognized as principal captors of a state while ignoring the real possibility that the inside political actors can also be identified as main captors. Further, its definition also recognizes the ‘threat of violence’ as means of capturing the state. Few like the World Bank (2017) and Brooks *et al.* (2013:122-132) unwarrantedly attempt to extend the phenomenon of state capture to include a military or armed invasion or act of threatening to capture the state in one way or the other. It is irrational to understand the phenomenon even within a violent or threatening context because the unique characteristic of state capture, in particular, constitution capture, is the fact that it arises within a constitutionally-established legal framework. As pointed out by Southall (2018: 29), its narrowly casual usage of the term ‘state capture’ leads to the real meaning of the phenomenon being undermined. It is arguable at any point that we cannot explain state capture as a sort of rent-seeking as understood by Iwasaki & Suzuki (2007: 396) or as a threatening approach or invasion as explained in World Bank (2017) and Brooks *et al.* (2013).

Now we will consider some issues at the operational level. Even though such scholars have attempted to broaden our understanding of the phenomenon of state capture at the real operational level, it is evident that some scholars have still rigidly been stuck to some of Hellman and his colleagues’ original conditions, such as the timing of the transition, the only single-actor perspective, and the nature of ends and means. Such a rigid approach leads them fallaciously not to recognize the existence of state-capture political settings, while others show their ability to determine the occurrence of the phenomenon in the same political backgrounds of the same polity. A classic example of this can be seen in the 2016 Zuma-Gupta case in South Africa¹⁸, wherein some scholars

have been too reluctant to discover the phenomenon’s existence (*e.g.*, Lodge 2018). However, others recognized this (*e.g.*, Southall 2018) in the very same political settings and in the very same academic volume, as seen in Meirotti & Masterson (ed. 2018)¹⁹.

Unlike Lodge (2018), in conducting their research project regarding the same Zuma-Gupta case, Bhorat *et al.* (2017), whose work was published under the title of ‘*Betrayal of the Promise: How South Africa is being Stolen*,’ firmly argue that ‘*South Africa has experienced a silent coup*.’ This means that it is a highly perilous political circumstance than state-capture political settings, according to Bhorat *et al.*’s (2017) analysis of the said South African political settings.

On the other hand, after the legal battle against the then President Jacob Zuma’s court bid not to publish the relevant report²⁰, in publishing the 2016 Report of Public Protector (*hereinafter* the Report of PP) of South Africa²¹ under the title of ‘*State of Capture*’ following the relevant provisions of their 1996 Constitution, the South African Public Protector’s approach has added additionally more values to the ongoing discourse of state capture from a constitutional and prosecutorial perspective that mainly focuses upon the political actors’ culpability (*vide*, the 2016 Report of PP; the 2018 Statement of Public Protector of South Africa²²).

The Zuma-Gupta case not only led South Africa to be more familiar with the state capture concept but also paved a path for some other African states to recognize the vulnerability scale of their own state-capture political settings (Masterson 2018: 183). Especially, it could be argued that such an academic approach to exploring the Zuma-Gupta case has also provided new insight into definitional and operational issues surrounding the phenomenon.²³ Though few have noticed the acknowledgment of the likelihood of political elites’ approach to state capture, many scholar works related to the same Zuma-Gupta case heavily seek out the conditions

to the business tycoon Gupta family. This can be considered as a case in point whereby the phenomenon of state capture has rigorously been tested at the definitional and operational level by both independent academics and public authorities like the prosecution institution of South Africa.

¹⁹ Compare Lodge (2018) with Southall (2018) in Meirotti & Masterson (ed. 2018), for example.

²⁰ BusinessTech, 31 October 2016, available at <https://businesstech.co.za/news/government/141761/van-rooyen-makes-second-attempt-to-block-state-capture-report/> BusinessTech, 2 November 2016, available at <https://businesstech.co.za/news/government/142113/public-protectors-report-on-state-capture-released-download-it-here/>

²¹ The Report of PP of South Africa of 2016 is available at <https://www.sahistory.org.za/archive/state-capture-report-public-protector-14-october-2016>

²² The Statement of Public Protector of South Africa of 2018 is available at <http://www.pprotect.org/sites/default/files/media%20statements/FINAL%20STATEMENT%20-%20Commission%20of%20Inquiry%20into%20State%20Capture%2018%20Jan%202018%20%283%29%20%282%29.pdf>

²³ Additionally, for full detail on the relevant judicial commission of inquiry into allegations of state capture of South Africa which arose from the 2016 Zuma-Gupta case, *vide* the recently published series of Judicial Commission of Inquiry into State Capture Reports’ (2022) volumes of Part II to Part III.

¹⁸ The Zuma-Gupta case revealed the symbiotic relationship of the then South African President Jacob Gedleyihlekisa Zuma and his close family members

of the timing and outsider actors apart from the extent of democratic consolidation and a certain degree of political centralization (*cf. for example*, ed. Meirotti & Masterson 2018; Masterson 2018; Lodge 2018; Southall 2018; Bhorat et al. 2017; Akinduro & Masterson 2018).

Ironically, in their index of the state capture, despite their merely focusing on the outside captors, Hellman and his colleagues have not shown their tendency to maintain the timing condition (*vide* Hellman, Jones and Kaufmann 2000c: 9-11; Hellman et al. 2000a: 20-24). The line of their argument implies that political and economic transitional periods can typically cause a country to be the victim of state capture as it is (*vide, e.g.*, Hellman et al. 2000a; Hellman & Kaufmann *n.d.*). Interestingly, in Hellman and his colleagues' view, the work on the operational application of this 'conceptual framework to complex realities' of a given polity entirely depends on academics and experts as well as official sectors (such as public prosecutors) of its polity (Hellman & Kaufmann *n.d.*: 1). This means that the concept does not have to be tightened by each element of conditions diagnosed with their original work related to transition economies.

Nevertheless, it has become highly complicated because the current understanding of state capture has not only theoretically been confined to a transitional timing phrase by some state-capture indices (*cf. ed.* Meirotti & Masterson 2018: 189-91; Brooks et al. 2017:126-7) but also being empirically bound to a transitional occurrence (*vide* Lodge 2018). Such an approach inevitably forces us to overlook or ignore another real captor of the state, *i.e.*, the inside political actors or rulers of the state. For example, the index of state capture in Meirotti & Masterson (ed. 2018) relating to the 2016 Zuma-Gupta case rules out that such a political and/or economic transition 'goes beyond a change in government instituted by means of an election or the revision of a constitution' wherein 'an authoritarian political system with a centralized economy' is shifted into 'a multiparty democracy and a liberal market economy,' which is 'fundamental shift in the established normative values' (*ibid.*: 189) of a given state.

Correspondingly, does such a degree of the transitional process beyond an electoral government change matter when considering a state-capture situation in a polity? If the answer to this is 'yes' as seen in Lodge (2018), for example, then the following key question is 'what is the legitimate reason for not ruling out that a change in the government within an electoral process (whether with a landslide victory or thin majority) or the political leadership of government change (within or without a franchise electoral system), and a merely constitutional amendment can also generate state-capture political settings, which is tantamount to wholesale transition political settings for state capture. In this context, few scholars (*e.g.*, Grzymala-Busse 2008; Edwards 2017; Akinduro & Masterson 2018; Mkhabela 2018) have attempted to formulate a valid and compelling argument that a franchise electoral environment where (ethnically, racially, religiously, lingual, etc.) diverse society is shaped and ruled by political elites'

election-based ethnocentric or racial, religious psych along with their dominant political parties' can also lead to an avenue for the state being captured.

Hence, it is necessary to develop an analytical framework for understanding the phenomenon of state capture beyond the explanation and conditions by Hellman and his colleagues' original works and their à la. Otherwise, we fail to recognize even the state-capture political settings initiated by the inside political actors or political leadership of a state in return for private benefits²⁴ or politically motivated interests²⁵.

V. THE ELEMENTS OF AN ANALYTICAL FRAMEWORK FOR CONSTITUTION CAPTURE

As briefly discussed in the previous sections of this article, the current body of literature on state capture has been growing broader and dealing with its definitional and operational issues to some extent. However, many scholars remain stuck in Hellman and his colleagues' original definitions and conditions. Overall, the literature generally lacks 'a theoretical space as to the normative aspects' (Rothstein & Varraich 2017: 95).

The major weakness in the literature, we argue, is that although the phenomenon of state capture is directly related to the state (legislative and policy) decision-making process along with the functions of its executive and judicial branches, no attempt seems to explain the phenomenon at least in terms of the underlying principles of the basic concepts of the state and its constitutional decision-making process. On the other hand, except for few like Grzymala-Busse (2008), Edwards

²⁴ For example, in Tunisia, during his administration, the former President Zine El Abidine Ben Ali's and his family's assets, including properties from boats and yachts to more than 660 firms, were estimated at approximately 13 billion USD, which was amounted to more than one-quarter of the 2011 Tunisian GDP (*vide* Rijkers, Freund & Nucifora 2014: 6). The Ben Ali case proves how the inside leadership of the government, together with his or her inner circle clans or cronies, can become active captors of the state within a constitutional framework.

²⁵ For example, the 18th Amendment to the 1978 Constitution of Sri Lanka was enacted in September 2010 and arose as a consequence of the then President Mahinda Rajapaksa's and his ruling party's opportunistic constitutional approach to annulling the 17th Amendment to the Constitution to abolish some Commissions designed to maintain and enhance the checks and balances in the governing system including the Bribery Commission while strengthening the executive power over the legislation and judiciary, and to lift the restrictions on President's discretionary power over high-profile unelected public officials and Appellate and Supreme Court judges including the Chief Justice, and to repeal the Article 31(2) of the 1978 Constitution which constitutionally limited the term of office of the President to two-term, meaning that any sitting President is constitutionally entitled to contest presidential elections as much as s/he would wish among other constitutional elements (for more details, *vide ed.* Edrisinha & Aruni 2011; Krishnamohan 2015). However, after a new government was elected in 2015, the 18th Amendment was repealed by the 19th Amendment in April 2015 so as to limit President's power and establish the previous independent Commissions before the 18th Amendment, and impose the restriction on the two terms of office for the President among other elements. Ironically, the 19th Amendment was repealed by the 20th Amendment in October 2020, just two months after a new government was elected in August 2020 under the leadership of the said former President Mahinda Rajapaksa and his brother Gotabhaya Rajapaksa to strengthen the President's power over the other two branches of the government, among other things.

(2017), and Rothstein & Varraich (2017), a great many scholars have shown their failure and reluctance to acknowledge that the phenomenon can also be explained in terms of the inside political actors of the state (*i.e.*, elected/unelected state power-holders) beyond Hellman and his colleagues' original definition and conditions.

Another apparent weakness in understanding the phenomenon is that the academic focus has been exclusively placed on the economic consequences of the phenomenon in terms of the activity-politics (*i.e.*, the political life) of the state. Hence, there is little or no attempt to explore the fullest possible picture of the real locus of the phenomenon of *state capture* and its profound consequences for the state in terms of the sphere-politics (the idea) of the state. Further, despite several forms of state-capture political settings being discussed in some academic works (*e.g.*, Hellman and his colleagues' seminal works, Grzymala-Busse 2008, and Edwards 2017), no attention has focused on the distinction of recognizing *constitution-capture* as a typology of state capture in which the established element/s of a constitution or legislation in question is/are fully considered as empirical evidence.

To address such an apparent lack of exploratory approach to determining even the obvious manifestation of state-capture political settings in the established elements of a constitution or legislation, we are theoretically and empirically required to develop an analytical framework advanced by normative and applied concepts concerning the state and its constitutional decision-making process. At the outset, to avoid its inherent complexity, we claim that the occurrence of shaping '*the formation of the basic rules of the game*' (as defined in Hellman and his colleagues' original definition but excluding the term '*the efforts of firms*') should conceptually be identified as one typology of the phenomenon of state capture, namely '*constitution capture*.' The enacted constitutional elements in question should be used as empirical evidence when examining political settings for constitution capture. In other words, such enacted constitutional or legislative elements should be construed as direct and profound consequences of constitution-capture or state-capture political grounds of a given polity. It is mainly because the current literature on state capture has so surrounded us with perplexing explanations of the phenomenon that we have theoretically been reluctant to explore even the real political settings for capturing the constitutional decision-making process by the inside political actors of the state primarily for political interests.

For example, with the current understanding of the phenomenon, we lack the theoretical ability to explore constitution- or state-capture political settings in the 18th and the 20th Amendments to the 1978 Constitution of Sri Lanka enacted in September 2010 and in October 2020, respectively under the two different terms of Mahinda Rajapaksa and his brother Gotabhaya Rajapaksa's administration with a two-thirds majority of the legislation or Parliament.²⁶

²⁶ Vide supra note.

Correspondently, we suggest utilizing the *retroductive* (or *abductive*) reasoning method developed by Peirce (1931-1935; 1958) that infers the causes from the consequences or effects.²⁷ In this way, we can infer the reasons (for enacting the constitutional/legislative element/s in question) from the consequences (*i.e.*, the already-established constitutional elements).

To put it another way, if we are first put forward to theoretically and empirically examine whether the already-established constitutional elements of legislation or a constitution in question appear to be unjust or have been adopted within the conventional process of constitutional justice, then we will be put in a good position to dig out the story or stories behind that enacted legislation or constitution to determine the manifestation of constitution-capture political settings in them²⁸ rather than being merely confined to economic aspects and perception-based accounts by the actors involved or inductive reasoning method.

To do so, we argue that any analytical framework for determining the manifestation of constitution-capture or state-capture political settings should be synthesized by the underlying principles of several normative theories within the realms of the state, its constitutional decision-making process, and constitutional justice to form a common conceptual denominator in the *sui generis* nature of the state and its constitutional decision-making process. For this purpose, several theories can be considered; among them are John Rawls' ([1971] 1999) *Veil of Ignorance*, Buchanan & Tullock's ([1962] 1999) *Constitutional Choice*, and Elster's (1977, 2000, and 2003) *Constitutional Precommitment* along with the *social contract theory* nourished by the *public trust doctrine*. By synthesizing the fundamental principles of these theories, we tentatively claim that the elements of such a common denominator in the *sui generis* nature of the state and its constitutional decision-making process should be that of '*the contractual commitment (or constitutional precommitment) to nurturing and enhancing the ultimate distribution channel of justice to the whole people who live in its territory regardless of their ethnicity, race, religious, gender, social, economic, or political background and so forth*

²⁷ It is obvious that, unlike inductive reasoning designed to test a hypothesis being already endorsed by a retroductive or anticipatory procedure, the function of retroduction begins with 'the stimulus to guessing' or 'the hint of the conjecture' derived from experience (Peirce: CP 2.755). Peirce explains the grammar of scientific speculation. If we were 'to develop the reasons the force of which' we feel our selves, we assume 'they would have weight with others (Peirce: CP 2.219). It cannot also be denied that one's academic desire to utilize a reasoning method is entirely dependent on the underlying purpose and/or the extent of the understanding of the study s/he will undertake.

²⁸ For example, to contemplate whether certain elements of a constitution or legislation regarding the language policy of a given country have been captured by their majority rule (*i.e.*, their majority ethnic, racial, or religious people), we should first be expected to explore adverse or dire constitutional consequences for the certain or the selected group/s of the citizenry (*i.e.*, the state as a whole) in which the language right of those people affected has been deliberately excluded from the established constitutional elements of its language policy of the country in question.

(in the extreme sense, the subject of a state is extended to be included in all the living creatures and the environment within its territorial boundary).’ We believe such an approach to the phenomenon of constitution capture leads us to understand the very concepts of the state and its constitutional decision-making process while helping to contemplate how profoundly the consequences of state capture can encroach upon the sphere-politics (*i.e.*, the idea) of the state rather than impinging upon the activity-politics (*i.e.*, the political life) of the state.

Several other factors are also considered to enrich such an analytical framework with some normative elements. Firstly, we should not ignore the fact that the phenomenon of state capture is inherently coupled with the state’s politics. This means that the extent to which we can explain the phenomenon of state capture essentially depends upon the extent to which how deeply we can understand the *sui generis* nature of the state and its constitutional decision-making process.

Secondly, we should attempt to draw the fullest possible picture of the real locus of the phenomenon and its profound consequences for the state in terms of the sphere-politics (*i.e.*, the idea) of the state rather than merely being focused on the activity-politics (*i.e.*, the political life) of the state. We argue that the real locus of the phenomenon lies in the sphere-politics of the state.²⁹ The general thought is that the constitutional decision-making process of a state physically happens in the activity-politics of the state. There we perceive that lawmakers assemble in the legislature and make laws following the established procedural process. Thus, when attempting to complete the real locus of our law-making process, an overall picture of such process of activity-politics of the state comes to our mind at first, which deceives us in

²⁹ We can understand the concept of politics of the state either in terms of temporal politics and spatial politics (vide Palonen 2011; Badie, Berg-Schlosser & Morlino 2011) or in terms of political activities in ‘the political life of a state,’ and ‘the idea of the state’ per se (vide Steinberger 2004). Such clarification leads us to clearly understand the distinction between the activity of politics and the abstract notions in any political process, including constitution-making, which helps us determine the fullest possible picture of the real locus of the phenomenon of state capture or constitution capture in the first place.

To be clear, the spatial or the sphere concept interprets politics as a sphere, whereas the temporal or the activity concept construes it as an activity in the real physical world (vide Palonen 2011; Badie, Berg-Schlosser & Morlino 2011). The sphere-politics is referred to its abstract notions in the political sphere, such as moral values and political convictions that embolden political agents/actors or lawmakers to ideologically differentiate their united political collectivity or public goods from their private or personal identities (e.g., religion, ethnicity, nationality, cast and so forth) and personal or party gains in the exercise of executive, legislative and judicial power of the state. On the other hand, the activity-politics concept is referred to temporal or visible activities conducted by political agents/actors or lawmakers of the state in the real physical world. The sphere concept lies in the assumption that politics is that of everything that connects to the political sphere, while the temporal concept of politics necessitates contemplating a further condition of the distinction of political activities (Palonen 2011: 1300).

theory. In actual fact, the constitutional decision-making process is theoretically intrinsic to the sphere-politics of the state where the abstract notions in the political sphere of the state (such as moral values and political convictions that embolden political actors/agents or lawmakers to make constitutional choices) eventuate in their constitution-making process.

In other words, constitutional decision-making power is generated and maintained by the ideological or normative power of the state (falling within the sphere-politics of the state) instead of its political and economic power (*cf.* Poggi 1990; Steinberger 2004; Durkheim 2003). Therefore, we can reasonably explain the locus of the phenomenon of constitution capture and its consequences based on the states’ sphere politics. Here we argue that profound consequences of constitution-capture political settings are all the time to destroy the very normative properties of the sphere-politics of the state.

Thirdly, following our exploration of the locus of the phenomenon, we claim that we should shift our focus from the activity-politics (*i.e.*, the political life) to the sphere-politics (*i.e.*, the idea) of the state to deal with the inability of the current understanding of the phenomenon to diagnose the manifestation of real constitution-capture political settings even in a single element of a constitution or legislation. Understandably, it seems illogical to distinguish state capture from other typologies of political corruption (*e.g.*, influence, administrative corruption, lobbying) by a mere claim to shift the focus from a set of active actors (the inside political actors of the state) to other active actors (the outside business actors of the state) as understood by Hellman and his colleagues’ original works and their followers’ literature, which focuses on the state’s activity-politics. In other words, it necessitates freeing the current understanding of the phenomenon from the unwarrantedly-confined economic explanations provided by Hellman and his colleagues’ original understanding and conditions, merely been designed to consider the relationship between the state and the outside business actors of the state within the arena of the state’s activity-politics. As such, a theoretical understanding of the real locus of the phenomenon leads us to shift our focus to the sphere-politics from the activity-politics of the state, which can rescue the explanation of the phenomenon from unnecessary confinement to market-oriented perspectives. Such an approach offers an insight into understanding the question of what *really* happens to the state in the occurrence of the phenomenon.

Above all, fourthly, we should construe a constitution as a social contract. When a constitution is explained in terms of the theory of social contract, we are also theoretically forced to examine the relationship between the ruling and the ruled class in terms of the principal-agent theory and the public trust doctrine. It follows that the (elected and unelected) public office holders (or power holders) should act as the agents of the entire people of the state while the people are the principals of those power holders. This means that when the power holders become constitutional decision-makers, they should act on behalf of the principals’ interests through a collective approach to distribute constitutional justice to

everyone, at which point they should not act as the agents of any certain selected group/s of the people. At the very point where they deliberately fail or omit to act as the agents of the entire people in the constitutional decision-making process to gain their own political, racial, religious, or financial interests or ends which are against the principals' interests, the constitution- or state-capture political settings begin to emerge.

Evidently, these factors discussed in this section cannot be overlooked when considering any analytical framework for determining the manifestation of political settings for constitution capture in the established elements of a constitution or legislation. However, it should be emphasized that the points made here are suggestive but not conclusive. Our attempt in this paper is not to provide a complete or comprehensive list of theoretical and normative elements of developing such an analytical framework.

VI. CONCLUSION

To sum up, it is evident that the current body of literature on the phenomenon of state capture has been unwarrantedly confined to economic explanations and Hellman and his colleagues' original definition and conditions while lacking descriptive and normative aspects in the explaining of the phenomenon. Accordingly, the thrust of our argument is that we should shift our research focus from the activity-politics (*i.e.*, the political life) to the sphere-politics (*i.e.*, the idea) of the state rather than Hellman and colleagues' shifting from a set of captors (*e.g.*, the inside political actors) of the state to other captors (*e.g.*, the outside business actors). Examining in this way means that the locus of the phenomenon and its profound consequences should be explained in terms of the sphere of politics of the state.

We further argue that to fully explore state-capture political settings in the established elements of a constitution or legislation, the occurrence of shaping '*the formation of the basic rules of the game*' should conceptually and empirically be recognized as a typology of the phenomenon of state capture, naming 'constitution capture.' As such, we also strongly suggest that any analytical framework for determining the manifestation of constitution-capture or state-capture political settings should be synthesized by the underlying principles of several normative theories related to the state and its constitutional decision-making process with the employment of a common denominator in the *sui generis* of the state and retroductive reasoning method designed to infer the causes (*i.e.*, constitution-capture political settings) from the consequences (*i.e.*, the established constitutional or legislative elements) in question.

Finally, we conclude that the extent to which the phenomenon of state capture or constitution capture can be understood firmly rests upon the extent to which how deeply we can understand the *sui generis* nature of the state and its constitutional decision-making process. However, further studies are necessary to enrich such an analytical framework with normative elements of the relevant theories and empirically test it in the real constitutional context.

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