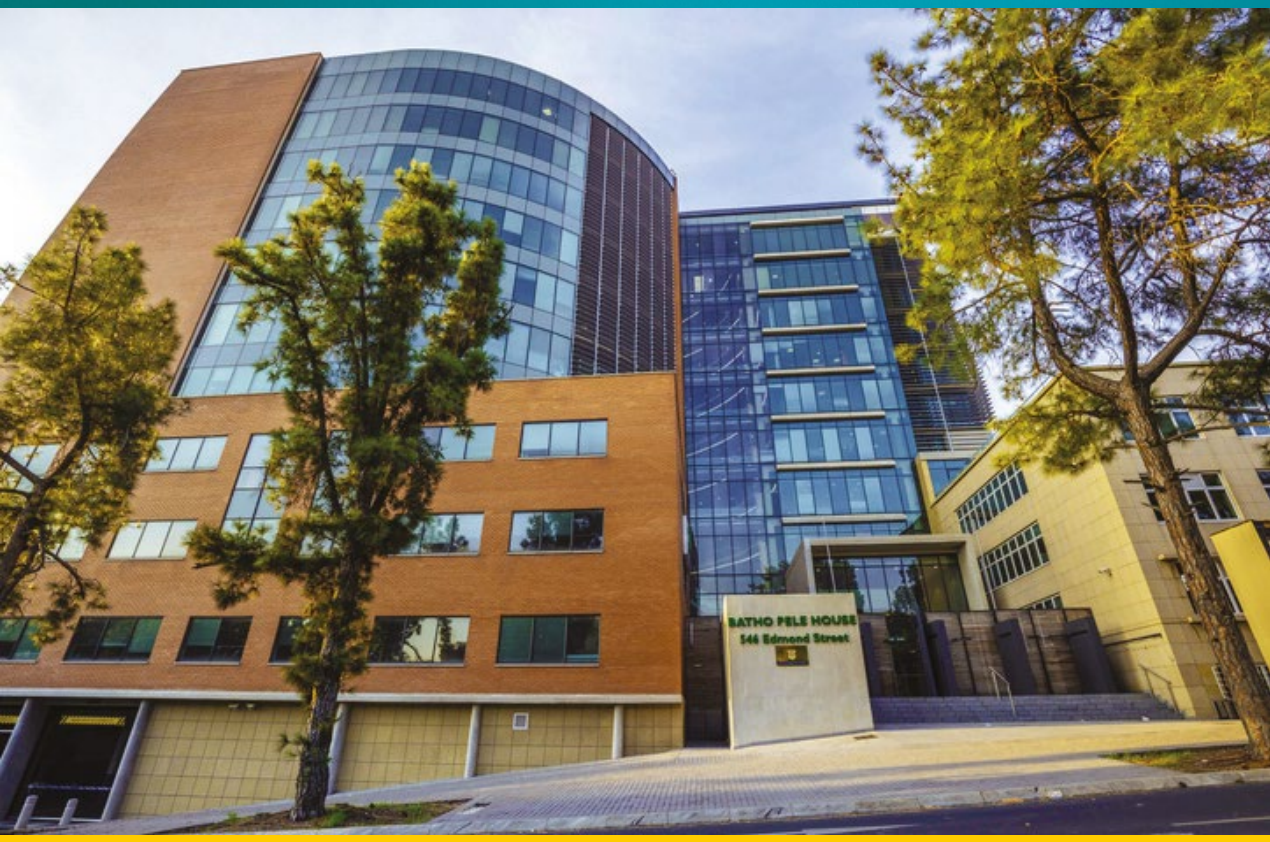
REFORMING PUBLIC ADMINISTRATION IN SOUTH AFRICA: A PATH TO PROFESSIONALISATION



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Reforming Public Administration in South Africa

A PATH TO PROFESSIONALISATION

Editor

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About PARI

Established in 2010, the Public Affairs Research Institute (PARI) is a Johannesburg-based organisation, affiliated to the University of the Witwatersrand, that works to support the development of a more effective and accountable state—one that better supports a more economically and socially just society. Much of PARI's work studies the effectiveness of state institutions in service delivery and infrastructure. Also running a postgraduate teaching programme, the organisation generates high-quality academic research that aims to uncover and understand the structural dynamics shaping state practice and to develop strategies for reform. PARI works with change agents in the public service and civil society to improve the implementation of policies in relevant fields as well as to advocate for changes to relevant legislation, government systems, or ways of thinking about or framing a governance challenge. Its work inside departments and agencies across government and collaborations with other organisations in the country and the global South provide unique insights into state performance and state-society relations.

About the Authors

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Preface

We wish briefly to set out the history of this publication and to acknowledge the personnel at PARI who contributed to this collective effort.

This book had its origins in the research, writing, dissemination, and advocacy efforts surrounding three policy position papers produced by PARI. These three papers treated distinct parts of the South African public administration: high-level appointments within the criminal justice sector[1], public procurement[2], and the system of recruitment and appointment of public servants[3]. Versions of these papers were presented and discussed at several advocacy forums including a conference jointly hosted by PARI and the Ahmed Kathrada Foundation in 2019, workshops with civil society in the same year, and various public 'webinars' over the last 18 months.

The position papers were informed by ongoing conversations with knowledgeable and supportive political office-bearers and public managers. The proposals they articulated constitute a collective product of partnership between civil society organisations, research institutes, and individuals committed to a politics oriented around the achievement of a free and equal society devoid of racism, sexism, and other forms of oppression and marginalisation, as set out in our Constitution's founding provisions. More specifically, the proposals emanate from and demonstrate PARI's commitment to seeing a reformed state administration support the achievement of a more just and equitable society along such lines. Our inclusive process recognised the importance to this politics of a democratic, lawful and developmental public administration. PARI is dedicated to supporting the construction of such an administration through activism around specific reforms with widely evidenced efficacy.

These papers went through a process of several stages of collaborative review during their initial production. This process included a series of workshops where some external advocates and academics offered written comments and others discussed earlier drafts. PARI wishes to thank here the persons who participated in this process, which yielded considerable constructive criticism: Geo Quinot, David Bruce, David Lewis, Lukas Muntingh, Lawson Naidoo, Gareth Newham, Anton van Dalsen and Lee-Anne Germanos, Robert Cameron, Kris Dobie, Brian Levy, Vinothan Naidoo, Ben Turok, Michael Nassen Smith, Niall Reddy, Glen Robins, Lisa Seftel, Ron

[1] Florencia Belvedere, 'Appointments and Removals in Key Criminal Justice System Institutions' (Public Affairs Research Institute, April 2020), https://pari.org.za/position-papers-criminal-justice-system/.

[2] Ryan Brunette and Jonathan Klaaren, 'Reforming the Public Procurement System in South Africa' (Public Affairs Research Institute, May 2020), https://47zhcvti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/PROC05-05-20.pdf.

[3] Ryan Brunette, 'Position Paper on Appointment and Removal in the Public Service and Municipalities' (Public Affairs Research Institute, April 2020), https://47zhcvti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/REC05-05-20.pdf.

Watermeyer, Johan Kruger, John Jeffery, Trish Hanekom, and Anthony Butler. In addition, representatives from at least the following organisations attended at least one of the events at which these papers were discussed: the Ahmed Kathrada Foundation, ANC Stalwarts and Veterans Group, Auwal Socio-Economic Research Institute (ASRI), Black Sash, Centre for Complex Systems in Transition, Centre for Development and Enterprise, Corruption Watch, Council for the Advancement of the South African Constitution (CASAC), Dullah Omar Institute (DOI), Freedom House, Helen Suzman Foundation (HSF), Institute for Security Studies (ISS), Johannesburg Against Injustice (JAI), Nelson Mandela Foundation, Organisation Outdoing Tax Abuse (OUTA), Public Service Accountability Monitor (PSAM), SANGOCO, Strategic Dialogue Group (SDG), Studies in Poverty and Inequality Institute (SPII), and #UniteBehind.

Each of the papers underwent a further stage of blind peer-review from two legal academics in the field of administrative law and revisions in response to those reviews. It is the individual authors of each of the three chapters and the editor that take final academic and professional responsibility for the content and any errors that may exist.

A number of persons at PARI contributed specifically and significantly to this effort. Vishanthi Arumugam, holder of the communications portfolio, got this publication started—collating and reformatting most of the original files. Sarah Meny-Gibert, PARI's research coordinator, contributed to the writing throughout (in particular to the introduction) and copy-edited much of the final product. Florencia Belvedere contributed not only as the author of one of the substantive chapters but also as head of PARI's State Reform Programme, where this project was housed. Jonathan performed the duties of a book editor, overseeing the peer review process and the compiling, writing, and final editing of this book. Mbongiseni supported the project enthusiastically from its inception.

Finally, it is worth noting here that this book is published in a digital form and is available through open access. We thank our publisher, Simon Sephton, for exploring this electronic path with us. With this publication, PARI is continuing to experiment with the best ways to disseminate ideas and stimulate debate around themes of reform and reinvention for the South African state. In a number of state sectors such as judicial reform, recent trends in the literature have demonstrated that policy-oriented research can play an important role.[4] We believe state transformation is a process that is fundamentally based in practices of democratic citizenship and is something in which all citizens may usefully contribute. Noting that the digitalization of academic production and scholarly publication raises many and complex issues (worthy of a book in its own right?), we wholeheartedly support the aim of access to knowledge which lies behind open access publishing.

Mbongiseni Buthelezi *and* Jonathan Klaaren
Johannesburg, September 2021

[4] Hugh Corder and Justice Mavedzenge, eds., Pursuing Good Governance: Administrative Justice in Common-Law Africa (Cape Town, South Africa: Siber Ink, 2019).

Introduction

Conceiving (of) State Reform in South Africa

This short book analyses three distinct and key features of the state: the system of appointment and removal in the public service and municipalities, high-level appointments and removals within the criminal justice sector, and public procurement. A state's politics and its capacities are constituted in important ways by how it fills its public administrative offices (including its prosecution service) and purchases its necessities. The book, considering outcomes in South Africa, advocates for specific reforms in each area. It argues that the timely consideration and adoption of reforms along these lines is an urgent task. With that in mind, the book has been written chiefly for two audiences: both for activists keen to build a state which can play its role in advancing the progressive transformation of South African society, and for scholars who are interested in understanding the character and possibilities of the evolving South African public administration.

In 2019, President Cyril Ramaphosa acknowledged that 'our greatest efforts to end poverty, unemployment and inequality will achieve little unless we tackle state capture and corruption in all its manifestations and in all areas of public life'.[1] He promised, on behalf of government, to work with South African society to fight these threats and strengthen the state's ability to promote its democratic mandate and address the needs of its people. As this book is published more than two years later, it is clear that efforts to address the system of patronage in the public sector have been limited. Further, the COVID crisis has highlighted just how pressing the need for a state reform agenda (and its execution) is. It remains urgent to reverse the degradation of state institutions and to rearticulate and reaffirm, in a concrete form, the values and aspirations underlying the role of the public service in our as-yet-untransformed society. This book endeavours to contribute to the development of an overarching strategy for state reform by proposing concrete ways to promote institutional integrity, democratic control and administrative effectiveness.

Even before the Covid-19 pandemic, when Ramaphosa made his speech, the South African state was manifestly in crisis. The high ideals of the anti-apartheid movement had decomposed in corruption and the politics of patronage. The fiscus, the public administration and critical infrastructure were deteriorating. The economy, partly in consequence, had stalled. These well-attested propositions received greater recognition when the pandemic struck. Government's early decision to lockdown, decisive and informed by science, at first won near-universal

[1] https://www.gov.za/speeches/President-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000.

goodwill as South Africans rallied against a common threat. Within weeks, however, this rare amity evaporated. The police and army were implicated in gratuitous acts of violence against ordinary people. A series of poorly justified and sometimes imprudent lockdown regulations accumulated. Corruption plagued the emergency procurement of personal protective equipment and other items needed to save lives. The lockdown lingered, it was extended twice, as the state failed to establish the test, trace and quarantine capacities needed to safely lift it. Economic and social support to businesses, workers, and the unemployed, was limited by fiscal concerns and rolled out late and haphazardly. Criticism, often warranted, sometimes opportunistic, exploded from all quarters.

The pandemic had caught South Africa unprepared and incapacitated. The country, already overwhelmed by the routine problems of normal times, now had to respond nimbly to a great and unforeseen public health emergency. It had to communicate clearly and elaborately, to quickly construct largescale and complex administrative operations, and coordinate tens of millions of people into new patterns of behaviour. In these tasks, it mostly fell despairingly short. The pandemic may be a prelude to what is shaping up globally to be an age of catastrophe—defined first and foremost by climate change—and it showed what South Africa might look like if it doesn't move to address its state crisis. By the end of 2020 the economy had contracted by 7 percent. The expanded unemployment rate had breached 40 percent. In surveys, 18 percent of households reported hunger.[2]

The book charts a path between and beyond two positions which have long had an out-sized place in South Africa's discussion about its contemporary governmental and public administrative problems. First, there is what we could call the moralist position. It stresses the need for ethical leaders. In their absence, it urges accountability, mobilising the polity behind disciplinary action, prosecutions and, for some, electoral turnover. The authors of this book do not deny the importance of ethics and accountability, but no country has ever satisfactorily resolved an episode of corruption and patronage politics of contemporary South African proportions through such efforts alone. There are simply too many people to prosecute, and too many others ready to take their place in the patronage system.

The second position can be labelled economistic, because it reduces the issues of corruption and patronage to economic causes. Proponents of this position argue that these issues are a consequence of the prevalence of poverty in South African society and its extreme inequality. As solutions, they promote economic development and redistribution, by whatever methods they might prefer. The most cursory look at the world will show the importance of such considerations. The richer and more equal countries have a visibly lesser incidence of corruption, but the economistic position elides the extent to which corruption and patronage are themselves impediments to economic advance. In contemporary conditions of globally

[2] https://cramsurvey.org/wp-content/uploads/2021/02/10.-Van-der-Berg-S.-Patel-L.-Bridgman-G.-2021-Hunger-in-South-Africa-during-2020-Results-from-Wave-3-of-NIDS-CRAM-1.pdf.

competitive capitalism, a professional and capable state is important for driving rapid development and associated redistribution.[3]

The chapters of this book accept the relevance of the factors addressed by moralism and economism. They emerge, however, from the view that official conduct, whether ethical or malfeasant, is powerfully framed, constrained and enabled by the structure of the institutions within which officials operate. They arise from a recognition that this structuration of the state has significant consequences in terms of economic outcomes. The chapters move with contemporary politics, by building on official policy statements which point in a serviceable direction. By building on these statements, the chapters also try to push government to move beyond them. They articulate a more encompassing and fundamental strategy for change. Moreover, although these chapters draw on policy and contain extensive analysis of law, they develop their arguments with an appreciation of their political-sociological context.

Chapter 1 is on reforming processes for appointment and removal in the public service and municipalities. In the South African system, politicians hold largely unchecked powers over these processes. Ryan Brunette, tracing the legal framework, shows how it allows politicians to bring their political and personal connections into public administrative office, which downplays technical competence and enables circumvention of the procedural controls which protect public administrative functions from corruption. Given the country's levels of economic deprivation and inequality, politicians can and often do use the opportunities entailed to accumulate wealth and to generate the patronage resources needed to build support and to evade democratic accountability. Destabilisation and paralysis are often further effects—as energy and resources are directed away from government programmes and policy formulation/implementation and towards private interests and factional battles. Countries which have successfully overcome expansive, systemic episodes of corruption and patronage have reformed personnel systems to close down those opportunities, and South Africa should emulate them. In ways that preserve democratic control, Brunette argues that political powers must be checked and balanced by dividing appointment and removal processes into stages and giving the Public Service Commission and other independent bodies power over some of these.

Chapter 1 sets the stage for Chapter 2, which deals with appointment and removal processes in key criminal justice institutions. The legal framework that governs appointment and removal in these organs of state, which have investigative and prosecutorial functions, has blurred the lines between politics and regulation, undermining the independence that these institutions need to address corruption and other forms of malfeasance without fear or favour. Florencia Belvedere

[3] For example: Evans, P., & Rauch, J. E. (1999). 'Bureaucracy and growth: A cross-national analysis of the effects of Weberian state structures on economic growth'. American Sociological Review, 748–765; Kohli, A. (2004). State-Directed Development: Political Power and Industrialization in the Global Periphery. Cambridge, UK: Cambridge University Press.

discusses and justifies a series of reforms to the appointment and removal processes for senior leaders in the National Prosecuting Authority (NPA), the South African Police Service (SAPS), the Directorate for Priority Crime Investigation (DPCI), and the Independent Police Investigative Directorate (IPID) which aim to improve the transparency and rigour of these processes and to better guarantee their independence from partisan politics, while ensuring that the President as head of state, and the executive, retain their Constitutional powers to appoint. President Ramaphosa's appointment of Shamila Batohi as head of the National Prosecuting Authority (NPA) is one example of the positive effects of appropriate selection processes and credible appointments. Chapter 2 considers how to diffuse similar processes through the NPA and other criminal justice institutions.

Finally, chapter 3 deals with reform of the public procurement system. Ryan Brunette and Jonathan Klaaren give a sense of the scale and significance of public procurement in South Africa, the historical forces which have shaped it, and the problems which have emerged in the course of this history. They make the case for a process of reform which moves through the recently published draft Public Procurement Bill and which optimises imperatives—often viewed as competing—of integrity, operational efficiency and the promotion of socio-economic goals such as industrial development and black economic empowerment. The reforms considered in chapters 1 and 2 would serve to insulate procurement processes from inappropriate political and other forms of interference, a central cause of corruption. Beyond this, Brunette and Klaaren propose shifting the burden of public procurement integrity from restrictive rules, which constrain legitimate actors and are rarely enforced against the corrupt, to stronger methods of enforcement. They offer a lighter regulatory framework to enable good purchasing practice and advance black economic empowerment, and then they complement this with a series of innovative mechanisms for frustrating corruption, including a system of financial rewards for whistleblowers.

The reforms articulated and argued for in these three key features of the South African state are overlapping and mutually reinforcing. The authors readily acknowledge that other sectors and dimensions of the state also require concerted attention. The state-owned enterprises and other statutorily-defined public entities are an obvious omission. The authors also do not address the specific problems of particular sectors, like health, education and water. The basic principles and models developed in these chapters are relevant to this broader context, but will need to be tailored where distinctive legal frameworks and specific political and organisational contingencies require it. In any event, the ideas and arguments made in these pages are only a start. We hope to expand from this early foray to cover other areas in future, under an expansive state reform project.

Indeed, the focus of the book can be understood as necessarily preparatory in the sense of providing a vision for a better recalibration of the relationship between politics and administration in units of the South African state. Taking this forward will require work in both politics and administration. As recalibrated here, we

believe this relationship is foundational for a range of interventions to reduce corruption and improve public administration.

Additionally, getting this relationship right underpins the model of economic development seen perhaps most clearly in chapters 1 and 3 (as well as the culture of the rule of law directly supported by the criminal justice sector institutions treated in chapter 2). The work presented here on the public procurement system sees the relationship between politics and administration as playing an important role in ensuring procurement activity plays an active and contributory role in economic development, including local economic development. The work presented here on the potential for reform of state recruitment practices is likewise based upon a vision of the state as embedded within a society of material as well as ideal interests. At least in present-day South Africa, the fortunes of the state administration and the fate of the economy are mutually implicated. The state reform project is an iterative process between two spheres most often incorrectly seen as completely separate: the public and the private. In this sense, the book contributes to the articulation of a distinct developmental path for South African society.

CHAPTER 1

Appointment and Removal in the Public Service and in Municipalities

RYAN BRUNETTE

INTRODUCTION

This chapter argues for comprehensive reform of the rules and procedures that govern appointments to, and removal from, administrative positions in South Africa's national and provincial public service and its municipalities. The goals of this reform are to realise a rigorous reduction in corruption, while improving the democratic responsiveness, professionalism, and developmental effectiveness of the South African public administration. There is, at the time of writing, widespread recognition that the South African state has undergone a process of deterioration. Observers have seen the progressive, programmatic promise of the post-apartheid era degenerate into a politics of patronage and spoils. The fiscus, partly under this pressure, has become strained. The public administration's capacity to drive development and redistribution has been impaired. In a number of sectors, policy has become gridlocked and error-prone, delivery inefficient and erratic, and basic infrastructure is in many regions collapsing. The economy, reflecting these developments, has stagnated, with the average South African getting poorer and the poverty rate rising. Whatever else is needed to lift South Africa out of this malaise, the bleeding of the state must be stopped, the orientations and capacities needed to orchestrate a process of societal correction and advance must be built.

The proposed reforms developed here are central to this task. They are properly understood as foundational to the practice and study of modern, especially democratic, public administration. They were a pivotal consideration in many of its first acts[1] and in the founding texts of its academic study.[2] It has long been recognised that where politicians exercise unconstrained power over appointment and removal in the public administration, they can and will be tempted to use this power to give positions to supporters, to place them across administrative checks and balances, and engage in corruption. In the 1850s, for instance, Britain began its final push towards a non-partisan and professional civil service. It established an independent commission responsible for appointments and discipline, then expanded the authority of this body to cover most administrative posts by the 1870s. The

[1] For example Northcote, S.H. and Trevelyan C.E. (1854). 'Report on the Organisation of the Permanent Service. House of Commons'. Accessed on 18 June 2021 at https://www.civilservant.org.uk/library/1854_Northcote_Trevelyan_Report.pdf.

[2] Wilson, W. (1887). The Study of Administration'. Political Science Quarterly 2(2): pp. 197–222; Goodnow, F.J. (1900) Politics and Administration: A Study in Government. London: MacMillan.

United States, in contrast, was over this same time moving toward the zenith of its so-called 'spoils system', where—in accordance with the dictum that to the victor belongs the spoils of the enemy—incoming politicians would remove, *en masse*, the administrative appointments of their predecessors, freeing higher posts for their associates and directing contracts and other public benefits to their friends and followers. In 1880, in his classic comparative study of British and American public administration, Dorman Eaton concluded that 'Government by parties is enfeebled and debased by reliance upon a partisan system of appointments and removals,' continuing on appraisal of the British experiment that 'methods, which leave to parties and party government their true functions in unimpaired vigour, tend to reduce manipulation, intrigue, and every form of corruption in politics.'[3] After the Pendleton Act of 1883 initiated the process of implementing Eaton's recommendations, the United States itself entered a long era of visibly declining corruption. It constructed the considerable public-administrative capacities needed to implement the expansive programmes of the New Deal.

These experiences have been replicated widely. Countries that established appropriately insulated processes of appointment and removal early on in their political development,[4] such as Germany, Sweden,[5] Japan,[6] Malaysia,[7] and Botswana,[8] experienced significant and consequential episodes of relatively clean and capable government after the arrival of mass, democratic politics. Others, like the early if limited democracies of the United Kingdom[9] and the United States,[10] dramatically reduced incidences of corruption and patronage when political and administrative

[3] Dorman Eaton. 1880. Civil Service in Great Britain: A History of Abuses and Reforms and their Bearing upon American Politics. New York: Harper and Brothers, pp. 24–25.

[4] See Shefter, M. (1977). Party and Patronage: Germany, England, and Italy. Politics & Society 7(4), pp. 403–51.

[5] For example: Ertman, T. (1997). Birth of the Leviathan: Building states and regimes in medieval and early modern Europe. Cambridge University Press.

[6] Silberman, B. S. (1967). Bureaucratic Development and the Structure of Decision-Making in the Meiji Period. The Journal of Asian Studies, 27(1), 81–94.; Silberman, B. S. (1978). Bureaucratic Development and Bureaucratization: The Case of Japan. Social Science History, 2(4), 385–398.; Johnson, C. (1982). MITI and the Japanese miracle: the growth of industrial policy: 1925–1975. Stanford University Press.

[7] Puthucheary, Mavis. 1978. The Politics of Administration: The Malaysian Experience. Kuala Lumpur: Oxford University Press.

[8] Picard, L. A. (1987). The Politics of Development in Botswana: a model for success? (p. 298). L. Rienner Publishers.

[9] Rubinstein, W. D. (1983). The end of 'old corruption' in Britain 1780–1860'. Past & Present, 101(1), 55–86.; Harling, P. (1995). Rethinking 'Old Corruption'. Past & Present, (147), 127–158; O'Gorman, F. (2001). Patronage and the reform of the state in England, 1700–1860. Clientelism, interests and democratic representation: The European Experience in Historical and Comparative Perspective, 54–76.

[10] Van Riper, P.P. (1958). History of the United States Civil Service. Evanston, I.L.: Row, Peterson; Skowronek, S. (1982). Building a new American state: The expansion of national administrative capacities, 1877–1920. Cambridge University Press.; Glaeser, E. L., & Goldin, C. (Eds.). (2007). Corruption and Reform: Lessons from America's Economic History. University of Chicago Press.

leaders established civil service systems within which personnel decisions were removed from political arbitrariness. On the other hand, the experiences of hundreds of other polities show that extensive politicisation of personnel practices in public administrations is an important factor in corruption and patronage. A number of studies make this correlation quantitatively across different state organisations within countries and across large numbers of countries.[11] Contemporary South Africa corroborates these findings.

Recent government policy statements realise this. The National Development Plan recognises the problem of inappropriate political interference in public administration and argues for the Public Service Commission (PSC) to take a direct role in appointment processes.[12] In December 2020, following this argument, the Draft National Implementation Framework Towards the Professionalisation of the Public Service was gazetted.[13] In April 2021, a draft Public Service Amendment Bill was released for public comment, which points in the same direction by devolving personnel powers to administrative heads.[14] These policy statements represent an important acknowledgement, at the highest levels of government, of the key problems with the current system of appointment and removal and the traditional methods for resolving these. The present chapter works to push this acknowledgement to its logical conclusion. First, after offering a brief background on the public personnel system, the legal framework governing appointment to and removal from the public service is summarised and analysed. The framework gives considerable, effectively unchecked power to political office-bearers, with predictable results in terms of corruption. We turn, next, to the legal framework governing personnel practices in municipalities, where much the same outcome is evident. Then, having established the need for reform, we articulate and argue for general principles of reform, a substantive model, and an appropriate process.

[11] Neshkova, M. I. and T. Kostadinova (2012). The effectiveness of administrative reform in new democracies. Public Administration Review 72: pp. 324–33; Dahlström, C., V. Lapuente and J. Teorell (2012). The merit of meritocratization: Politics, bureaucracy, and the institutional deterrents of corruption. Political Research Quarterly 65: pp. 656–68; Rauch, J.E. and P.B. Evans (2000). Bureaucratic structure and bureaucratic performance in less developed countries. Journal of Public Economics 75(1): pp. 49–71; Meyer-Sahling, J.-H. and K.S. Mikkelsen (2016). Civil service laws, merit, politicization, and corruption: The perspective of public officials from five East European countries. Public Administration 94: pp. 1105–23; Oliveros, V. and C. Schuster (2017). Merit, tenure and bureaucratic behavior: Evidence from a conjoint experiment in the Dominican Republic. Comparative Political Studies 51(6): pp. 759–92; Bersch, K., S. Praça and M.M. Taylor (2017). State capacity, bureaucratic politicization, and corruption in the Brazilian state. Governance 30: pp. 105–24.

[12] National Planning Commission. "National Development Plan: Vision for 2030," November 11, 2011. http://www.gov.za/sites/www.gov.za/files/devplan_2.pdf.

[13] National School of Government. "A National Implementation Framework towards the Professionalization of the Public Service," December 8, 2020. https://www.gov.za/sites/default/files/gcis_document/202012/44031gon1392.pdf.

[14] Available at https://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/pama/Notice%20for%20comments%20to%20the%20Public%20Administration%20Management%20Amendment%20Bill.pdf

1. BACKGROUND TO THE PUBLIC PERSONNEL SYSTEM IN SOUTH AFRICA

South Africa has always resisted reforms such as those advocated for here. The South African state, the political forces that have historically formed it, has often replicated the biases and inequalities inscribed in the development of South Africa's economy. State institutions, after the intensifying British imperialist drive of the long nineteenth century, favoured English South Africans over Afrikaners. In the course of the longer and more profound history of colonialism and apartheid, it privileged white people over black people. Politicisation of the public administration has been a recurrent method for disadvantaged groups to reconfigure the state and redirect it toward addressing rightful grievances. The process, however, has simultaneously allowed politicians to place their allies across administrative checks and balances, facilitating privileged access to state resources, opening channels through which the politically-connected could rise more surely and quickly up the class structure than their compatriots, unleashing the spoils of public office into political-economic competition and threatening a descent into corruption.

The South Africa Act of 1909, drawing on precedent established in the broader Anglophone world, provided for a Public Service Commission (PSC) to check political discretion in appointments and removals. The incoming South African Party government, however, largely Afrikaner, nationalist, distrustful and opposed to the 'Milnerite state' which had been built in the aftermath of an imperialist war waged against them, delayed the establishment of the Commission to gain time to appoint allies into the administration. In the following decades, the Commission was often ignored, and then itself politicised. In result, the broader South African state trailed behind the administrative professionalisation and control of corruption achieved in otherwise comparable settler polities such as Australia and Canada. In the debate about politicisation in South Africa, much is made of the African National Congress (ANC)'s adoption of the Leninist doctrine of cadre deployment, in terms of which the party aims to ensure that it 'plays a leading role in all centres of power,' to promote a 'national democratic revolution' toward a 'united, non-racial, non-sexist and democratic society.'[15] Yet this call for politicisation is not reducible to Leninism, it emerges from systemic features of South African society. Moreover, the doctrine did not originate so much as legitimate and structure institutions pre-existing in the colonial and apartheid state.

In 1994, the ANC's elected office-bearers inherited from Afrikaner nationalists relatively wide prerogatives over the appointment of managerial heads of state organisations. It also adopted a proclivity for applying them in the dispensation of political favour and comradeship. These prerogatives were first exercised within days of the inauguration of Nelson Mandela's administration, but in a manner that was contained by the ambience of the government of national unity and the so-called

[15] ANC. 1997. Strategy and Tactics, as amended at the 50th National Conference. Accessed on 18 June 2021 at https://www.marxists.org/subject/africa/anc/1997/strategy-tactics.htm.

'sunset clause' public service protections engineered in the negotiated transition. The PSC itself was reconstituted with a balance between old guard administrators and new ones with ANC ties. A new Public Service Act was passed, providing for the amalgamation of apartheid's patchwork of race-based administrations into a single, non-racial post-apartheid public service. A new Department of Public Service and Administration (DPSA) was established, which began to assume some of the executive powers of the PSC, including the coordination and recommendation of senior administrative appointments. New ANC ministers came into incumbency atop old guard directors-general who had approached the end of five-year term contracts. These were often, but not always, replaced with new, ANC-aligned administrators. Natural attrition and organisational restructuring provided opportunities for the assertion of political preferences in middle and lower management positions.

Constitutional and legislative changes in 1996 and 1997 finally removed the PSC's executive powers over personnel practices, demoting it to an oversight, advisory, and grievance body. By loosening this significant, constitutionally independent check on the president and ministers, on premiers and members of provincial executive councils, the scope for politicisation in the national and provincial public service was dramatically expanded. In municipalities, councillors and mayors gained wider latitude over appointments and operations under the Municipal Systems Act of 2000. The resulting process of politicisation was and remains in tension with the Constitution, and understanding this is critical for defining the contours of reform.

2. THE LEGAL FRAMEWORK GOVERNING APPOINTMENT AND REMOVAL

The Constitution envisages a public administration that maintains a high standard of professional ethics; that is efficient, economic and effective in its use of resources; is development-oriented; provides services in a manner that is impartial, fair, equitable and without bias; encourages participation in policy-making; and is accountable and transparent. It supports good human-resource management and career development. It promotes 'employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation'.[16] Section 197(3) provides that, 'No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.'[17] Section 197(4) gives a limited exception. It requires legislation—presently under section 12A of the Public Service Act—to regulate the appointment of persons on grounds of policy considerations.[18] Beyond

[16] Section 195 of the Constitution of the Republic of South Africa (1996).

[17] Section 197(3) of the Constitution of the Republic of South Africa (1996).

[18] Section 197(4) of the Constitution of the Republic of South Africa (1996); s 12A of the Public Service Act, 103 of 1994; Public Service Regulation 66, 2016; DPSA. 2018. 'Filling of posts in offices of executive authorities and deputy ministers and the management of staff due to changes in political office bearers'. Circular Number: HRP 8 of 2019.

this countenance of a staff of special advisers attached to the offices of political executives, the Constitution only allows that appointment procedures have recourse to criteria of ability and demographic representivity. There is no provision, including in the law more broadly, for political criteria to enter into decisions about appointments to fixed posts within the public administration. For instance, in *Mlokoti v Amathole District Municipality*,[19] the Eastern Cape Division of the High Court found that in a competition for the position of municipal manager, despite the fact that there was an expressed political preference for another candidate, the municipality was obliged to appoint the best candidate.

Although in this way the statutory framework removes political criteria from consideration in appointment and removal processes, it nevertheless, as we shall see, gives politicians all the powers necessary to include them in practice. The resulting tension sits at the heart of South Africa's governmental crisis. In arguing for a resolution of this contradiction, this chapter has limited its own scope in two significant ways. First, it focuses on processes of appointment and removal. These processes are central, but their reform will necessitate a range of other adjustments in the allocation of powers and functions for other personnel matters and more broadly. That complexity is here elided, for the sake of brevity and clarity of argument.

The second limitation is a focus on the public service and on municipalities. The public service includes departments, government components and service delivery units in the national and provincial spheres.[20] Municipalities include both municipal administrations and municipal entities.[21] These categories do not cover all of the organs of state established in terms of the Constitution and other laws. They do not include the so-called Chapter 9 Institutions,[22] the security services[23] and the state-owned public entities.[24] The functions of these latter institutions, in theory and to a significant extent in fact, are such as to justify operation outside of the Public Service Act and related legislation. Their reform, therefore, will be subject to somewhat different particulars and processes to those elaborated here. It should be stressed, however, and at the outset, that international experience suggests that the reforms considered in this chapter for the public service and the municipalities, by constraining some patronage opportunities, will redirect political energies into a search for other patronage opportunities. Government agencies outside the public

[19] *Mlokoti v Amathole District Municipality and Another* (2009)30 ILJ 517 (E).

[20] Government components, established in terms of s 7A of the Public Service Act, are bodies directly accountable to ministers or members of executive council (MECs), but that sit outside of departments, facilitating a measure of autonomy and customisation in the performance of specific functions. Service delivery units, established in terms of s 7B, are ringfenced units within departments dedicated to the performance of specific socio-economic functions.

[21] As defined in the Municipal Systems Act.

[22] Established in terms of Chapter 9 of the Constitution.

[23] Established in terms of Chapter 11 of the Constitution.

[24] Established often in terms of their own statute and listed in schedules 1, 2, and 3 of the Public Finance Management Act.

service—public entities in the South African nomenclature—are generally a preferred source. It follows that the reforms considered here must be combined with efforts to constrain opportunities for patronage in these other parts of the state.

2.1 The public service

Appointments and removals in the public service are governed by the Public Service Act, 103 of 1994. Certain adjustments are made, for certain categories of employees, in terms of a range of other statutes, but the present discussion will confine itself to the Act and other core legislation. Under the Act, the Minister of Public Service and Administration (MPSA) is given the power to set norms and standards, by way of regulations, determinations and directives, encompassing a wide range of administrative practices, including appointments and removals.[25] A crucial definition provided for in the Act is that of an 'executive authority'. The executive authority of a department or government component, subject to the broader terms of the Act and other legislation, is given all those powers and duties necessary for the department or component's internal organisation, as well as for appointment and dismissal. An executive authority is ordinarily—with the notable exception of the Public Service Commission to be discussed momentarily—the political office-bearer responsible for the department or government component, so that the President is the executive authority for the Presidency, the relevant premier for their office of the premier, and ministers and, at provincial level, members of executive council (MECs) for departments and components which fall within their portfolio.[26]

In terms of the Act, each organ in the public service must have a head, with a specific designation, such as directors-general for national departments and the offices of premiers and, simply, heads for government components and provincial departments. Departmental heads are responsible for the efficient administration of their department, including the effective utilisation and training of staff, the maintenance of discipline, and so on.[27]

2.1.1 *The Public Service Commission*

Section 196 of the Constitution provides for a single Commission, the PSC, to exercise oversight over the public service.[28] The heart of attempts to professionalise the public service since the South Africa Act of 1909, the body has played an increasingly diminished role since the 1980s. In terms of the 1996 Constitution, the Commission is required to be independent and impartial.[29] It consists of 14 commissioners, five for the national sphere and one for each province.[30] The five must be recommended by a proportional committee of the National Assembly, approved

[25] Section 3(1) of the Public Service Act, 103 of 1994.
[26] Section 1 of the Public Service Act, 103 of 1994.
[27] Section 7(3) of the Public Service Act, 103 of 1994.
[28] Section 196(1) of the Constitution.
[29] Section 196(2) of the Constitution.
[30] Section 196(7) of the Constitution.

by a majority of the Assembly, and appointed by the President. In appointing each provincial commissioner, a person must be recommended by a proportional committee of the relevant provincial legislature, approved by a majority of that provincial legislature, nominated by the Premier, then appointed by the President.[31] Commissioners are appointed for a five-year term, once renewable, and must be South African citizens and fit and proper persons with knowledge of, or experience in, administration, management or the provision of public services.[32] In terms of the Public Service Commission Act, required by the Constitution, no commissioner may hold office in a political party or political organisation.[33] The President must designate a chairperson and a deputy chairperson.[34] The President must determine remuneration and other conditions of service of these and the other commissioners, and the conditions may not be altered during the term of the commissioner.[35] In terms of the Constitution, commissioners are removable only on grounds of misconduct, incapacity or incompetence, as found by a committee and resolved by a majority of the National Assembly or of the legislature of the relevant province.[36]

The Commission's autonomy is protected by these procedures of appointment, remuneration, and removal. The Constitution also enjoins all organs of state—'through legislative and other measures'—to support the independence, impartiality, dignity and effectiveness of the Commission. It prohibits interference in the Commission's operations.[37] The Public Service Commission Act makes it an offence to hinder or obstruct the Commission from the performance of its function, punishable on conviction by a fine or imprisonment for a period not exceeding 12 months, or both.[38]

The Commission must exercise oversight over the public administration in a way that encourages effectiveness, efficiency and a high standard of professional ethics.[39] It is required to promote the basic values and principles governing public administration as set out in section 195 of the Constitution. The Commission has broad powers to investigate, monitor and evaluate the public service. It receives and investigates complaints from employees, acts as a grievance body and offers appropriate remedies. It can propose measures to improve performance. It can give direction to the effect that recruitment, transfers, promotions and removals comply with the values and principles of section 195.[40] The Public Service Commission Act gives the power to summons, secure records and administer oaths to the Commission

[31] Section 196(8) of the Constitution.
[32] Section 196(10) of the Constitution.
[33] Section 6(2) of the Public Service Commission Act, 46 of 1997.
[34] Section 5 of the Public Service Commission Act, 46 of 1997.
[35] Section 6 of the Public Service Commission Act, 46 of 1997.
[36] Section 11 of the Constitution.
[37] Section 196(3) of the Constitution.
[38] Section 12 of the Public Service Commission Act, 46 of 1997.
[39] Section 196(2) of the Constitution.
[40] Section 196(4) of the Constitution.

and it makes it an offence to violate these powers.[41] The Act specifies a power to set rules,[42] which it has used most prominently to regulate the procedure for dealing with conflicts of interest.[43] The Constitution implies that national commissioners can only exercise these powers and functions in the national sphere. It grants to provincial commissioners these powers and functions in their provinces.[44] The Public Service Commission Act thus enables the relevant delegations, which are achieved with specificity in regulations.[45]

The PSC, as it stands, has notable defences against its own politicisation and it has tended to exercise its powers and perform its functions with a degree of independence. Yet awkwardly, under the Public Service Act, politicians play a significant role in appointments into the Office of the PSC, which is responsible for providing administrative support to the commissioners. The chairperson of the PSC is made executive authority responsible for the Office.[46] Nevertheless, the selection committee for its director-general includes political office-bearers,[47] the power of appointment goes to the President,[48] and although this power has been delegated to the chairperson, the decisions of the chairperson are subject to Cabinet concurrence and the President may intervene in the process or rescind the delegation as he or she sees fit.[49] Selection committees for deputy directors-general of the Office also include political office-bearers,[50] albeit with the statutory power of appointment falling to the chairperson.[51] The framework, which parallels that of the broader public service, amounts to a mechanism for politicising a constitutionally independent body.

2.1.2 *Requirements and qualifications for appointment to the Public Service*

The framework of requirements and qualifications for appointment to posts in the South African public service is fairly well-developed. The Public Service Act provides that all appointees must be citizens or permanent residents and must be

[41] Section 10 of the Public Service Commission Act, 46 of 1997.
[42] Section 11 of the Public Service Commission Act, 46 of 1997.
[43] Rules of the Public Service Commission: Managing Conflicts of Interest Identified through the Financial Disclosure Framework for Senior Managers. GN 865 in GG 32298 of 12 June 2009.
[44] It does so at subsec 196(13).
[45] Sections 11(*b*) and 13 of the Public Service Commission Act 46 of 1997, along with the Governance Rules of the Public Service Commission. GN 263 in GG 38620 of 30 March 2015.
[46] Section 1 of the Public Service Act, 103 of 1994.
[47] Public Service Regulation 67(2)(*c*).
[48] Section 12(1) of the Public Service Act, 103 of 1994.
[49] Department of Public Service and Administration. (2013). 'Executive Protocol: Principles and Procedures for the Employment of Heads and Deputy Directors-General Nationally'; Mbeki, T. (1999). 'Delegation of Power Entrusted to the President: Head of National Departments'. Annexure A in Department of Public Service and Administration. (2003). Senior Management Service Handbook. Accessed on 18 June 2021 at http://www.dpsa.gov.za/dpsa2g/documents/sms/publications/smshb2003.pdf.
[50] Public Service Regulation 67(*g*), 2016.
[51] Sections 1 and 9 of the Public Service Act, 103 of 1994.

fit and proper persons.[52] Subordinate legislation establishes age limits and health requirements. The executive authority, with the assistance of DPSA benchmarks, must set job requirements that reflect the main objectives and core functions of the post, that do not unfairly discriminate, and that otherwise comply with statutory requirements.[53] Criminal and financial records, though not necessarily disqualifying, must be considered for their bearing on the suitability of a candidate for the job to which they have applied.[54] The public service, the organs of state within it, are designated employers under the Employment Equity Act, which prohibits unfair discrimination and requires the development and implementation of plans to bring the demographics of staff up to parity with the demographics of the country.[55] Applicants are disqualified—although this may be waived for defined reasons—if they previously left the service on condition that they would not seek reappointment. Applicants are also disqualified if they earlier left the public service due to ill-health and there is insufficient evidence of recovery.[56] The Public Service Regulations state that where a person has been dismissed for misconduct, they cannot be reappointed for a period of time, with serious offences like corruption resulting in the maximum of five years.[57]

MPSA directives establish general qualifications for entry, setting a basis that is supplemented by a complicated array of legislative instruments governing specific fields, such as financial management, education, healthcare, and engineering. In the case of the senior management service (SMS), which covers most posts in grades 13 to 16, the MPSA's directives, formally, compare well with international benchmarks. Directors (generally grade 13) and chief directors (14) need a relevant undergraduate qualification. Deputy directors-general (15) and heads of department (16) need a postgraduate qualification. These posts also set work experience as a requirement for appointment. At grade 13, appointees need five years of experience in middle or senior management. At grade 14, they need five years in senior management. At grade 15, they need eight to ten years of experience in senior management. At 16, they must have eight to ten years of experience in senior management, with at least five of these within an organ of state. Applicants for an SMS post must pass the required pre-entry course at the National School of Government.[58]

[52] Section 10 of the Public Service Act, 103 0f 1994.

[53] Public Service Regulation 57(1) and 64, 2016.

[54] Cabinet Memorandum 1 of 2006; Simelane, M. (2008). 'Implementation of the National Vetting Strategy in the Public Service'. Department of Justice and Constitutional Development. Accessed on 12 June 2019 at http://www.dpsa.gov.za/dpsa2g/documents/je/2013/1_6_5_4_18_04_2008.pdf; Muthambi, A.F. (2017). 'Directive on Personnel Suitability Checks'. Department of Public Service and Administration. Accessed on 15 October 2019 at http://www.dpsa. gov.za/dpsa2g/documents/ep/2018/14_1_1_P_11_01_2018.pdf.

[55] Employment Equity Act, 55 of 1998.

[56] Public Service Regulation 60, 2016.

[57] Public Service Regulation 61, 2016.

[58] Diphofa, M. (2016). 'Amended Directive on Compulsory Capacity Development, Mandatory Training Days and Minimum Entry Requirements for SMS'. Accessed on 15 October 2019 at http://www.dpsa.gov.za/dpsa2g/documents/sms/2016/sms_08_04_2016.pdf.

2.1.3 *Powers and procedures of appointment*

Where a prospective or current vacancy is identified, the line management for that post can apply to initiate an appointment process. The head of administration may opt to temporarily fill that vacancy by assigning an employee to perform that role on an acting basis, and where the vacancy occurs in the post of head of administration the executive authority may appoint an acting head.[59] Acting appointees may serve for a maximum of twelve consecutive months.[60] Oversight and administrative support for appointment processes are provided by an organ of state's human resources division, or by the DPSA in the case of higher posts. When the application to initiate an appointment process is approved, an advertisement including the necessary information must be drafted and approved, then communicated with the intention of reaching the entire pool of potential applicants, with vacancies in the SMS advertised nationally.[61] An appointment process may involve a skills search, with suitable candidates approached directly and asked to apply. Due consideration must be granted to all applicants.[62] Screening may eliminate those applicants who do not meet the minimum requirements and qualifications set out in the advertisement. Those who do may then be short-listed, on the basis of relevant and objective criteria. The short-list, constituting a pool of the best candidates, is subject to personnel suitability checks, looking at the credit, qualifications, and criminal records of applicants. Those applicants passing these checks advance to a selection committee, and may be subjected to security vetting after appointment.

The selection committee must be established by the executive authority responsible for appointment. The overarching principle of composition is that these committees must consist in at least three members at a level equal to or higher than the grade of the post to be filled, but the chairperson should be at a level higher than the post to be filled.[63] So, the selection committee for the director-general of the Presidency must be chaired by the Minister in the Presidency and include at least two other ministers and a national head of department.[64] The selection committee for a head of a national department or national government component must be chaired by the minister responsible for the portfolio and include at least two other ministers and another national head of department.[65] The selection committee for a deputy director-general of a national department must be chaired by the minister responsible for the portfolio and include at least two deputy ministers and the relevant head of department.[66] Chief directors would then ordinarily go through

[59] Section 31 of the Public Service Act, 103 of 1994.
[60] Public Service Regulation 63, 2016.
[61] Public Service Regulation 65, 2016.
[62] Section 11 of the Public Service Act, 103 of 1994.
[63] Public Service Regulation 67(1), 2016.
[64] Public Service Regulation 67(2)(*b*), 2016.
[65] Public Service Regulation 67(2)(*a*), 2016.
[66] Public Service Regulation 67(2)(*f*), 2016.

selection committees consisting of administrative officials. These patterns are replicated, with the necessary changes, in the provinces. A director-general of an office of a premier must be selected by a committee chaired by an MEC of the relevant province and include at least two other MECs and a head of a national department.[67] The head of a provincial department or provincial government component must be selected by a committee chaired by the relevant MEC and include at least two other MECs and the head of the relevant premier's office,[68] and so on. The regulations guide executive authorities to establish, as far as possible, demographically representative selection committees.[69]

A selection committee must consider only information based on valid methods, the requirements of the job, the department's employment equity plan, and in respect of candidates at higher grades, understanding of the department's mandate, the ability to identify problems and find innovative solutions, and the ability to work in a team. All criteria used in selection decisions must be free of bias and discrimination.[70] Where the selection committee cannot recommend a suitable candidate, the relevant executive authority can engage in a process of head-hunting, but any candidate who emerges from this process must go through the same selection process as the other candidates who applied.[71] Where the selection committee does make a recommendation, then this goes to the official responsible for appointment. In the case of administrative heads, the Public Service Act assigns this power in national government to the President, and in the provincial governments to the relevant premier.[72] In national government, this power is ordinarily delegated to executive authorities, although the President can intervene should he decide to.[73] A decision must be communicated in a memorandum with supporting documents to the MPSA, which will conduct oversight and submit it to the Cabinet for concurrence. At this point the executive authority must issue an appointment letter.[74] In the case of deputy heads, the power of appointment is assigned to executive authorities,[75] and their decision must also be communicated to the MPSA and

[67] Public Service Regulation 67(2)(*d*), 2016.
[68] Public Service Regulation 67(2)(*e*), 2016.
[69] Public Service Regulation 67(3), 2016.
[70] Public Service Regulation 67(5), 2016.
[71] Public Service Regulation 67(7), 2016.
[72] Section 12 of the Public Service Act, 103 of 1994.
[73] Mbeki, T. (1999). 'Delegation of Power Entrusted to the President: Head of National Departments'. Annexure A in Department of Public Service and Administration. (2003). Senior Management Service Handbook. Accessed on 18 June 2021 at http://www.dpsa.gov.za/dpsa2g/documents/sms/publications/smshb2003.pdf; Mchunu, S. (2020). 'Application of the Public Service Regulations, 2016 with Respect to the Filling of Head of Department and Deputy Director-General Posts'. Accessed on 18 June 2021 at http://www.dpsa.gov.za/dpsa2g/documents/ep/2020/ep_17_11_2020.pdf.
[74] Department of Public Service and Administration. (2013). 'Executive Protocol: Principles and Procedures for the Employment of Heads and Deputy Directors-General Nationally'.
[75] Section 9 of the Public Service Act, 103 of 1994.

taken to Cabinet for concurrence.[76] In appointments to posts lower down the hierarchy, the executive authority is free to appoint.[77] This pattern is replicated, with some variation in delegations and cabinet procedures, in provincial government. Section 12(2) of the Public Service Act restricts appointment contracts for heads of department to a maximum of five years, renewable. Staff at lower levels may be appointed on term-contracts, but they are generally subject to one-year probation and then appointed on a permanent basis.[78]

2.1.4 *Discipline and dismissal*

The Public Service Regulations establish a code of conduct for public servants.[79] The code underlines an array of others applied to more specific fields, as in supply chain management.[80] It complements the whole framework of rules and norms which define the employment relationship and govern official roles, powers and responsibilities. Public servants have a positive obligation to report non-compliance with the Public Service Act and other laws.[81] The Act, together with other legislation such as the Public Finance Management Act,[82] places an obligation on administrative heads and executive authorities to report and address non-compliance and misconduct, including through the imposition of sanctions on offenders.[83] The public service, of course, sits within an elaborate context of institutions, the most important of which are established by the Constitution, which are designed to continuously monitor procedures, bring transgressions to public attention, enforce discipline, and make corrections. Executive authorities, accountable within this context, play a particularly crucial role.

Executive authorities have the power of discipline over heads of administration.[84] Heads of administration, in turn, have the power of discipline over posts below them,[85] which will tend to be delegated down the line of command.[86] In providing for discipline, the Public Service Act is aligned with and recognises the authority of the Labour Relations Act. Disciplinary processes are governed by principles of procedural and substantive fairness, which prohibit bias and discrimi-

[76] Department of Public Service and Administration. (2013). 'Executive Protocol: Principles and Procedures for the Employment of Heads and Deputy Directors-General Nationally'.
[77] Section 9 of the Public Service Act, 103 of 1994.
[78] Section 12(2) of the Public Service Act, 103 of 1994; Public Service Regulation 68, 2016.
[79] Public Service Regulations 11–15, 2016.
[80] Breytenbach, J. (2003). 'Code of Conduct for Supply Chain Management Practitioners'. Practice Note 4 of 2003. Accessed on 18 June 2021 at http://www.treasury.gov.za/divisions/ocpo/sc/PracticeNotes/SCM–PracNote%2003%204.pdf.
[81] Section 16A of the Public Service Act and Public Service Regulation 13(*e*), 2016.
[82] Section 38 of the Public Finance Management Act, 1 of 1999.
[83] Section 16A of the Public Service Act, 103 of 1994.
[84] Section 16B(1)(*a*) of the Public Service Act, 103 of 1994.
[85] Section 16B(1)(*b*) of the Public Service Act, 103 of 1994.
[86] Department of Public Service and Administration. (2015). 'Labour Relations Sanctioning Guidelines for the Public Service'. Accessed on 18 June 2021 at http://www.dpsa.gov.za/dpsa2g/documents/nlr/2015/21_1_r_4_12_2015%20Annexure%20A.pdf.

nation and dictate a progressive and corrective approach. Managers are encouraged to pursue an informal approach, meeting with and counselling employees for minor offences and only then issuing verbal, written and final written warnings to provide opportunities to correct conduct.[87]

When further sanction is sought, an employee must receive a notice to attend a disciplinary hearing and must be afforded sufficient time to prepare a defence. Precautionary suspension or transfer, with full pay, is possible where a serious offence is alleged and where continued presence in the workplace might jeopardise an investigation or endanger the wellbeing or safety of a person or state property. Where a notice to attend a disciplinary hearing has been given, the relevant executive authority cannot accept a notice of resignation that pre-empts the disciplinary hearing.[88] Disciplinary hearings must exclude legal counsel. They should consist in a representative of the employer (usually the immediate manager of the employee), the employee and their representative (often of a labour union), and a chairperson (of higher grade than the representative of the employer or, where the hearing concerns the conduct of a head of administration, someone from outside the public service). Disciplinary hearings may recommend counselling, a written warning, a final warning, suspension without pay not exceeding three months, demotion, some combination of the above, or removal.[89] In the case of heads of administration, the relevant executive authority must apply the sanction, and for lower posts this power falls to the head of administration or their delegate.[90]

Where an official has already left the relevant organ of state and attained employment in another, both executive authorities may pursue disciplinary action, and each must cooperate with the other.[91] The state may, beyond these disciplinary measures, pursue civil damages, fines, and imprisonment. Where an employee is sanctioned, he or she may appeal through internal mechanisms and to upper management. Where they allege unfair labour practices or unfair dismissal, they may seek recourse through the mechanisms of the relevant bargaining council or to the Commission for Conciliation, Mediation, and Arbitration (CCMA) and then on to the Labour Court.

2.1.5 *Analytical summary: the public service*

The PSC offers a useful vantage point for regulation, but its independence is undermined by the involvement of political leaders in appointments to the higher administrative positions in its offices. The location of the Office of the PSC in the

[87] In terms of s 16B of the Public Service Act, 103 0f 1994; chapter 8 and schedule 8 of the Labour Relations Act, 66 of 1995.

[88] Section 16B(6) of the Public Service Act, 103 of 1994.

[89] Schedule 8 of the Labour Relations Act, 66 of 1995; Department of Public Service and Administration. (2015). 'Labour Relations Sanctioning Guidelines for the Public Service'. Accessed on 18 June 2021 at http://www.dpsa.gov.za/dpsa2g/documents/nlr/2015/21_1_r_4_12_2015%20Annexure%20A.pdf.

[90] Section 16B(1) of the Public Service Act, 103 of 1994.

[91] Section 16B(4) of the Public Service Act, 103 of 1994.

public service impairs the autonomy and flexibility with which it can pursue its objectives. The Commission, moreover, is fairly toothless. It is able to set rules and investigate, but it otherwise lacks powers of direction and enforcement and has remained marginal to the growing crisis of government.

The system of qualifications required for appointments to the SMS and to posts requiring professional qualifications are, although considered sparingly here, elaborate and relatively robust. These have been the focus of extensive regulatory efforts over the past few years and are increasingly being tied to the National School of Government established in 2015. A considerable disjoint between the qualification and competency system and the selection committee system occurs due to a failure to require independent subject matter experts on selection committees. The process of appointment, tracking good practice in this area, sets up in outline a system of tiered-screens, with a segregation of duties between human resources personnel, selection committees, executive authorities and, for the highest positions, the DPSA and Cabinet. Procedures for removal are reasonably strong. Public servants are protected from political coercion to the extent that their service can only be terminated with cause and with recourse to a range of appeal authorities. The virtues of South Africa's system for appointments and removals extend little further.

Political office-bearers, as executive authorities, are granted the most important organisational powers, especially those of appointment. In terms of the Public Service Act, heads of department and component, are still made responsible for the efficient management of their departments, including the effective utilisation of staff and the maintenance of discipline. Under the Public Finance Management Act 1 of 1999, they are also accounting officers, responsible for the governance of departmental finances and resources, procurement and the evaluation of major capital projects. So, while political heads get the most important powers, administrative heads get held accountable for performance management around the most important responsibilities. This misalignment between powers and responsibilities produces considerable conflict between politicians and administrators across the public service.[92]

Quite often, though, political office-bearers and administrative heads are more closely related. The Constitution and broader laws preclude South African politicians from factoring political criteria into appointment decisions, but in fact they do so pervasively. *The system of tiered-screens is illusory. Politicians constitute the relevant selection committees and they make final appointments. Where delegations are made to administrative officials, political appointment of politically-allied administrative heads enables political appointment of subordinates, so that politicisation cascades down the hierarchy.* Control of promotion and removal by political executives, the latter often through the backdoor by the power of suspension, further ties administrative

[92] Ramaite, R. (1999) 'Keynote Address'. Journal of Public Administration 34(4): pp. 286–92; Maserumule, M. H. (2007) 'Conflicts between Directors-General and Ministers in South Africa 1994–2004: A 'Postulative' Approach'. Politikon 34(2): pp. 147–64.

positions to political favour and prejudice. The system, in these ways, enables the construction of informal networks that bridge segregations of duties, oversight, checks and balances. It therefore facilitates the coordination of corruption.

Variations on this theme are multitudinous. The President and the premiers are given authority to appoint departmental and component heads. Depending on delegations and the balance in Cabinet or in a provincial executive council, this can give the President or the premier concerned very extensive patronage, involving a dangerous concentration of power. If instead strong ministers or MECs prevail, these can secure their own administrative heads and from this angle generate their own patronage resources. If external bodies, a party structure or an informal cabal or clique, control a politician, then they can control appointments within that politician's authority. *The essential mechanism of 'state capture', where administrative decisions regarding procurement and other matters are effectively externalised into undemocratically-constituted and opaque fora, thus comes into view.* Resources that are by this mechanism extracted from the state are used, in part, to purchase, by patronage, the mass political support necessary to win elections, retain power, and avoid accountability.[93]

At this point, the method of politicisation, originally intended to assert control over a potentially resistant apartheid public administration and to redirect the state toward progressive purposes, produces its antithesis, an administration that evades democratic control. The breakdown of this control in South Africa's public service is amply attested to, indeed annually by Auditor-General reports.

2.2 The municipalities

Municipalities, like the public service, are subject to section 195 and related provisions of the Constitution. The law of local government replicates the general features of the public service system as regards appointment and removal, but in a municipal context. The Municipal Systems Act, 32 of 2000, regulates personnel practices. It gives the power to set subordinate legislation to the minister responsible for local government, presently the Minister of Cooperative Governance and Traditional Affairs (MCOGTA).[94] The Municipal Structures Act, 117 of 1998, differentiates between different categories of municipalities. Category A or metropolitan municipalities cover South Africa's major conurbations.[95] Beyond these, the country is carved into category C or district municipalities, within which lie category B or local municipalities.[96] These categories of municipality are further

[93] On these matters, the evidence before the Zondo Commission, the Mpati Commission, the Nugent Commission, and other formal investigations and journalism is ample. On broader patronage relations, see such work as Von Holdt, K. (2019) 'The political economy of corruption: elite-formation, factions and violence'. Working Paper 10. Society, Work, and Politics Institute; Ndletyana, M. (2020) Anatomy of the ANC in Power: Insights from Port Elizabeth, 1990—2019. Pretoria: HSRC Press.

[94] Sections 1 and 120 of the Municipal Structures Act, 32 of 2000.

[95] Section 2 of the Municipal Structures Act, 32 of 2000.

[96] Section 3 of the Municipal Structures Act, 32 of 2000.

constituted as particular types of municipalities.[97] Most municipalities across the country are constituted under the mayoral executive system, wherein executive mayors are given general powers of direction and oversight over municipal administrations. KwaZulu-Natal, which operates a collective executive committee system with ward participation, is the major exception.[98] Here, executive committees, composed proportionally by the parties in council, exercise general powers of direction and oversight. The Municipal Systems Act gives to municipal managers, as heads of administration, the responsibilities of implementation.[99] Significantly, section 53 requires municipalities to establish a framework setting out all the roles and responsibilities of political structures, political office-bearers and the municipal manager, including lines of accountability and communication between them.[100] This has often been an invaluable mechanism for defining the relationship between politics and administration, if rarely fully operationalised.

The Municipal Systems Act enables, in defined circumstances, the establishment and acquisition of municipal entities, including private companies and service utilities.[101] Private companies must be acquired and founded under company law[102] and service utilities must be established through municipal by-laws.[103] Multiple municipalities can agree to establish jointly held companies[104] and service utilities.[105] In all cases, municipal entities are to be governed by boards. Chief executive officers, accountable to these boards, are responsible for administration.[106]

2.2.1 *Qualifications for office in municipal administrations and entities*

The Municipal Systems Act and subordinate legislation establish general requirements, competencies, and qualifications of office.[107] Appointments to municipal administrations must be South African citizens or permanent residents and possess the relevant competencies, qualifications, experience and knowledge. Senior managers, including municipal managers and managers directly accountable to them, are subject to a competency framework that measures strategic leadership, people management, project management, financial management, change leadership and governance leadership abilities. They are also subject to qualification requirements. Municipal managers, for instance, must have a bachelor degree in public administration, political science, social science, law or some similar field. They must have

[97] Section 7 of the Municipal Structures Act, 32 of 2000.
[98] KwaZulu-Natal Determination of Types of Municipality Act, 7 of 2000.
[99] Section 55 of the Municipal Systems Act, 32 of 2000.
[100] Section 53 of the Municipal Systems Act, 32 of 2000.
[101] Chapter 8A of the Municipal Systems Act, 32 of 2000.
[102] Section 86C(1) of the Municipal Systems Act, 32 of 2000.
[103] Section 86H of the Municipal Systems Act, 32 of 2000.
[104] Section 86F of the Municipal Systems Act, 32 of 2000.
[105] Section 87 of the Municipal Systems Act, 32 of 2000.
[106] Section 93J of the Municipal Systems Act, 32 of 2000.
[107] Sections 54A and 56 of the Municipal Systems Act, 32 of 2000, implemented by Regulation 8 and 9 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.

five years of relevant experience at a senior management level, as well as proven knowledge in relevant policy and legislation, governance systems and performance management, council operation and the delegation system, good governance, audit and risk management, and budget and financial management.

A board of directors of municipal entities must have the range of relevant expertise required to manage and guide the municipal entity, must be at least a third non-executive, and must have a non-executive chairperson.[108] No director may hold office as a councillor, be a member of a legislature, be an official of the parent municipality of that municipal entity, have a criminal record, have been declared of unsound mind by a court, or be an unrehabilitated insolvent.[109] A councillor or official, however, may be designated by the municipal council as a municipal representative, in other words a non-participating observer, at board meetings.[110]

The competency, qualification and experience standards for managers directly accountable to municipal managers are differentiated between officials responsible for development and town planning, public works, finance, community services, corporates services, and other areas.[111] Otherwise, at lower levels, qualifications are defined by the municipalities themselves and by other applicable legislation. Most important are the National Treasury regulations under the Municipal Finance Management Act, 56 of 2003.[112] These extend beyond both senior management and specifically financial competencies, toward supply chain management officers and officials in municipal entities. Disqualifications such as a criminal record and previous removal are required to be screened. The regulations establish periods—ten years in cases of financial misconduct, five years in cases involving dishonesty or negligence, and so on—over which someone dismissed from a municipality may not be appointed to a municipality.[113]

2.2.2 *Powers and procedures of appointment and termination*

When a post becomes vacant, an acting municipal manager may be appointed by a municipal council, and an acting manager reporting directing to a municipal manager may be appointed by the municipal council in consultation with the municipal manager.[114] These acting appointments may not exceed three months, with extension upon application to and at the discretion of the relevant MEC responsible for local government.[115] In making a true appointment, the mayor, in the case of a municipal manager, or the municipal manager, in the case of a manager

[108] Section 93E(1) of the Municipal Systems Act, 32 of 2000.
[109] Section 93F of the Municipal Systems Act, 32 of 2000.
[110] Section 93E(2) of the Municipal Systems Act, 32 of 2000.
[111] Regulation 8 and 9 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.
[112] Municipal Regulations on Minimum Competency Levels, 2007.
[113] Section 57A of the Municipal Systems Act, 32 of 2000; Schedule 2 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.
[114] Section 56(1)(*a*)(ii) of the Municipal Systems Act, 32 of 2000.
[115] Section 54A(2A) and 56(*c*) of the Municipal Systems Act, 32 of 2000.

directly accountable to the municipal manager, must obtain approval from the municipal council.[116] The post must, within 14 days of receipt of this approval, be advertised in a newspaper circulating nationally and in the province where the municipality is located. The closing date for applications must be a minimum of 14 days from the date of advertisement and a maximum of 30 days. After checking applications for compliance, these are then forwarded on to a selection panel.[117]

The municipal council must appoint a selection panel to make recommendations for appointment. Political criteria are excluded from appointment to the selection panel, with consideration only of the nature of the post to be filled, gender balance and skills, expertise, experience and availability. The selection panel for the post of the municipal manager must consist of at least three but not more than five persons. The mayor or a delegate must be its chairperson. A councillor designated by the council must be included, followed by another person who is not a councillor or staff member of the municipality but who has expertise or experience in the area of the advertised post. The selection panel for the post of a manager directly accountable to a municipal manager must also have between three and five members. It must include the municipal manager, who must be chairperson, as well as a member of the mayoral committee or councillor who is portfolio head of the relevant function, and a subject matter expert from outside the municipality's structures. Panel members are required to disclose conflicts of interest and if so recuse themselves. Family relation or indebtedness to a shortlisted applicant are specifically mentioned as grounds for recusal.[118]

In consultation with the selection panel, the chairperson must generate a shortlist of all candidates who meet the relevant requirements. Shortlisted candidates must be screened within 21 days. Interviews must be conducted within 21 days after screening and the applicants scored by each member of the selection panel. Applicants must also be scored against the requirements of the job. By consensus, or by way of the recording of dissent, the first choice, together with a second and third should these be present, must then be forwarded to council for resolution.[119] In terms of the Municipal Systems Act, the power to appoint a municipal manager is granted to the relevant municipal council.[120] The power to appoint managers directly accountable to the municipal manager is assigned to the council in consultation with the municipal manager.[121] When appointment is made, within 14 days, a report documenting the process must be sent to the relevant MEC for local

[116] Regulation 7 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.
[117] Regulation 10 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.
[118] Regulation 12 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.
[119] Regulation 13 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.
[120] Section 54A of the Municipal Systems Act, 32 of 2000.
[121] Section 56 of the Municipal Systems Act, 32 of 2000.

government.[122] A similar system is established within the municipal administration and under the authority of the municipal manager for lower positions.[123] There is no statutory requirement of open advertisement at these lower levels, which means that municipalities may and occasionally do approximate a closed career system, preferring promotion from within the administration over lateral appointments from without.[124] Municipal managers must be employed on contracts not exceeding five years or a year after the election of a new council. These contracts can be renewed by agreement. Lower positions within municipal administrations can be on probation and under permanent contract.[125]

The municipal council is responsible for establishing a process for the appointment of directors of municipal entities. The process must simply ensure that applications are widely solicited, that a list of applicants is compiled, and that appointments are made from this list in light of relevant requirements of the job.[126] An entity's board of directors is responsible for the appointment of a chief executive officer, subject to statutorily defined requirements of the job.[127] The chief executive officer is then responsible for appointment further down, under statutory requirements and the policies of the board.[128] Municipal entities co-owned by multiple municipalities or that are multi-jurisdictional are constituted along similar lines by agreement between municipalities.

Termination of service is by retirement at the appropriate age, by notice, and by removal for reasons of operational requirements, incapacity and misconduct. Misconduct must be established as against the Code of Conduct for Municipal Staff Members in the Municipal Systems Act.[129] Disciplinary processes are, as with the public service, subject to the Labour Relations Act.[130]

2.2.3 *Analytical Summary: the municipalities*

Municipalities do not have an independent central regulatory authority charged with general oversight of municipal administration. By statute, they fall legally outside of the public service. They therefore fall beyond the regulatory reach of the PSC. They have no equivalent, constitutionally independent body with jurisdiction over them, the closest approximation being the political offices of the MCOGTA in the national sphere and the nine MECs responsible for local government in the

[122] Regulation 17 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.
[123] Section 55 of the Municipal Systems Act, 32 of 2000.
[124] eThekwini Metropolitan Municipality, for instance, retained features of a closed career system below the highest positions.
[125] Section 57(6) of the Municipal Systems Act, 32 of 2000.
[126] Section 93E of the Municipal Systems Act, 32 of 2000.
[127] Section 93J of the Municipal Systems Act, 32 of 2000.
[128] Section 93J of the Municipal Systems Act, 31 of 2000.
[129] Schedule 2 of the Municipal Systems Act, 31 of 2000.
[130] Chapter 6 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014; Disciplinary Regulations for Senior Managers, 2011.

provinces. The effect is to generate some complications for a reform agenda concerned with building administrative independence, but these—as will be considered momentarily—do not appear insurmountable.

The municipalities, otherwise, broadly share the virtues and vices of the national and provincial public service system. The framework of competencies and qualifications is elaborate and relatively robust. Procedures for appointment and removal are suitably flexible and accord well with good practice in human resourcing. The process of appointment sets up, in outline, a system of tiered screens with a segregation of duties between human resources personnel, selection committees, municipal managers and councils. Independent subject matter expertise is included in selection committees for senior managers. Procedures for removal are strong, an important protection for administrative officials against illicit political pressure. Municipal entities are given considerable autonomy from board level down, so they are better able to tailor their internal operations to their specific functions, for good or ill. Employees within them retain the protections of the labour relations framework.

Municipal managers enjoy more definitely assigned powers of appointment below senior manager level. What this means is that the Municipal Systems Act is more closely aligned with the Municipal Finance Management Act, 56 of 2003, which sets municipal managers up as accounting officers for financial matters. This is even more precisely achieved for municipal entities, where chief executive officers are designated accounting authorities and are granted considerable powers to manage their operations.

Still, although in the municipal sphere, too, political criteria are formally excluded from appointment decisions, in fact they figure prominently. A vacancy in the post of municipal manager is often a pretext for some of the most vicious and debilitating factional conflicts in councils. Political appointment and control of a municipal manager enables politicisation of personnel practices right down to the lowest grade. Independent-minded municipal managers have tended to emphasise the section 53 definition of the relations between political office-bearers and administrative officials. Council's powers of suspension have been used liberally to remove them, with infamous golden handshakes securing tersystem occurs due tomination and more compliant successors. As political appointees have been layered into municipal administrations by successive municipal managers, administrative officials with political connections have constructed fiefdoms that resist central direction and build power through direct distributions of patronage jobs, contracts, houses, and what have you.[131] These have become an important

[131] Again, see Von Holdt, 2019, 'The political economy of corruption', and Ndletyana, 2020, 'Anatomy of the ANC in Power'; also Brunette, R., P. Nqaba and M. Rampedi (2018) '3 Cities. The Formation of Metropolitan Local Government in South Africa: Programme, Politicisation and Patronage in Ethekwini, Nelson Mandela Bay and Buffalo City, c. 1977–2016'. A PARI report. Johannesburg: Public Affairs Research Institute; Olver, Crispian (2017). How to Steal a City: The Battle for Nelson Mandela Bay. Cape Town: Jonathan Ball Publishers; Langa, Malose, and Karl

feature of municipal governance and a major impediment to democratic control of municipalities.

3. REFORM PRINCIPLES AND PROPOSALS

The law governing appointment and removal in South Africa's public administrations exhibits a series of characteristic problems. It provides politicians with considerable power over appointment decisions. De jure, in appointments, this power is constrained by the exclusion of political criteria from the relevant decision-making, by complex frameworks of necessary competencies and qualifications, and by a system of tiered screens that segregates duties between human resource officials, selections committees, and appointing authorities. De facto, political authorities are in any case empowered to play a determining role in appointing across the screens, so they are ultimately not prevented—there is no effective check and balance that does so—from introducing political criteria into appointment decisions. Adding the power of suspension and the ability to pay off contracts, used to get around the relatively strict protections of the Labour Relations Act, politicians and those who might control them can appoint political allies across segregations of duties and otherwise project political pressure in such a way that circumvents rules and coordinates the illicit extraction of resources from public administrations. Democratic control is in this way loosened. Political appointees, in their own right often powerful political players, carry into administrations political networks which can be mobilised to resist direction through the administrative line of command. Control loosens even further as political turnover layers these political networks into administrations.

This is how corruption and patronage politics works in South Africa. Analysis of the vast majority of corruption scandals will reveal these mechanisms at play. Comparative experience, considered at the outset, provides another level of evidence for their centrality. If South Africa is to decisively tackle its problems of corruption and patronage politics, here is the point at which to do so.

3.1 Principles of reform

The principles guiding reform have been considered at length above and are embedded in the Constitution of the Republic. South Africa's public administration must be responsive to democratic direction, professional and developmentally effective. In these respects, the current legal framework is not working. Significant adjustments in the direction of an independent administrative check, a functional segregation of duties in appointment and removal processes is necessary. Simply improving the qualifications frameworks that govern appointments and removals

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Von Holdt. 2012. Insurgent Citizenship, Class Formation and the Dual Nature of a Community Protest: A Case Study of 'Kungcatsha.' In Contesting Transformation: Popular Resistance in Twenty-First Century South Africa, edited by Marcelle C. Dawson and Luke Sinwell. London: Pluto Press; and others.

in South Africa's public administration does not provide this independent check. The country, as outlined above, has invested heavily in developing these qualifications frameworks. There is little indication that they have appreciably addressed deterioration of South Africa's public administrative capacity or broader problems of corruption and patronage in politics. The basic reason is that political office-bearers remain free to appoint, promote and dismiss as they see fit. The construction of illicit and otherwise inappropriate personal and political networks across segregations of duties continues with foreseeable results. It is necessary, in order to resolve problems of political interference, corruption and patronage, to empower independent bodies that can act as a check against such manipulation.

A further principle rests on a fact that has been touched on only obliquely. Patronage, a now central feature of South African politics, has become fundamental to the workings of power. Its essential mechanism, overbroad political powers over personnel, will not easily be reformed. A direct and wholesale confrontation will in present circumstances be fruitless. The reform process, therefore, must be relatively indirect and incremental. It should be designed in such a way that the President will have the discretion, by proclamation, to determine when, in which organs of state, it will be rolled out.

3.2 The reform of appointment and removal processes

Reform will, by necessity, proceed somewhat differently for the public service and municipalities. Specifically, the reform in local government structures will be distinct, given that municipalities do not have a ready-made, constitutionally independent body, like the Public Service Commission, that can act as a check and balance in appointment processes. The reform process, however, follows in both a similar design. The basic idea is to enable political office-bearers to specify the expertise and professional characteristics that their policy orientations require of appointees and also to ensure that they can work with these appointees. Simultaneously, the point is to prevent them from manipulating appointment processes in such a way that extends illicit and inappropriate personal networks across public administrations. The generic process is divided into four stages of process planning, process administration, short listing and appointment. The content of each stage, with each tending to be under the authority of a different actor, can be illustrated as follows.

3.2.1 *The reform of the public service*

In the public service, the PSC is a ready-made structure that offers an important lever for reform. Under the present Constitution, the Commission is granted a relatively robust independence. In implementing legislation, however, this is attenuated by provision for political involvement in appointments to the Office of the PSC. In order to play the role envisioned for it here, that legislation must be amended to place the power of appointment to and removal from these offices squarely with the Chair of the Public Service Commission, for the director-general and deputy directors-general, and then with the director-general for lower posts.

The Public Service Act does not effectively check and balance political office-bearers in making appointments and removals in the broader public service. The PSC, rendered suitably independent and empowered, can provide this check and balance. It should do so through a series of elaborations based on the National Development Plan, which is itself centrally concerned with insulating public administrations from unlawful political interference and is formally government policy.

The National Development Plan proposes the creation of a new administrative head of the national public service.[132] The appointment of the head of the public service—on which the Plan remains silent—should be dealt with as follows. The national public service commissioners should have the power to plan the appointment process. They should do so in consultation with the President. Process planning should involve establishing the necessary qualifications, job and person specifications, the scoring and types of tests, and the categories of subject matter experts

[132] See chapter 13.

that will sit on the selection committee. Appointment plans, however, would have to be within broad legislative parameters, as regards qualifications and other matters. Plans that design the process in such a way as to render competition in selection meaningless, or that introduce partisan political criteria directly into the process, will be invalid. The national public service commissioners should, at this point, administer the process, design and conduct tests, compile a long-list on the basis of compliance and minimum thresholds, and establish a selection committee chaired by a commissioner and made up of independent persons. A minority of these persons should fit within the categories of technical experts prescribed in the appointment plan. The selection committee would be responsible for arriving at a short list of candidates. The President should then appoint from the short list.

In this process, a link is created between the policy concerns of the government, the technical needs of the administration, and the expertise and personal qualities required of the appointee. The PSC, situated centrally in a segregation of duties, operates as a check and balance on political manipulation. Simultaneously, the Commission does not shortlist or act as an appointing authority. It simply administers the process to ensure that it aligns with the law. Its new role is therefore not in substantial conflict with existing, constitutionally-inscribed grievance and other functions. The involvement of only national commissioners preserves the quasi-federal structure of the Constitution.

The National Development Plan envisions that the head of the public service, among other matters, will see to the career progression of senior public managers, by convening appointment processes, conducting performance assessments and running discipline. It recommends that it convene appointment processes in conjunction with the PSC. In the case of national heads of department and component, then, much the same process as for heads of the public service should be followed. The major difference should be that now, the head of the public service should take over process planning, doing so in consultation with the relevant minister. The minister should take the power to appoint. In the case of deputy heads of department and component, since these are still within the strategic level of organisations, the relevant head of the public service should plan the process, in consultation with the relevant minister and the head of department or component, to ensure coherence between policy purposes and technical expertise. The relevant commissioner, to check and balance the process, should then administer the process. A duly constituted selection committee should short list. To align the line of command with the office of the head of department or component, he or she should then appoint.

This chapter endorses the National Development Plan's concerns with moving towards longer term and ultimately permanent contracts for senior management. It also endorses the need to devolve appointing authority for lower positions into the administrative sphere. In operationalising the latter, selection committees should be constituted and chaired by the deputy head responsible for human resources or their delegate. The head of department or component should then appoint,

running a check and balance throughout organisational appointment processes. Excluding these lower posts from the remit of the Public Service Commission and the head of the public service avoids turning these structures into a bottleneck over personnel processes. It also more precisely aligns authority and accountability in these organisations on the head of department or component.

Removal, including precautionary suspension in a fast-tracked process, of the head of the public service, heads of department and component, and deputy heads, should be by their immediate superior, but subject to justification to and authorisation by the relevant commissioners. Removals further down should fall to the head of department or component.

The present distinction between lead and consult, within process plan, is confusing and so should be adjusted as suggested below.

	Head of the public service	Heads of department	Deputy heads of department	Lower-ranked posts
Process plan	Public service commissioners, consulting with the president.	Head of the public service, consulting with the minister/MEC	Head of the public service, consulting with head of department and minister/MEC	Deputy head for human resources, consulting within head of department.
Process admin	Public service commissioners	Public service commissioners	Public service commissioners	Deputy head for human resources
Short-listing	Selection committee chaired by commissioner	Selection committee chaired by commissioner	Selection committee chaired by commissioner	Selection committee chaired by deputy head for human resources
Appointment	President	Minister / MEC	Head of department	Head of department

3.2.2 *The reform of municipalities*

Municipalities lack a constitutionally independent regulatory authority equivalent to the PSC. There is some concern within government to bring municipal administrations within the public service. There are a number of advantages to this, in terms of consolidating regulatory capacity, establishing uniform norms and standards, along with promoting the retention of skill and staff mobility. Still, even if a unified public service is created, the direct administration of municipal appointment and dismissal processes by the Public Service Commission would invite constitutional challenge. It seems likely that such a challenge would be fatal to reform legislation in this sphere.

Municipalities, therefore, pose special difficulties for reform design. Indeed, international experience with civil service reform along the lines proposed here suggests that it moves most slowly across municipalities. There are a number of

ways in which one might proceed. A classic option, widely practiced for instance in the United States over the course of the twentieth century, might be to have local councils appoint independent committees, with tenured membership on staggered terms, as a substitute for the PSC. The success or failure of such a system would tend to be defined by the sort of pressure that could be brought to the process of constituting these committees. Wide transparency provisions could facilitate political mobilisation behind trustworthy candidates, but in contemporary conditions the balance of pressure in most localities is likely to favour forces of patronage.

An alternative, more robust option would seek to leverage the relative strength and independence of national political and economic institutions to insert a stronger check into municipal appointment processes. This option should be preferred. Specifically, local government is unique in that it intersects with a variety of professions that enjoy nationwide, strong and often already statutorily independent and regulated professional associations. The engineering, architecture, planning and accounting professional bodies could all be brought into new, independent personnel committees, whose function would be to check and balance political office-bearers in appointments to senior management. More corporatist bodies, involving a wider set of interests, could include local business associations, unions and civil society. If municipalities are brought into the public service, then the PSC could provide oversight as to whether these committees are properly constituted and functional. The committees could then be involved in appointment processes along the lines set out above.

The process for appointing municipal managers would begin with municipal councils defining qualifications, job and person specifications, types of tests and scoring. Municipal human resource departments could administer the process until the point of long listing and also support the work of those independent municipal personnel committees. These committees would then shortlist. Municipal councils would then appoint from this short list. The appointment of boards of municipal entities and the appointment of managers reporting directly to municipal managers should proceed similarly, but with municipal managers taking on a more substantial role.

This chapter, also for municipalities, endorses the National Development Plan's concern with moving towards longer term and ultimately permanent contracts for senior management. It endorses the need to devolve appointing authority for lower positions into the administrative sphere. For appointments to these lower positions, selection committees should be constituted and chaired by the manager responsible for human resources or their delegate. The municipal manager should then appoint, with the result being to run a more robust segregation of duties throughout municipal appointment processes.

Removal, including precautionary suspension in a fast-tracked process, should be by council, for municipal managers, and by the municipal manager, for managers reporting directly to them. Again, however, removal from these posts should

be subject to justification to, and authorisation by, the independent municipal personnel committee.

3.3 A statutory mechanism for incrementalism

Since it is unlikely that sufficient power could be mobilised to achieve these reforms all at once, a more incremental approach is necessary. Recourse to incrementalism is always necessary when engaging with expansive and deep-rooted patronage systems: efforts to undo them must develop a mechanism that reformers can mobilise around to gradually push corruption and patronage back.[133] The most appropriate mechanism for the sorts of provisions elaborated here is what is called a 'covering-in' mechanism. A statute providing for the reforms outlined above could be passed and enacted, but need not apply anywhere initially. It could include, instead, a clause which grants the President the power to 'cover in' into the statute's terms, by proclamation, specific departments, components or municipalities. A proclamation covering parts of the administration into the statute would be irrevocable, except by another statute.

Mechanisms for covering in have been a common feature of the proposed reforms, especially in the Americas. They have a number of advantages. Not only do they provide a point around which reformers can mobilise, but they also maximise the chances that reformers will make gains when crises and shifts in broader political alignments and interests create opportunities for reform. Covering-in mechanisms even create incentives for politicians who are otherwise disinclined, such as when a political party about to lose incumbency covers parts of their administration in to deny patronage resources to an incoming opposition.[134] Leveraging scandals and other such events, a covering-in mechanism can be used to steer patronage away from those parts of the state where it has had its most devastating consequences. Parts of the state that perform more vital functions or which are otherwise in special need of insulation can be covered in. In carving out corruption and patronage politics from these sorts of angles, covering-in mechanisms not only reduce corruption and patronage, they channel it in less dangerous directions. A statute with a covering-in clause will produce no immediate costs for patronage politicians. It can, however, set off powerful, virtuous dynamics that result in the construction over time of more democratic, professional and developmental public administrations.

[133] See, for instance, Skowronek, S. (1982) Building A New American State: The expansion of national administrative capacities, 1877–1920. New York: Cambridge University Press 69–74 (detailing the executive orders and legislative provisions serving to include in tranches through the course of successive Presidential administrations from different parties increasing numbers and percentages of positions within the merit-based civil service regime).

[134] Geddes, B. (1994) Politician's dilemma: building state capacity in Latin America. Berkeley, C.A.: University of California Press; Grindle, M. (2012) Jobs For The Boys: Patronage and the state in comparative perspective. Cambridge, M.A.: Harvard University Press.

CONCLUSION

This chapter has argued for reform of the rules and procedures that govern appointment to, and removal from, administrative posts in South Africa's public service and its municipalities. The aim is to substantially reduce corruption and the influence of patronage in South African politics, while enhancing democratic control, professionalism and the developmental effectiveness of South Africa's public administration.

Through a survey of comparative and domestic democratic experience, the chapter argues that to build a public administration that is suitably insulated from illicit and inappropriate political interference, South Africa needs to make significant adjustments to its public personnel practices. Centrally, the country needs to create an independent administrative check on appointment and removal processes, by assigning certain stages of these processes to independently constituted bodies. The creation of this check is a condition for the whole system of administrative checks and balances. The primary purpose here is to establish the general need for this reform.

A call for suitable insulation from political interference does not amount to a call for neutrality in the way that the state relates to social interests in society. Insulation is a matter of checks and balances. It aims to ensure that laws and public policies are followed. Laws and public policies, on the other hand, always inherently pick sides. They cannot possibly be neutral. The South African Constitution recognises the injustices of South Africa's past. It positively intervenes in favour of black people, women, the working class and poor, together with other categories of people who have suffered oppression, exploitation and exclusion. The desire to ensure that South Africa's progressive laws and policies are adhered to aligns with and promotes this constitutional vision.

It is necessary to reiterate that reforms to achieve this insulation are not the same thing as reforms to enhance the qualifications of South Africa's public servants. Insulation from illicit and inappropriate political interference requires a subtle array of checks and balances on political power. These must leave the lawful powers of politicians intact, but also confine the exercise of those powers to within the bounds of the law. Reforms of personnel practices along the lines suggested here are the best way to begin to establish these checks and balances, because they enable politicians and public administrators to begin to check and balance each other in a way that supports democratically-determined law and public policy. Public service qualifications and capabilities, however desirable, do not in themselves achieve this.

A secondary purpose of this chapter, then, is to open debate about the specifics of reform, by offering one specific model for reform. This model, we argue, works to ensure democratic, political control over public administrations. It simultaneously prevents the manipulation of personnel practices to build illicit or inappropriate political and personal networks within public administrations. There are major

political impediments to implementing this reform wholesale. Lots of people have a material interest in the system as it is currently constituted. The model, therefore, sets up an incremental reform process, with the new process for appointment and removal being rolled out organ-of-state by organ-of-state over an indefinite period of time, reducing costs in terms of political capital now, while generating early benefits and virtuous feedback loops over the longer term.

CHAPTER 2

Appointments and Removals in Key Criminal Justice System Institutions

FLORENCIA BELVEDERE

INTRODUCTION

In his February 2019 State of the Nation address,[1] President Ramaphosa highlighted the erosion, in recent years, of the integrity and ability of vital public institutions, including law enforcement agencies, to fulfil their mandates as a result of the effects of state capture. In recognition of this, he committed to stabilising and restoring the credibility of institutions such as the National Prosecuting Authority (NPA), the South African Revenue Service (SARS), the State Security Agency (SSA) and the South African Police Service (SAPS) and highlighted the appointment of a new National Director of Public Prosecutions (NDPP) to 'lead the revival' of the NPA.[2]

The criminal justice system is a pillar of the democratic state; its proper functioning is critical to uphold the rule of law and respect for the Constitution. Over the last decade, however, the criminal justice system has been subject to significant political manipulation. Corruption and patronage politics have brought into question not only the independence and accountability of the key institutions tasked with investigative and prosecutorial mandates within the criminal justice system, but also their legitimacy and ability to uphold constitutionalism and the rule of law in South Africa. Political interference has systematically eroded public respect and trust in criminal justice institutions, which have come to serve the interests of party factions, rather than the public. This has enabled impunity; patronage has been allowed to continue unabated. Those who need to be prosecuted or investigated are not, resources are diverted from key cases, investigations are thwarted and certain types of crime have increased. The weakening and hollowing out of these institutions, through undue influence over appointment and removal processes within them, has further helped to de-professionalise them while enabling further patronage. There is a need to re-establish the legitimacy, impartiality and independence of key criminal justice system institutions.

[1] https://www.gov.za/speeches/president-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000.

[2] The Director and Deputy Director of Public Prosecutions may be dismissed only on a recommendation by the Judicial Service Commission based on a finding of incapacity, incompetence or misconduct of any of the offices concerned, Panel of Constitutional Experts: Memorandum, (20 September 1995), CP020095.MEM, Suggested Draft A Text, http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF, p. 24 (accessed 13 October 2019).

The President's commitments are an opportunity to rethink the key processes that militate against the ability of these institutions to operate independently and carry out their work without fear or favour—as required by the Constitution. One such area—the appointment and removal processes of the senior leadership of these institutions—tends to blur the political–administrative divide. Appointments to criminal justice institutions are often made by politicians (the President or ministers), with limited oversight over what is often regarded as unlimited 'discretion' since such appointments are 'political'. In some cases, there are very limited requirements for individuals to head institutions as with SAPS or the Independent Police Investigative Directorate (IPID). In other instances, where there are requirements for a person to be 'fit and proper', these terms have only begun to acquire meaning over the past few years as court cases and inquiries have sought to do so.

Although courts and inquiries have helped to clarify criteria and the rationality of appointment or removal decisions by the President or ministers, appointment and removal processes across criminal justice institutions need fundamental institutional reform. To ensure selection of the best-qualified persons, the review, selection and recommendation of appointees must be carried out by panels or committees of competent individuals with the necessary skills, knowledge and experience to interpret and define criteria and apply them conscientiously and consistently. Ironically, recommendations for such mechanisms were made as early as 1995, when South Africa was drafting its final Constitution[3] and continued, at least in relation to the National Prosecuting Authority, during discussions of the NPA Bill in the late 1990s. More recently, key figures like Deputy Chief Justice Dikgang Moseneke have questioned whether the democratic project is best served by vast powers of appointment by the national executive and have enjoined us to think about 'how best to shield appointments of public functionaries to institutions that gird our democracy, from the personal preferences and vagary of the appointing authority'.[4] It seems we have now come full circle.

Through litigation and research, which includes drafting submissions to ongoing enquiries, civil society organisations have been active participants in ensuring the independence and accountability of key institutions within the criminal justice system. There are also important initiatives being driven by civil society, such as Judges Matter, an organisation that focuses on the selection of judges through the Judicial Services Commission, and organisations such as the Institute for Security Studies (ISS) and Corruption Watch (in relation to the appointment of the National Commissioner of Police and the Public Protector). This bodes well for possible

[3] Moseneke, D. C. J. (2014). 'Reflections on South African Constitutional Democracy—Transition and Transformation'. In keynote address at the MISTRA-TMALI-UNISA conference (Vol. 20). http://www.casac.org.za/wp-content/uploads/2016/11/Dikgang-Moseneke-Keynote-address.pdf (accessed 20 March 2020), p. 18.

[4] De Villiers, W. P. (2011). Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models. Journal of Contemporary Roman-Dutch Law, 74, 247.

reforms to appointment processes with a view to creating a capable and responsive state.

This chapter briefly describes the processes of appointment and removal of the senior leadership within key institutions with investigative and prosecutorial mandates within the criminal justice system, namely: the National Director of Public Prosecutions (hereinafter 'NDPP') (National Prosecuting Authority), Deputy National Directors, Directors, Special Directors and Deputy Directors of Public Prosecutions; the National Commissioner of Police, the Deputy National Commissioner, and Provincial Commissioners within the South African Police Service; the Head, Deputy Head and Provincial Heads of the Directorate for Priority Crime Investigations (DPCI or 'Hawks') and the Executive Director of the Independent Police Investigation Directorate (IPID).

The following principles guide the chapter and the reforms it argues for:

- Since the Constitution defines the role of the President in appointments (NDPP, National SAPS Commissioner), the focus of reforms should be to reduce the possibility for political interference without having to undertake the arduous process of amending the Constitution.
- The scope of the chapter will be on the processes of appointment and removal within the institutions that perform investigative and prosecutorial functions within the criminal justice value chain, namely: NPA, SAPS, DPCI (Hawks) and IPID. The discussion will not cover the judiciary.
- The argument extends beyond the national heads of these agencies (i.e., for NPA, proposals will include directors at seats of the High Court, as well as the deputy national head and Deputy Directors; for SAPS and DPCI, the argument will also focus on provincial commissioners and directors) to focus on how the senior leadership of these agencies is appointed/removed.
- There is a general consensus across civil society organisations, and even within the National Development Plan, that a selection panel should be established to shortlist, interview and assess candidates, and provide recommended candidates to the President or Minister, as the case may be, depending on the post.
- The selection panel should bring together a broad range of skills, knowledge and stakeholders that will enable it to assess the integrity, substantive knowledge and leadership skills of candidates.
- In terms of removal processes, these should be informed by recommendations from investigations undertaken by independent panels chaired by a judge or retired judge and other persons (depending on the post).
- Parliament should play a role in the adoption of resolutions if they disagree with recommendations by independent panels for the removal of persons from their posts based on the suitability or performance of candidates (or lack thereof).
- Appointments to NPA, DPCI, IPID and SAPS should be non-renewable to prevent patronage; terms of office should, as far as possible, allow sufficient time to carry out duties (i.e., a minimum of five years).

- Amendments to regulations will be required to put in checks to the power of the President and Minister, where they are responsible for appointments (i.e. NPA, DPCI, IPID).

The remaining sections of this chapter describe the processes for appointments and removals in the criminal justice system institutions above and set out possible improvements to them, in relation to the criteria for selection, and processes for appointment and removal.

1. THE NATIONAL PROSECUTING AUTHORITY

Both the Constitution and the National Prosecuting Authority Act 32 of 1998 ('NPA Act') contain provisions regarding the processes of appointment and removal of the senior leadership within the NDPP. Over and above this framework, there are various court cases which have had significant influence in these processes and which will also be analysed below.

The prosecuting authority was established to assist the executive in the application and the execution of criminal law. It is associated with the executive branch of government rather than the judicial branch.[5] The African National Congress, in its much-needed bid to democratise the prosecuting authority, sought to establish a national prosecuting authority with a head appointed by the President. At the time, the constitutionality of this provision was challenged on the grounds that it offended the separation of powers but the Constitutional Court rejected this objection.[6]

Section 179(1)(*a*) of the Constitution provides that there is a single prosecuting authority in the republic consisting of a National Director of Public Prosecutions (NDPP), as the head of the prosecuting authority, who is appointed by the President, as head of the national executive. Section 179(1)(*b*) states that the NPA is also made up of Directors of Public Prosecutions (DPPs), and prosecutors, as determined by an Act of Parliament, and such legislation must ensure that DPPs are appropriately qualified. Further, Section 179(4) expressly states that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

The NPA Act gives effect to Section 179 of the Constitution and regulates a number of matters, including the process of appointment of the NDPP, the Deputy National Directors of Public Prosecutions (DNDPP), Directors, Special Directors and prosecutors. In particular, Chapter 3 (Sections 8 to 19) deals with the appointment, remuneration and conditions of service of members of the NPA.

[5] Schönteich, M. (2015). 'A story of trials and tribulations: The National Prosecuting Authority, 1998–2014'. South African Crime Quarterly, 50(1), 5–15. https://www.ajol.info/ index.php/sacq/article/view/110362 (accessed 20 March 2019), p. 6.

[6] Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of National Director of Public Prosecutions ('Ginwala Commission'), November 2008, Para 69, p52.

1.1 Requirements for appointment of the National Director of Public Prosecutions, Deputy National Directors and Directors

The NPA Act provides for a number of requirements for appointment. In particular, Section 9 notes that any person who is to be appointed as National Director, Deputy National Director, or Director must be a South African citizen, have legal qualifications that would allow him or her to practice in all courts in the country and be a 'fit and proper' person, 'with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned'. Section 32 of the NPA Act further states that a member of the prosecuting authority is expected to 'serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law'.

In 2008, the Ginwala Inquiry, which was the first inquiry held in terms of Section 12(6)(*a*) of the NPA Act and probed into the fitness of the then head of the NPA, Adv. Vusi Pikoli, sought to expand on the requirement under Section 9(1)(*b*) of the Act — 'the fit and proper' requirement. The inquiry held that the question of whether a person is fit and proper is fact specific and context dependent.[7]

The inquiry noted that a legal qualification is only one of the requirements for appointment; the incumbent must also be a person of experience, integrity and conscientiousness to be entrusted with the responsibilities of the office of the NDPP. Although these are formal requirements, Ginwala sought to highlight that they imply that the incumbent must have a broader experience. As the inquiry's report described it:

> It cannot be a sufficient qualification that the NDPP has appropriate legal experience. To execute the responsibilities of the office of the NDPP, the incumbent must also have *managerial and leadership skills and qualities*. He or she sits at the apex of a complex organisation that employs large numbers of people, bringing together various elements of the criminal justice system. He or she must also possess an *understanding of the socio-political climate that prevails as well as the policy programme of the government*.[8]

While it is welcomed that an NDPP should have the necessary managerial and leadership skills and qualities, and broader experience, the idea that an NDPP should understand the sociopolitical conditions and government's policy programme as the context within which such office is situated and operates should not have a detrimental effect on prosecutorial decisions.

In relation to the requirement of *integrity*, the inquiry held that it 'relates to the character of a person — honesty, reliability, truthfulness and uprightness',[9] whereas *conscientiousness* is related but different in that it 'relates to the manner of application to one's task or duty — thoroughness, care, meticulousness, diligence and assiduousness'. In Ginwala's view, 'conscientiousness can be said to mean profes-

[7] Ibid, Para 70, pp. 52–53, emphasis added.
[8] Ibid, Para 71, p. 53.
[9] Ibid.

sionalism—the willingness and ability to perform with the required skill and the necessary diligence'.[10]

The report noted that the requirement that a person must be fit and proper to be 'entrusted with the responsibilities of the office concerned' has neither been defined in the Act nor judicially defined. It sought, nonetheless, to highlight the gravity and importance of the position of an NDPP by noting:

> ... the person must possess an understanding of the responsibilities of such an office. There must be an appreciation of the significance of the role a prosecuting authority plays in a constitutional democracy, the moral authority that the prosecuting authority must enjoy and the public confidence that must repose in the decisions of such an authority.[11]

Echoing the sentiments above, in a Supreme Court of Appeal case challenging the appointment of Adv. Simelane to the position of NDPP, Justice JA Navsa emphasised the importance of understanding the fit and proper requirement, as well as the need for persons who lead the NPA to be of utmost integrity and willing to act without fear, favour or prejudice, in relation to the 'awesome' powers of the NDPP and their centrality to the preservation of the rule of law.[12] These powers include deciding whether or not to prosecute someone, defining prosecution policy and, intervening in a prosecution when policy directives are not complied with. In other words, a person who is fit and proper to be the NDPP will be able to 'live out in practice the requirements of prosecutorial independence'.[13]

1.1.1 *What does s 9(1)(b) require of the President in the appointment process?*

In addition to providing guidance on the interpretation of existing requirements, South African courts have also assisted in setting out what the process of applying such requirements should entail. In this regard, courts have established that, as much as the President exercises a public power, such power must be exercised rationally—not only must the decision be rationally related to the purpose for which the power was given, but the process of reaching it must also be so. In the case of *DA vs the President of RSA and Others [2011] ZASCA 241*, it was noted that the President must, at the very least, consider whether the person he or she has in mind for appointment as the NDPP has the qualities described in s 9(1)(*b*).[14] It was suggested that such a decision- making process would at least require the following:

(*a*) obtaining sufficient and reliable information about the candidate's past work experience and performance;

(*b*) obtaining sufficient ad reliable information about the candidate's integrity and independence; and

[10] Ibid, Para 72, p. 54.

[11] *Democratic Alliance v The President of the RSA and Others* (263/11) [2011] ZASCA 241 (1 December 2011), Para 72, p. 29.

[12] *Pikoli v The President* 2010 (1) SA 400 (GNP) Du Plessis J (at 406E–F), quoted in *Democratic Alliance v The President of the RSA and Others* (263/11) [2011] ZASCA 241 (1 December 2011), Para 89, p. 33.

[13] Ibid, Para 96, p. 36.

[14] Ibid, Para 98, p. 36.

> (*c*) in cases where the candidate is the subject of allegations calling his fitness to hold office into question, a satisfactory process to determine the veracity of the allegations in a reliable and credible fashion.[15]

In other words, there must be insistence about the qualities the NDPP must possess to lead the NPA on its constitutional path, without fear, favour or prejudice. There has to be a 'real and earnest engagement' with the requirements of s 9(1)(*b*).[16] Given the importance of the NPA and the office of the NDPP, the courts have argued that this is 'the least that 'we the people' can expect and that s 9(1)(*b*) demands'.[17]

1.1.2 *'Fit and Proper' as an objective determination*

Echoing the Ginwala Inquiry's comment that the requirement of 'fit and proper' is fact specific, both the Supreme Court of Appeal (SCA) and the Constitutional Court have agreed that the determination is an objective one, based on facts. The NPA Act does not say that the candidate for appointment as NDPP should be fit and proper 'in the President's view'. Had this been the purpose, the legislature could easily have done so and left it to the complete discretion of the President.[18] As noted by the SCA, 'an objective assessment of a person's personal and professional life ought to reveal whether one has integrity'; '[c]onsistent honesty is either present in one's history or not, as are conscientiousness and experience'. Importantly, as noted by Navsa JA, '[…] having regard to the purposes of the Act, served also by s 9(1)(*b*) of the Act, there can in my view be no doubt that it is not left to the subjective judgment of transient Presidents, but to be objectively assessed to meet the constitutional objective to preserve and protect the NPA and the NDPP as servants of the rule of law'.[19]

In his assessment of whether Adv. Simelane was a fit and proper person and in his subsequent decision to appoint him to the position of NDPP, the President had failed to consider material information before him which brought into question the integrity and honesty of Adv. Simelane (i.e., findings from the Ginwala Inquiry, and a report by the Public Service Commission on whether Adv. Simelane should be subjected to a disciplinary inquiry, among others). As the Constitutional Court concluded:

> The absence of a rational relationship between means and ends in this case is a significant factor precisely because ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important

[15] Ibid, Para 107, p. 39.

[16] Ibid.

[17] *Democratic Alliance v The President of the SA and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012), Para 22, p. 18.

[18] *Democratic Alliance v The President of the RSA and Others* (263/11) [2011] ZASCA 241, Para 117, p. 42.

[19] *Democratic Alliance v The President of the RSA and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012), Para 89, p. 66.

> job effectively. The means employed accordingly colour the entire decision which falls to be set aside.[20]

Although the above case did not necessarily pronounce on whether Adv. Simelane was a fit and proper person, the Court found that the President had acted in an irrational manner in assessing Adv. Simelane for the position.

In contrast, in the later case of *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, the Constitutional Court was unwilling to reinstate Mxolisi Nxasana to the position of NDPP, despite having found that his removal from the post of NDPP (and the appointment of Mr Abrahams as a result) was constitutionally invalid. Even though Mr. Nxasana sought to impress on the Court his fitness for the office and the Court recognised the undue pressure that he had experienced, Justice Madlanga noted, based on objective material before the Court that:

> [Mr Nxasana] was willing to be bought out of office if the price was right. As much as I sympathise with him, I do not think that is the reaction expected of the holder of so high and important an office, an office the holder of which—if she or he is truly independent—is required to display utmost fortitude and resilience. Even allowing for human frailties—because Mr Nxasana is human after all—I do not think the holder of the office of NDPP could not reasonably have been expected to do better. His conduct leads me to the conclusion that a just and equitable remedy is not to allow him to return to office.[21]

From the above discussion, it can be gleaned that South African courts and inquiries have assisted not only in expanding on the meaning of existing requirements but also in setting out how such requirements should be assessed (i.e., considering all relevant information and making rational decisions). However, they have not questioned the mechanisms or individuals currently tasked with giving effect to such guidance. In this regard, the thoroughness and rationale required to carry out selection and appointment decisions have highlighted the importance of selection mechanisms or panels made up of persons with the insight, knowledge, skills and capability to conduct the analyses required for decision-making. This is a key concern of this chapter, as robust mechanisms that enable thorough and informed selection processes that are insulated from possible improper political interference are generally lacking across the key criminal justice institutions canvassed in this paper.

1.2 Process and power to appoint the NDPP, Deputy National Directors and Directors

In terms of Section 179(1)(*a*) of the Constitution and Section 10 of the NPA Act, the President *must* appoint an NDPP. It should be noted however, that over and above

[20] *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, Para 45, p. 26.

[21] *Democratic Alliance v The President of the RSA and Others* (263/11) [2011] ZASCA 241 (1 December 2011), Para 107, p. 38.

this mandate, Section 11 of the NPA Act extends the President's powers of appointment beyond those in the Constitution. In particular, the President may, after consultation with the Minister of Justice and the NDPP, also appoint a maximum of four persons as Deputy National Directors of Public Prosecutions (DNDPPs). Similarly, the President may also, after consulting with the Minister of Justice and the NDPP, appoint Directors of Public Prosecutions at the seat of each High Court in the Republic, in different provinces, as well as Special Directors (Section 13 of the NPA Act).

There is, however, no prescribed statutory process of how the President is expected to assess a candidate's fitness for office;[22] another concern is that the President exercises executive power, 'after consultation with' and not 'in consultation with' different parties. In other words, the President does not have to agree with those he is mandated to consult, which would seem to reduce the ability of an NDPP to influence such decisions, despite the fact that many appointees are accountable to the NDPP, and the NDPP must work closely with such appointees.

The NPA Act extends similar political influence to the Minister of Justice who, *after consultation with* the NDPP, may appoint one or more Deputy Directors of Public Prosecutions (DDPPs) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on, or assigned to him or her by the National Director (i.e., Special DDPPs), as well as acting directors from amongst DDPPs. As some commentators have noted, the concentration of appointments in the hands of the President and the Minister effectively means that 'the entire top echelon of the NPA (at least 14 positions) is appointed by the President and Minister of Justice without any input from other key stakeholders, such as Parliament, professional bodies or the public in general'.[23] Existing processes also strenuously limit the influence of the NDPP and Deputy NDPPs in the appointment of Directors, Special Directors and Deputy Directors; appointees are thus under the control and direction of superiors with limited influence in their appointment.

Some commentators have pointed out that political control over appointments also extends to lower levels because 'lower-ranking prosecutors are appointed on the advice of the NDPP who of course is a political appointee'.[24] In principle, if the process of selection of the NDPP were more consultative, and competent candidates were to be selected, it would not be inappropriate for the NDPP to have influence over lower- ranking appointments or to be responsible for such appointments, as is the case with the National Head of the DPCI in relation to its staff. The

[22] Muntingh, L., Redpath, J., & Petersen, K. (2017). An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future. African Criminal Justice Reform, Dullah Omar Institute, May 2017, p. 12.

[23] De Villiers, W. P. (2011). Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models. Journal of Contemporary Roman-Dutch Law, 74, 247.

[24] Kahla, C. (2018, December 4) Advocate Shamila Batohi appointed as new Director of Public Prosecutions. The South African. Retrieved from https://www.thesouthafrican. com/news/advocate-shamila-batohi-appointed-as-new-director-of-public-prosecutions/, 15 March 2019.

positive influence of the current NDPP is evident in the President's appointment of the professionally well-regarded Adv. Cronje to head the Investigative Directorate in the NPA. President Ramaphosa engaged in meaningful consultation with the current NDPP and followed her recommendation, even though the President is not required to do so. The challenge is that we cannot legislate or reform institutions with specific individuals in mind; mechanisms for selection need to provide safeguards, while being flexible enough to allow for meaningful consultation and thorough assessment of candidates.

While it is not the topic of this chapter to examine the model of appointments for staff prosecutors, there are some significant features of these appointments, as set out in Section 16 of the NPA Act, that should be taken into account including the explicit institutional context of legal professionalism (e.g. of the legal profession) for appointments within the NPA and other features such as the institutionalisation of an internship programme for aspirant prosecutors[25], and a greater role for the NDPP in either recommending someone for appointment or designating someone to do so. In comparison to higher level appointments, the NDPP has a greater say on who is recommended for appointment. As part of the appointment process for prosecutors, the Minister can prescribe legal qualifications but must do so with the agreement of the NDPP and after consultation with DPPs. If the NDPP is appointed through a consultative process that has integrity (i.e. by making use of panels of independent experts), then it could be expected that such a process could influence better prosecutor appointments.[26]

In the appointment of Adv. Shamila Batohi as NDPP, President Ramaphosa called on organisations and public institutions to assist in identifying suitable candidates for the post[27] and exercised his discretion to institute a panel to evaluate applicants, conduct interviews and make recommendations,[28] chaired by Energy Minister Jeff Radebe. Panel members were: Auditor General, Mr. TK Makwetu, Adv. B Roux of the General Council of the Bar, Mr. R Scott of the Legal Practice Council, Adv. L Manye of Advocates for Transformation, Mr. LB Sigogo President of the Black Lawyers Association and Mr. Mvuzo Notyesi, President of NADEL. This made the selection process more transparent, accountable and responsive to the current

[25] More information on the Aspirant Prosecutor Internship Programme is available at, https://www.npa.gov.za/aspirant (accessed 9 August 2021).

[26] Prosecutors are appointed subject to public service laws which prescribe the establishment of selection panels, albeit composed of internal members, many of whom should be legally trained.

[27] Law Society of South Africa. (2019, February 11) Restoring the Independence of the Prosecutorial Authority in South Africa. Press Statement issued on behalf of the National Association of Democratic Lawyers (NADEL), South Africa. Retrieved from https://www.lssa.org.za/news-headlines/press-releases/restoring-the- independence-of-the-prosecutorial-authority-in-south-africa, 15 March 2019.

[28] Pather, R .(2018, November 13). High court orders NDPP interviews open to media. Mail and Guardian. Retrieved from https://mg.co.za/article/2018-11-13-high-court- orders-ndpp-interviews-open-to-media, 17 July 2019. The case is *Right2Know Campaign vs President of the Republic of South Africa*, Case No: 81783/2018, High Court of South Africa, Gauteng Division, Pretoria.

political climate in South Africa. It is expected that the President will exercise his discretion and follow a similar procedure to appoint Deputy National Directors of Public Prosecutions.

However, despite the President's initiative to consult and institute a panel, NDPP appointment proceedings were only opened to the media and the public-at-large after a successful urgent court application by the Right2Know Campaign to prevent the process from being shrouded in secrecy.[29] In opposing the application, the Presidency seemingly argued that neither the Constitution nor the NPA Act imposes a qualification on the procedure or manner in which executive power is exercised.[30] In the absence of such a qualification in law, the procedure to be followed falls to the discretion of the President—which can be dangerous, as attested to by South Africa's recent political history.

There is currently no legislative provision that requires the President (or the Minister in relation to the appointment of DDPPs and acting directors) to constitute a panel to interview candidates and make recommendations to him or her or to ensure that this process is open to the public. Despite the current President's willingness to make the appointment process more transparent, such a mechanism for appointments has yet to be institutionalised to guard against future Presidents (or Ministers) who might not be as inclined to adopt an open and participative process for selection. It is for these reasons that this chapter argues for the adoption of regulations to cement this process.

1.3 Removal of the NDPP and Deputy NDPPs

The President has the power to remove an NDPP but only on specified and limited grounds after an inquiry has been held, and with the concurrence of Parliament for dismissal on such grounds. Nonetheless, as some commentators have noted, '[...] these appointment and removal provisions create the risk that the President will appoint a person who is unwilling, where necessary, to prosecute members of the executive or the ruling party, or persons politically connected to them; similarly, they create the risk that the President, with the concurrence of a parliament dominated by the ruling party, will seek to remove an NDPP who is willing to do so.'[31] These risks have materialised in South Africa; not one NDPP has served a full term in the past 18 years.[32]

[29] Correspondent. (2018, November 13). Why President Ramaphosa wants NDPP interviews held behind closed doors. News 24. Retrieved from https://www.news24.com/ SouthAfrica/News/why-president-ramaphosa-wants-ndpp-interviews-held-behind-closed-doors-20181113 15 March 2019.

[30] Muntingh, L., Redpath, J., & Petersen, K. (2017). An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future. African Criminal Justice Reform, Dullah Omar Institute, May 2017, p. 12.

[31] Ibid.

[32] *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, Para 45, p. 26.

Section 12(6)(*a*) of the NPA Act enables the President to provisionally suspend the National Director or a Deputy National Director from his or her office, pending an enquiry into his or her fitness to hold such office and, based on such enquiry, remove that person from office on the grounds of misconduct, continued ill-health, incapacity to carry out duties efficiently or no longer being a fit and proper person to hold the office concerned. After such removal, the President must communicate the reason for the removal and representations by the National Director or Deputy National Director (if any) to Parliament (within 14 days if Parliament is in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session). Within 30 days after this message is tabled in Parliament, Parliament is expected to pass a resolution as to whether or not the restoration to office of the National Director or Deputy National Director so removed, is recommended. In terms of Section 12(7), the President can also remove the National Director or a Deputy National Director from office if he or she is presented with an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to above.

In a 2018 case, the Constitutional Court found section 12(6) to be constitutionally invalid for empowering the President to suspend an NDPP and deputy NDPP without pay and for an indefinite duration. The Court was of the view that these conditions could be susceptible to abuse and could be invoked 'to cow and render compliant an NDPP or deputy NDPP'.[33] In making such decisions, the Court sought to remove provisions that could have the potential to induce an NDPP to tailor his/her actions in order to curry favour with the President, either out of fear of being suspended for an undetermined period with no income or in the hopes of being allowed to continue on in the position after turning 65.[34]As noted above, the Ginwala Inquiry in 2007/8 was the first conducted under Section 12(6) of the NPA Act. Although Ginwala found that Adv. Pikoli was indeed a fit and proper person to hold office as NDPP, then-President Kgalema Motlanthe, with the endorsement of Parliament, decided nevertheless to remove him from office. Adv. Nxasana did not undergo a section 12(6) inquiry. The most recent inquiry is the Mokgoro Inquiry, instituted by President Ramaphosa after pressure by civil society organisations to compel the President to take steps to remove Advocates Jiba and Mrwebi from the NPA.

While it is encouraging that the NPA Act allows for an inquiry to be carried out before the removal of an NDPP or Deputy NDPP, there is no guidance on the form it should take or who should chair it; section 12(6)(*a*) of the NPA Act only refers to the President undertaking an enquiry 'as the President deems fit' into a person's

[33] Breytenbach, G. (2018, August 21). We should be considering constitutional amendments to ensure an independent NPA. Daily Maverick. Retrieved from https://www. dailymaverick.co.za/article/2018-08-21-we-should-be-considering-constitutional-amendments-to-ensure-an-independent-npa/, 15 March 2019.

[34] Section 193(3) of the Constitution of the Republic of South Africa, 1996.

fitness to hold office. Once again, more explicit regulation to safeguard the independence of the process against vagaries of a sitting President is required.

1.4 Suggestions to reform the appointment process of the NDPP

Although the President took important steps to improve the transparency of the appointment process for the most recent NDPP, the selection criteria are not fully defined in the current NPA Act and there is no prescribed procedure for the appointment to be made by the President. In light of the NPA's unstable history there is an urgent need to ensure that inasmuch as the President is mandated to appoint the NDPP, the process becomes much more transparent and participatory to safeguard the independence of the prosecuting authority.

1.4.1 *Improving selection criteria*

Although there are certain selection criteria in place, recent work on this subject proposes that criteria for the position of NDPP should be more specific and look to the requirements for the positions of Public Protector or Auditor-General. To qualify for the latter, for example, section 193(3) of the Constitution requires that a person must not only be 'fit and proper' but also that 'specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard'.[35]

Over and above these requirements, there are suggestions that 'a certain minimum number of years of experience in a particular field may also be set as a requirement, as is the case with the public protector who must not only have legal experience but at least ten years' experience as one of the requirements'.[36]While criteria for appointment could be tightened, it is unlikely that they will be exhaustive. It is for this reason that the mechanism that is instituted to apply the criteria be robust enough to be able to, in a competent matter, assess the character, experience, skills, knowledge and abilities of those who seek to fill these posts, as set out in recent court judgments.

1.4.2 *Improving the mechanism to appoint candidates*

There is an urgent need for a panel or panels comprised of persons who are respected by the public that would undertake the tasks of reviewing the applications of candidates, shortlisting them, interviewing them and making recommendations to the President. This would apply not only to the position of NDPP, but also to the appointment process for Deputy NDPPs, Special Directors and Directors (seats of High Courts). It could also be used by the Minister in his/her appointment of Deputy Directors and Acting Directors.

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[35] African Criminal Justice Reform (2018, October). The Appointment and Dismissal of the NDPP: Instability since 1998. ACJR Factsheet No.7, p. 3.

[36] Muntingh, L., Redpath, J., & Petersen, K. (2017). An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future. pp. 38–39.

Some commentators advocate for Parliament to play a more direct role in identifying suitable candidates as it has done in the case of the public protector, whereas others suggest that this task should be undertaken by the Judicial Services Commission (JSC), which currently performs similar functions in the process of appointment of judges.[37]

Reliance on the procedure set out in section 193(5) of the Constitution (which provides for the appointment of the public protector and members of commissions provided for in Chapter 9 of the Constitution) would require the National Assembly to recommend to the President: candidates (*a*) nominated by a committee of the National Assembly that is proportionally made up of members of all parties represented in the Assembly and (*b*) approved by at least 60% of the members of the Assembly. It could be argued that if one party retains a significant majority, the reliance on this mechanism might result in the recommendation of candidates who are aligned to the majority party regardless of the person's integrity and zeal for independence. One aspect that could be strengthened should this model be adopted is the involvement of civil society in the recommendation, which is provided for in section 193(6) as envisaged in section 59(1)(*a*).

A sense of professionalism in the position of the NDPP could be instilled by structuring the selection process like that of the JSC. Members of the JSC have a broad set of pertinent skills, and represent different stakeholders with ample representation from members of the legal profession (attorneys, advocates and academics), as well as members of the National Assembly and the National Council of Provinces, who do not make up the majority. Interviews carried out by the JSC are open to the public—even if the JSC's subsequent deliberations are held in private, the record of such deliberations must be made available in certain circumstances.[38] Moreover, civil society organisations such as Judges Matter are able to play an active role in raising awareness about the candidates appearing before the JSC, by providing information about them, and developing questions for them to respond to. The Democratic Governance Rights Unit within the Department of Public Law at the University of Cape Town produces reports that aim to assist the JSC by providing impartial insight into the judicial records of the short-listed candidates, as well as to provide civil society and other interested stakeholders with an objective basis on which to assess the suitability of candidates for appointment to the bench.[39] Although it could be argued that the recent panel to identify and recommend candidates for NDPP was inspired by the composition of the JSC, the panel

[37] *Helen Suzman Foundation v Judicial Service Commission* (CCT289/16) [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) (24 April 2018).

[38] See for instance, Democratic Governance Rights Unit (2019). Submission and Research Report on the Judicial Records of Nominees for Appointment to the Constitutional Court, Supreme Court of Appeal, High Court and Labour Court, April 2019. The reports are available at http://www.dgru.uct.ac.za/research/researchreports/ (accessed 15 March 2019).

[39] National Treasury. (2019, February 4). Terms of Reference: Selection Panel to recommend new Commissioner for SARS. Retrieved from http://www.treasury.gov.za/ comm_media/press/2019/2019020401%20Panel%20TOR_final.pdf 20 March 2020, p. 1.

did not include members of the National Assembly or the NCOP. Considering that independence is a critical quality for the leadership of the prosecuting authority, the lack of panel members selected on the basis of parliamentary membership is to be welcomed. This was also the case with the panel to select and recommend the current SARS Commissioner, which followed the recommendations of the Nugent Commission's Second Interim report (November 2018). The report called for panel members who 'should be apolitical and not answerable to any constituency, and should be persons of high standing who are able to inspire confidence across the tax-paying spectrum'.[40] The composition of the SARS panel is instructive in that it allowed for individuals to form part of the panel as a result of their knowledge, expertise or technical know-how without a specific institutional or professional affiliation. The panel established to recommend NDPP candidates, on the other hand, was constituted by members with professional body or institutional backing selected by such bodies to form part of the panel. Although institutional backing can act as an added safeguard for panel members, the composition of selection panels should be flexible enough to accommodate individuals of 'high standing' with a well-known reputation for their work, skills and abilities, who can contribute to the integrity of the selection process.

2. SOUTH AFRICAN POLICE SERVICE (SAPS)

2.1 Requirements for appointment of the National Commissioner and Provincial Commissioners

In comparison with requirements for the NDPP, the existing legislative framework has minimal requirements for the appointment of the National Commissioner of the South African Police Service, which has approximately 195,000 members.[41] To put this deficiency in perspective, according to a press release by the Institute for Security Studies in 2017, the selection criteria for the National Police Commissioner is 'less rigorous than for the lowest rank of constable'—and is an enabling factor to persons being appointed for political reasons rather than for their ability to do the work.[42]

Contrary to the assumption that the top leadership of the SAPS should be a bastion of integrity, all five of the most recent national commissioners have been sanctioned for criminal acts including fraud, corruption, obstruction of justice,

[40] Nantulya, P. (2018, February 17). South Africa's Strategic Priorities for Reform and Renewal. Africa Center. Retrieved from https://africacenter.org/spotlight/south- africas-strategic-priorities-reform-renewal/, 18 March 2019.

[41] Institute for Security Studies. (2017, July). How to appoint an honest and competent police commissioner. July 2017. Retrieved from https://issafrica.org/about-us/ press-releases/how-to-appoint-an-honest-and-competent-police-commissioner, 17 March 2019.

[42] Nantulya, P. (2018, February 17). South Africa's Strategic Priorities for Reform and Renewal. Africa Center. Retrieved from https://africacenter.org/spotlight/south- africas-strategic-priorities-reform-renewal/, 18 March 2019.

and even murder.[43] This is not aided by a legal framework that provides no guidance on requirements that such persons must meet before taking up such a critical post.

To illustrate, section 207(1) of the Constitution simply indicates that '[t]he President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service'. In relation to the appointment of provincial commissioners, section 207(3) states that the 'National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province'. It further calls on the Cabinet member responsible for policing to mediate between the parties in instances where the National Commissioner and the provincial executive are unable to agree on the appointment.

Section 199(7) of the Constitution cautions against the security services or any of its members prejudicing political party interests that are legitimate in terms of the Constitution or acting in a political party partisan manner. Yet, despite this explicit attempt at ensuring that the police service is apolitical and non-partisan, the Constitution is quite minimalist in setting out any kind of criteria or description of the appointment process for the National Commissioner (or Provincial Commissioners), except that such persons can be a woman or a man. No more guidance can be found in the South African Police Service Act ('SAPS Act'), 68 of 1995.

All one can glean from section 6 of the SAPS Act is that the President must appoint the national commissioner of SAPS, while the latter, in turn, appoints provincial commissioners of SAPS, with the concurrence of the provincial government. In principle, national and provincial commissioners are appointed for a period of five years. However, this term of office may be extended for successive periods of up to five years at a time if the President (in the case of the National Commissioner) or the National Commissioner (in the case of provincial commissioners) agrees to do so.[44] The issue of successive terms of office and the risks that this poses for the independence of key institutions was highlighted by the Constitutional Court in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23. While referring to the DPCI, Chief Justice Mogoeng said that renewal of terms of office 'invites a favour-seeking disposition from the incumbent … It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard to the preferences of the one who wields the discretionary power to renew or not to renew the term of office. No holder of

[43] Sections (7)(2) and 7(3) of the South African Police Service Act 68 of 1995.

[44] *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, quoted from *Helen Suzman Foundation v President of the Republic of South Africa*; *Glenister v President of the Republic of South Africa* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) (Helen Suzman Foundation), Para 81.

this position of high responsibility should be exposed to the temptation to 'behave' herself in anticipation of renewal'.[45]

In the absence of even the most minimal of requirements, it has not been possible to challenge, as has occurred in the case of the appointment of the NDPP, the appointment of the national commissioner. To date, there have been no court cases challenging such requirements or the lack thereof.[46] Sections of the SAPS Act dealing with misconduct and incapacity of the national commissioner make mention of inquiries to establish whether the person is 'fit for office' and 'capable of executing his or her official duties efficiently'.[47] However, there is no detail regarding what is required. There has been some debate as to whether a national commissioner should have policing experience as one of the basic requirements to qualify for the post. Those who support this contention point out that policing is a specialised field and therefore the person to hold such position should be a career police official rather than a civilian. Policing is seen as a profession that requires a specialised set of skills, coupled with autonomous expertise, independent judgment and the ideal of service.[48] In contrast, there are others who hold that policing knowledge is secondary to having good management and leadership skills to lead the police service.[49] Against increasingly complex and broad- ranging police operational situations, the emphasis is on a high standard of interpersonal and communication skills, combined with the capability of using problem-solving techniques that are in line with the Constitution.

2.2 Process of appointment of the National Police Commissioner and Provincial Commissioners

There are no legislative provisions that set out the appointment process to be followed in relation to the National Police Commissioner or Provincial Commissioners. There is also limited information regarding these processes since they have historically taken place beyond the public eye at the discretion of the President or the National Commissioner, respectively.

The National Development Plan has identified the challenges in the appointment process and has suggested the following:

The National Commissioner of Police and Deputies should be appointed by the President on a competitive basis. A selection panel, established by the President,

[45] Helen Suzman Foundation (2018). The Criminal Justice System: Radical reform required to purge political interference, December 2018. https://hsf.org.za/publications/ special-publications/ the-criminal-justice-system-radical-reform-required-to-purge-political-interference.pdf (accessed 7 March 2019), p. 5.

[46] Section 9 SAPS Act.

[47] See for instance, Van Heerden, T. J. (1982). Introduction to police science. Pretoria: University of South Africa; Bowman, T. L. (2010). Is policing a job or a profession? The case for a four-year degree. CALEA Update Magazine, 108.

[48] Schulte, R. (1996). Which challenges will police managers have to meet in the future? College of Police and Security Studies, Slovenia.

[49] National Development Plan, p. 391.

should select and interview candidates for these posts against objective criteria. The President should appoint the National Commissioner and Deputies from recommendations and reports received from this selection panel. This would enhance the incumbents' standing in the eyes of the community and increase the respect accorded them by their peers and subordinates.[50]

The suggestions made in this chapter for the institution of selection and recommendation panels are aligned with the recommendations from the National Development Plan.

2.3 Removal of the National Police Commissioner

Sections 8 and 9 of the SAPS Act deal with the procedures to be followed in the event that the Cabinet loses confidence in the National Commissioner, or the National Commissioner faces allegations of misconduct, or questions about his or her fitness for office or capacity for executing his or her official duties efficiently.

In such cases, the President may establish a board of inquiry consisting of a judge of the Supreme Court as chairperson, and two other suitable persons, to conduct an inquiry, compile a report and make recommendations. A similar process as set out for National Commissioners is outlined for cases involving Provincial Commissioners. In respect of Provincial Commissioners, the National Commissioner is called upon to establish a board of inquiry consisting of not more than three persons, with a chairperson who has practised for at least 10 years after having qualified as an advocate or an attorney, or who is otherwise suitably qualified in law.

In comparison to the appointment procedures, the removal procedures require the President to act upon the recommendation of a board of inquiry, which must have at least a judge of the Supreme Court. The required presence of a Supreme Court judge on the board provides comfort as to the impartiality of the inquiry[51] and provides a mechanism that could be instituted in relation to the removal of leaders in other key criminal justice agencies.

Upon completion of its work, the board must submit its recommendations to the President, the National Commissioner and Parliamentary Committees.[52] Based on the report's recommendations, the President may remove the National Commissioner or 'take any other appropriate action'.[53] If the President postpones his decision for a period, he is required to request the same board of inquiry, or a

[50] Helen Suzman Foundation. (2018, December). The Criminal Justice System: Radical reform required to purge political interference. Retrieved from https://hsf.org.za/ publications/special-publications/the-criminal-justice-system-radical-reform-required-to-purge-political-interference.pdf (accessed 7 March 2019), p. 5.

[51] Section 8(6)(*a*), SAPS Act.

[52] Section 8(6)(*b*) SAPS Act.

[53] Section 8(7) SAPS Act.

similar board established for that purpose, to compile a new report and to make a new recommendation.[54]

An example of such inquiry was undertaken in 2012, chaired by Judge Moloi to look into the fitness of National Commissioner Cele to hold office. The inquiry followed a damning report by the Public Protector where it was found that Cele had failed to follow the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies in the conclusion of two controversial property leases — such failure amounted to improper conduct and maladministration.[55]

2.4 Suggestions to improve criteria and reform the appointment process of the National Commissioner

One commentator suggests criteria for the position of National Police Commissioner or Deputy National Police Commissioner should include that a candidate must[56] be a citizen of South Africa only, with a South African university degree, who has had a distinguished police career and has been employed in a senior management position for at least 15 years. Moreover, such person should not be a member of Parliament or of a provincial legislature, or be a premier/mayor or deputy mayor or hold office in a political party. The candidate must not have been convicted of a criminal offence, or of having violated the Constitution.

Whether the selection criteria are detailed in advance as above, or left up to be fine-tuned by a selection panel, it is fundamentally important that a competent and independent panel undertakes a thorough assessment of each candidate.

It would seem that the National Development Plan proposition as set out above calls for a mechanism similar to that being used for the recent appointment of the NDPP and, possibly, future Deputy NDPPs. One option would likely involve Parliament, whereas another might involve a separate structure or panel, akin to the JSC, which makes recommendations to the President. One suggestion, which combines both approaches, advocates for the establishment of a National Police Service (NPS) commission or board which would advertise, interview candidates and submit a list of the top 15 candidates to Parliament for national and deputy national commissioner posts. The board would be made up of representatives from the Presidency, the ministries of Police, and Public Service and Administration, Chapter 9 institutions, the Public Service Commission, the JSC, and the Legal Practice Council. Upon receipt of the list with the candidates in the order of

[54] Public Protector of South Africa (2010). Against the Rules Too, Report of the Public Protector in terms of s 182(1) of the Constitution of the Republic of South Africa, 1996 and s 8(1) of the Public Protector Act, 1994 on an investigation into complaints and allegations of maladministration, improper and unlawful conduct by the Department of Public Works and the South African Police Service (SAPS) relating to the leasing of SAPS accommodation in Durban, 2011.

[55] Montesh, M. (2014). A proposed model for the appointment and dismissal of the national commissioner of the South African Police Service: a comparative study. Journal of Law, Society and Development, 1(1), 68–89.

[56] Ibid, p. 86.

preference, Parliament would vote on the candidates—a 75% majority of the votes would be required for a candidate to be appointed national commissioner. If Parliament does not agree on any of the names put forward, the process would have to start again and the position re-advertised.[57] This suggestion, however, is quite cumbersome, would require constitutional amendments since the appointment would be done by Parliament and not the President, while it could also become highly politicised to secure the necessary votes.

A different panel-based mechanism was proposed to Parliament in 2017 by the Institute of Security Studies (ISS) and Corruption Watch (CW) for the purposes of the appointments of the national police commissioner and head of the DPCI ('Hawks'). In their submission to Parliament, ISS and CW promoted the establishment of a police leadership selection panel as part of a transparent and public participatory process to undertake the following activities:[58]

1. The establishment of a panel of experts who can develop key selection criteria for both leadership positions.
2. Publicly advertising the positions and making the selection criteria known.
3. Shortlisting the best possible candidates and releasing their CVs for public comments and objections.
4. Conducting the interview process in public and objectively assessing the candidates against the selection criteria.
5. Presenting no more than five of the best candidates to the President to choose from and appoint as SAPS National Commissioner.
6. Presenting no more than five of the best candidates to the Minister of Police to choose from and appoint as the head of the Hawks.

The model proposed by ISS and CW allocates an important role to Parliament in the appointment process through its exercise of oversight by: advising the Minister of Police to establish the recommended National Policing Board or selection panel that will develop the necessary selection criteria and requirements for employment, possibly based on existing criteria for the posts of SAPS divisional and provincial commissioners; advising the President to act on the recommendations of the National Policing Board or selection panel; and, facilitating public participation in the process, as was done in the recent appointments to the heads of various Chapter 9 institutions. This could include circulating the CVs of the applicants, providing space in Parliament for the interviews to be conducted, and facilitating public inputs on the candidates, to assist the selection panel in compiling a shortlist

[57] Corruption Watch and ISS (2017). Submission by Corruption Watch and the Institute for Security Studies to the Parliamentary Portfolio Committee on Police: Civil society support to the National Development Plan recommendations for the Appointment of the SAPS National Commissioner, that should also apply to the Head of the Directorate for Priority Crime Investigations ('the Hawks'), 12 September 2017, p. 5.

[58] Ibid, pp. 5–6.

of up to five candidates who meet the minimum criteria.[59] Importantly, the model emphasises the key role of civil society in providing information about the candidates and testing their integrity. As criteria for the post, the submission takes as a point of departure the criteria that have been defined for selecting the head of the DCPI (Hawks) (discussed below).

In addition to a selection panel, amendments to SAPS Employment Regulations of 2018 are needed, to repeal all provisions that enable direct ministerial interference in appointments and promotions such as those requiring a number of senior management appointment and promotion decisions to be done 'in consultation with the Minister'[60] and those that bypass clearly defined selection processes.

Lastly, and in order to initiate a process of renewal of the compromised management cohort of the criminal justice agencies, competency assessments against minimum standards, as supported by the National Development Plan, should be conducted at the top and senior management level focusing on the SAPS, but also on the Hawks and the NPA. For the SAPS, an audit should be conducted to identify those who have been appointed or promoted in terms of regulations that allow the SAPS National Commissioner to appoint or promote without going through a selection process. Appropriate steps should be taken to remove or redeploy people occupying posts for which they do not have the required competencies, or employees with criminal records. These posts should be filled following a transparent, merit-based and competitive process.[61]

3. DIRECTORATE OF PRIORITY CRIME INVESTIGATIONS (DPCI)

The establishment of the DPCI or Hawks within the SAPS followed the disbandment of the Division of Special Operations (DSO), known as the 'Scorpions', within the NPA. It was enabled by legislative amendments and established as a separate unit in the SAPS in terms of section 17L of the SAPS Act (as amended).

3.1 Requirements for appointment of National Head, Deputy Head and provincial heads of DPCI

Echoing some of the criteria set out for the NDPP, section 17CA(1) of the SAPS Act states that the Minister, with the concurrence of the Cabinet, has the power to appoint a South African citizen, who is fit and proper, 'with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned', as the National Head of the DPCI. Such

[59] See s 47(1) of the SAPS Employment Regulations of 2018, and particularly s 47(1)(*n*). For a discussion of this matter, refer to Institute for Security Studies (ISS) and Corruption Watch (CW), State Capture and the Political Manipulation of Criminal Justice Agencies: A joint submission to the Judicial Commission of Inquiry into Allegations of State Capture, April 2019, pp. 55–56.

[60] Ibid, p. 53.

[61] The case was *Sibiya v Minister of Police and Others* (GP) unreported case no 5203/15 (20 February 2015).

appointments are for a non-renewable fixed term of not shorter than seven years and not exceeding 10 years.

Similarly, sections 17CA(4) and (6) of the SAPS Act empower the Minister, in consultation with the National Head of the Directorate and with the concurrence of Cabinet, to appoint a Deputy Head and Provincial Heads, respectively, on the same terms as described in section 17CA(1) above. Unlike with the case of appointments within the NPA, these provisions enjoin the Minister to act 'in consultation with' the National Head of the DPCI, thus requiring a level of concurrence in the decision-making with the National Head, in addition to the Cabinet.

The courts have had ample opportunity to pronounce on the meaning of the 'fit and proper' requirement following the findings in relation to Adv. Simelane. In the case of *Helen Suzman Foundation and Freedom Under Law v Minister of Police and Others* (23199/16) [2017] ZAGPPHC 68, the applicants emphasised that the DPCI is a premier law enforcement agency, integral to the battle against corruption and maladministration, which is why the Act requires the National Head to be a person of integrity. They contended that in appointing General Ntlemeza to that high office at the time, Police Minister Nhleko had acted irrationally and unlawfully, had failed to fulfil his constitutional duty to protect the integrity and independence of the DPCI and to undertake a proper inquiry into whether General Ntlemeza was fit and proper to be the Head of the DPCI. The principal ground of review was that Minister Nhleko had not taken into account materially relevant considerations; more particularly, he failed to a judgment of the High Court, by Matojane J, in an earlier case in which General Ntlemeza's integrity was called into question.[62] In dealing with the 'fit and proper' requirement, the Court pronounced as follows:

> To determine objectively whether a person is fit and proper, this Court would have to weigh up the conduct of the person against the conduct that is expected of a person occupying the office of that Head.[63]
>
> The judgments are replete with the findings of dishonesty and mala fides against Major General Ntlemeza. These were judicial pronouncements. They therefore constitute direct evidence that Major General Ntlemeza lacks the requisite honesty, integrity and conscientiousness to occupy the position of any public office, not to mention an office as more important as that of the National Head of the DPCI, where independence, honesty and integrity are paramount to qualities. Currently no appeal lies against the findings of dishonesty and impropriety made by the Court in the judgments. Accordingly, such serious findings of fact in relation to Major General Ntlemeza, which go directly to Major General Ntlemeza's trustworthiness, his honesty and integrity, are definitive. Until such findings are appealed against successfully they shall remain as a lapidary against Lieutenant General Ntlemeza.[64]

[62] *Helen Suzman Foundation and Freedom Under Law v Minister of Police and Others* (23199/16) [2017] ZAGPPHC 68, Para 37, p. 26.
[63] Ibid, Para 39, p. 27.
[64] *Helen Suzman Foundation and Freedom under Law v Minister of Police and Others* (23199/16) [2017] ZAGPPHC 68, Para 35, p. 25.

In addition to expanding on the meaning of the requirements, in November 2014 the Constitutional Court also found that sections 17CA(15) and (16) of the SAPS Act which allowed for the extension of the Head's and the Deputy Head's terms of office beyond retirement age amounted to a renewal of their terms, which undermines the operational independence of the Head and Deputy Head of the DPCI. The Court therefore ordered that these provisions be deleted from the Act.

3.2 Process of appointment of the Head of the DPCI, Deputy Head and provincial heads

According to section 17CA of the SAPS Act, it is the Minister, with the concurrence of the Cabinet, who appoints the Head of the DPCI. While Cabinet must concur with the Minister's decision, this provision does not delineate how the process of assessment and selection should be undertaken in the first place.

Importantly, however, the Minister has a duty, as set out in the judgments concerning the appointment of Adv. Simelane as NDPP, to positively establish that candidates for the post meet the requirements as set out in the SAPS Act, in line with the case of *Helen Suzman Foundation and Freedom Under Law v Minister of Police and Others* (23199/16) [2017] ZAGPPHC 68.

In this case, the North Gauteng High Court was scathing against the Minister of Police in the process of appointment of General Ntlemeza as Head of the DPCI. In particular, it expanded on what is required to determine if a person qualifies as 'fit and proper'. The Court emphasised that all relevant material must be considered, including court pronouncements (judgments) that speak to the integrity of the person in question. As the Court put it:

> The judicial pronouncements made in both the main judgment and the judgment in the application for leave to appeal are directly relevant to and in fact dispositive of the question whether Major General Ntlemeza was fit and proper if one considers his conscientiousness and integrity. Absent these requirements Lieutenant General Ntlemeza is disqualified from being appointed the National Head of the DPCI.[65]
>
> … The Minister simply brushed aside a considered opinion of a superior court. The question here is not one of discretion but whether the person who has been described by such judicial pronouncement can be appointed in the face of such pronouncements. This was a quintessential example of the Minister completely ignoring and brushing aside remarks by a Court.[66]

Echoing the approach taken in the cases dealing with the appointment of Adv. Simelane as NDPP, the court found that the process of appointment was irrational since it excluded critical evidence in the form of court judgments that related directly to the requirements of fitness, propriety and integrity required of the post. The establishment of a selection panel could assist in ensuring that all relevant material evidence is properly considered.

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[65] Ibid, Para 36, p. 26.

[66] *McBride v Minister of Police and Another* [2015] ZAGPPHC 830; [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP) (High Court judgment), Paras 15–16.

3.3 Removal process

Section 17DA of the SAPS Act deals with the removal from office of the National Head of the DPCI. Removal on the ground of misconduct, incapacity or incompetence can be undertaken based on a finding by a Committee of the National Assembly and the adoption by the National Assembly of a resolution, supported by a two-thirds majority of its members, calling for that person's removal from office.

In relation to the removal of the Head of the DPCI, the *Glenister* cases resulted in the deletion of sub-section 2 of section 17DA which allowed the Minister to provisionally suspend the Head of the DPCI and institute a commission of inquiry into his or her fitness to hold office as it offended against the independence of the DPCI. The Constitutional Court held that the Minister's power to remove the Head of the DPCI from office in section 17DA is a threat to his/her job security, whereas the suspension and removal of the Head through a parliamentary process, guarantees job security and provides a level of independence. While a two-thirds majority of National Assembly members is required for removal, the reliance on Parliament could nonetheless result in decisions being carried out according to party or coalition lines rather than based on the merits of the case.

4. INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE (IPID)

Section 206(6) of the Constitution states that upon receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province. Since IPID is mandated to investigate police conduct, it is imperative that the institution is allowed to retain its independence both structurally and operationally. In a recent judgment, the High Court found that the independence of IPID is expressly guaranteed and protected under section 206(6) of the Constitution, which is 'significant and decisive'.[67] Moreover, in its role as 'watchdog over the police', in order to uphold its credibility and the confidence of the public it is necessary for IPID to 'be not only independent but […] also be seen to be independent to undertake this daunting task without any interference, actual or perceived, by the Minister'.[68]

However, as the sections below will show, South Africa is still far from ensuring such independence in relation to a key corruption-fighting body such as IPID.

4.1 Requirements for appointment

The only requirement that appears in section 6(1) of the IPID Act is that the person nominated as Executive Director of IPID must be 'suitably qualified'. The vagueness of the requirement is astounding given the vital role that IPID plays as part of the state machinery to fight corruption and police misconduct. This lacuna in

[67] *McBride v Minister of Police and Another* [2016] ZACC 30, Para 41, p. 23.

[68] *Helen Suzman Foundation in re Robert McBride and the Minister of Police*, Case no. 6175/19 of 21 February 2019.

the requirements is even more surprising considering that IPID has oversight and accountability responsibilities over the DPCI. In view of this, at the very least, the Executive Director of IPID should meet the requirements set out for the Director of the DPCI, which have been described earlier in this chapter.

4.2 Power to appoint and process of appointment

Section 6(1) of the IPID Act, 1 of 2011, vests the Minister of Police with the power to nominate a person to be appointed as Executive Director to head IPID. Of extreme concern is that this section requires the Minister to follow whatever procedure the Minister determines. There is therefore no prescribed procedure to ensure that this process is fair, transparent and administratively just. One only needs to recall that the current Minister of Police is the same person who was found not to be fit as National Police Commissioner in 2012. Like in the case of the DPCI and SAPS, the Executive Director has the power to appoint provincial heads of IPID.

The only oversight measure that the Act allows in the process of appointment for the Head of IPID is for the relevant Parliamentary Committee to confirm or reject such nomination within a period of 30 parliamentary working days from the date of nomination (section 6(2)). The proportion of members of the committee necessary for such nomination to be confirmed is not clear, but it may be assumed that it will be in proportion to the National Assembly's composition. Reliance on parliamentary committees carries the obvious risk that party members would vote to support a particular party position and not necessarily informed by the merits of the candidate. There is also no procedure set out to inform how the Minister of Police is expected to arrive at a nomination to be presented to Parliament (i.e., whether by himself, or based on the recommendations of some form of panel).

In the event that the appointment is confirmed, the successful candidate is appointed subject to the laws governing the public service to a term of office of five years, renewable for one additional term only (section 6(3)). Presumably, if the appointment is not confirmed, the nomination process would need to start afresh. The North Gauteng High Court, in an unreported judgment of February 2019, sanctioned an agreement between the Minister of Police, Parliament's Portfolio Committee on Police and the head of IPID, where the Minister was permitted to recommend renewal or non-renewal, for consideration of the Portfolio Committee, which was then empowered to take a decision.[69] This court order was made in spite of several Constitutional Court judgments declaring that the renewal of terms of office of persons in positions which require independence cannot be subject to the discretion of political actors. An application for leave to appeal to the Supreme Court of Appeal against this court order was rejected on the basis that the Minister's role is limited to making a non-binding recommendation on renewal, which the

[69] Petersen, T. (2018, September 4). Greater independence for IPID closer as amendment bill approved. News 24. Retrieved from https://www.news24.com/SouthAfrica/ News/greater-independence-for-ipid-closer-as-amendment-bill-approved-20180904 (accessed 21 March 2019).

Portfolio Committee can either reject or confirm as a protection to safeguard IPID's independence. In May 2021, the Constitutional Court was approached for leave to appeal this decision; the matter is pending.[70]

The appointment of the Executive Director subject to the laws governing the public service was challenged in the Constitutional Court as falling short of the independence from political interference required by an entity like IPID, but only in relation to the removal of the head of IPID. As much as the Court allowed Parliament time to amend the IPID Act, these provisions cover the process of removal and not appointment of the Head of IPID. In 2019, the Amendment Bill was approved by the National Assembly and by the National Council of Provinces.[71] The IPID Amendment Act was assented to by the President on 3 June 2020 and contains provisions similar to those governing the removal of the Head of the DPCI. However, such provisions do not extend to the process of nomination and selection of the Head of IPID.

4.3 Removal process

Prior to a Constitutional Court judgment in 2016, the Executive Director could be removed at the sole and unfettered discretion of the Minister of Police with the total absence of an oversight mechanism. Moreover, the Executive Director of IPID was subject to the laws governing the public service in relation to suspension and removal. However, as the Constitutional Court noted:

> To subject the Executive Director of IPID, which the Constitution demands to be independent, to the laws governing the public service — to the extent that they empower the Minister to unilaterally interfere with the Executive Director's tenure — is *subversive* of IPID's institutional and functional independence, as it turns the Executive Director into a public servant subject to the *political control* of the Minister.[72]

The Constitutional Court confirmed that section 6 of the IPID Act gives the Minister of Police enormous political powers and control over the Executive Director to remove him without parliamentary oversight.[73] In the words of Bosielo AJ:

> This is antithetical to the entrenched independence of IPID envisaged by the Constitution as it is tantamount to impermissible political management of IPID by the Minister. To my mind, this state of affairs creates room for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or who is sympathetic to the Minister's political orientation. This might lead to IPID becoming politicised and

[70] Helen Suzman Foundation, (2021). 'HSF Approaches Constitutional Court for Leave to Appeal against order Sanctioning Unlawful IPID Agreement', Press Release, 3 May 2021, available at: https://hsf.org.za/news/press-releases/press-release-hsf-approaches-constitutional-court-for-leave-to-appeal-against-order-sanctioning-unlawful-ipid-agreement.

[71] *McBride v Minister of Police and Another* [2016] ZACC 30 Para 39, pp. 22–23 (emphasis added).

[72] Helen Suzman Foundation. (2018, December). The Criminal Justice System: Radical reform required to purge political interference. Retrieved from https://hsf.org.za/ publications/special-publications/the-criminal-justice-system-radical-reform-required-to-purge-political-interference.pdf 7 March 2019, p. 9.

[73] *McBride v Minister of Police and Another* [2016] ZACC 30, Para 38, p. 22.

being manipulated. Is this compatible with IPID's independence as demanded by the Constitution and the IPID Act? Certainly not.[74]

In view of the above, the Constitutional Court declared sections 6(3) and 6(6) of the IPID Act to be unconstitutional. section 6(6), which is the removal provision for the Executive Director, was amended to read like the remaining removal provisions for the national head of the Hawks contained in the SAPS Act. Even though Parliament was given 24 months from the date of the order (6 September 2016) to permanently cure the defects in the IPID Act, the amendment bill did not become law within that period. On 3 June 2020 the President finally assented to the Act, which requires Parliament to have an oversight role in which a two-thirds majority vote is needed in the National Assembly to remove the Executive Director of IPID.[75] However, the IPID Amendment Act does not incorporate changes to recruitment criteria or the process of appointment.

CONCLUSION

This chapter has provided a detailed breakdown of existing requirements, appointment and removal processes for senior leadership within the NPA, SAPS, DPCI and IPID. In some instances, there is a dearth of requirements for particular positions. In others, requirements are defined but the mechanisms for appointment and, in some cases, removal, lack a degree of independence, both real and perceived, from improper political interference that is fundamental to ensure that these criminal justice institutions remain professionalised and are able to carry out their mandates and duties without fear or favour and in line with the values of the South African Constitution. To mitigate against this predominant executive power, the chapter has argued for the establishment of selection panels made up of competent, diverse and professional members who have the knowledge and experience to contribute to the making of rational decisions in relation to the selection and recommendation of candidates for appointment, as well as their removal.

Since the focus of this chapter has been on the procedures followed in relation to senior leadership positions, it has not dealt in detail with possible political interference evidenced by the power of the Minister of Justice to appoint Deputy Directors and Acting Directors of Public Prosecutions with very limited say by the NDPP, under whose control and direction such persons must discharge their duties, and of the Minister of Police in relation to senior management appointments in the SAPS. Such analysis should be linked to measures to reform recruitment practices

[74] Petersen, T. (2018, September 4). Greater independence for IPID closer as amendment bill approved. News 24. Retrieved from https://www.news24.com/SouthAfrica/ News/greater-independence-for-ipid-closer-as-amendment-bill-approved-20180904 (accessed 21 March 2019).

[75] National Treasury (2019, March 21). Report to the Minister of Finance: Appointment of Commissioner of the South African Revenue Service, Report of the Selection Panel for Commissioner of SARS. Retrieved from http://www.treasury.gov.za/comm_media/press/2019/2019032701%20Report%20of%20the%20 Selection%20Panel%20for%20Commissioner%20of%20SARS.pdf, 20 March 2020, p. 3.

more broadly, as echoed in Chapter 13 of the National Development Plan, particularly in relation to the blurring of the political administrative divide, accountability and reporting lines, brought about by Ministerial appointments below the level of Director-General.

APPENDIX
Specific Proposals for Appointments and Removals in Key Criminal Justice System Institutions

Criteria for selection

The criteria for selection can be defined in broad strokes, with the proviso that the selection mechanism set up to apply such criteria might find it necessary to define the criteria or amend it accordingly depending on the post that is being filled. In other words, there needs to be a degree of flexibility for the selection panel/board to adjust criteria based on candidates who have applied. This method was adopted in the selection process for the SARS Commissioner.

Taking into consideration that South African courts and commissions of enquiry have provided important interpretation on key criteria such as 'fit and proper' and have reaffirmed the need for appointment decisions to be rational, criteria for candidate selection should include, at a minimum, the following:

- Legal qualifications that entitle the candidate to practice in the Republic, particularly for NPA appointments.
- Being fit and proper, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.
- A minimum number of years of experience in a particular field (particularly if it is a technical post) as is the practice in many countries, including South Africa (e.g., criteria for SARS Commissioner).
- Demonstrated ability to uphold the principles in section 195 of the Constitution.

Other generic criteria that could be incorporated

- Management and leadership skills.
- Professionalism — the willingness and ability to perform with the required skill and the necessary diligence.
- Track record of being able to act with integrity and impartiality.
- Knowledge of socio-economic context and government programme.

Mechanism(s) for assessment, selection and recommendation of candidates

To enhance the transparency and integrity of the appointment process, it is proposed that appointments be made from recommended candidates put forward by a selection panel or board. Whether it is one mechanism that is adapted to cater for the requirements of different positions within different agencies or whether

the mechanisms are constituted separately, such panels should be guided by the following principles:

1. Selection panel(s) should be composed of persons representing a broad range of skills, knowledge and stakeholders to be able to assess candidates competently.
2. Panels for the top posts should be appointed by the President/Minister (depending on the post).
3. Panel members should comprise stakeholders derived from professional bodies, academic institutions and individuals of high standing. Suggestions include:
   (*a*) NPA: Auditor General, General Council of the Bar, Legal Practice Council, Advocates for Transformation, NADEL, Black Lawyers' Association plus a chair (Minister in the case of the NDPP and Deputy NDPP; NDPP as chair in the case of lower-ranking appointments).
   (*b*) SAPS/DPCI/IPID: Retired police general who has served with distinction; expert in criminal and police law; Treasury representative; Public Service Commission representative; expert in executive decision-making and ethics.
4. After applications have been received, the panel should publish the names of candidates so that the public is able to lodge objections.
5. The panel shortlists and holds interviews in public.
6. Panel recommends up to five candidates based on decisions supported by a majority of votes of panel members.

Mechanism(s) for removal of persons holding senior leadership positions

1. Establish a board of enquiry made up of a judge or retired judge and two other persons to carry out investigations for removal on the basis of incapacity, incompetence or misconduct across agencies where such mechanisms do not already exist.
2. Make recommendation to the President/Minister/Commissioner; ensure that President/Minister/ Commissioner abides by the recommendation of the board of enquiry. Alternatively, if the recommendation is not followed, then such decision taken must be shown to be rational and reasons should be provided.
3. Parliament is then required to pass a resolution on whether or not restoration to office of the person who has been removed, is recommended.

CHAPTER 3

Reforming the Public Procurement System in South Africa

RYAN BRUNETTE • JONATHAN KLAAREN

INTRODUCTION

Public procurement is significant in terms of the scope of the state functions it operationalises and the scale of its contribution to public expenditure. The South African government spends almost a trillion rand a year through the public procurement system, around 1.3 times what it pays in employee compensation and 19.5 per cent of gross domestic product (GDP). Public procurement has, as such, powerful effects on the tone and substance of South African politics and in the structure and distributions of its economy.

There is a general consensus, widely evidenced, that South Africa's public procurement system is in crisis. It exhibits high levels of non-compliance and corruption, too often incurs fruitless and wasteful expenditure, and fails to provide the right goods and services, at the right price, and at the right place and time.

The points made above have not gone unnoticed. In his 2012 budget speech, then Minister of Finance, Pravin Gordhan, announced the formation in the National Treasury of an Office of the Chief Procurement Officer (O-CPO).[1] In his 2013 speech he declared that this vehicle would initiate a wider push to reform the procurement system, following up with an unprecedented acknowledgement of the political challenges involved:

> Let me be frank. This is a difficult task with too many points of resistance ... While our ablest civil servants have had great difficulty in optimising procurement, it has yielded rich pickings for those who seek to exploit it. There are also too many people who have a stake in keeping the system the way it is. Our solutions, hitherto, have not matched the size and complexity of the challenge … This is going to take a special effort from all of us in government, assisted by people in business and broader society.[2]

By 2019 important advances had been made: in capacitating the O-CPO, in reviewing existing high-value and long-term contracts for the recovery of monies fraudulently obtained, in renegotiating the terms of contracts, and in intelligently optimising supplier registration, tendering and transversal contracting through

[1] 2012 Budget Speech By Minister of Finance Pravin Gordhan [Web log post]. (2012, February 22). Accessed 10 October 2019 at https://www.gov.za/2012-budget-speech-minister-finance-pravin-gordhan.

[2] 2012 Budget Speech By Minister of Finance Pravin Gordhan [Web log post]. (2013, February 27). Accessed 10 October 2019 at http://www.treasury.gov.za/ documents/national%20budget/2013/speech/speech.pdf.

the gCommerce platform, the central supplier database (CSD), and the e-tender portal. These advances, however, have not been sufficient. The O-CPO and its supporters have operated under the constraint of periodic and intense political pressure. Progress has been slow.

The draft Public Procurement Bill, which was released for public comment in February 2020 for a five-month period, outlines potentially important changes in constructing a more coherent regulatory framework for South Africa's public procurement regime, and clarifying authority in a proposed Public Procurement Regulator. While we welcome these proposals, the problems cannot solely be solved by legal changes. The issues covered in this chapter are broader in scope than the reforms contained in the Bill. We include consideration of a range of operational challenges, supporting the development of a public procurement system that is better designed and capacitated to play its constitutionally intended role in supporting economic and social development.

The chapter is aligned with the call to mobilise people in broader society behind public procurement reform. Although reform-minded civil society, unionists and business people cannot feasibly co-direct all the technicalities of public procurement reform, they can and must develop a strategy for applying pressure to push such a reform process in the right general direction. Reform-minded politicians and public administrators, in contemporary conditions, need a bulwark in broader society; they need to be pushed beyond what they believe possible.

1. PUBLIC PROCUREMENT IN SOUTH AFRICA

1.1 The evolution of the procurement system

South Africa under apartheid operated a classically centralised procurement regime, with national functions vested in a State Tender Board that delegated to departments and other entities, together with alternative arrangements for security-related purchasing and state-owned enterprises. Provincial and local governments, as well as the plethora of segregated administrations, operated similar systems.

Tender boards were usually composed of political representatives, state officials, and corporatised interests such as business, industry, professional and other associations.

These interests engaged directly in the allocation of tenders; the idea was that they would balance one another out so that distribution of tenders would be impartial. The boards favoured open, competitive tenders but operated loosely and delegated widely; departures from the lowest-priced rule were common. The procurement system veered strongly towards larger, better established businesses, appointed on long-term contracts. The above characteristics were institutionalised in item specifications, and in norms, standards, rules and procedures. Public procurement was exclusively for white businesses; access for black business expanded

from the 1960s in segregated administrations, and in some historically white administrations in the years immediately preceding 1994.[3]

The system was widely and justly condemned for its racial bias. Generally, and rightly so, the central tender boards were seen as a bottleneck in service delivery, and the specific needs of user departments were often poorly matched.

Public procurement reform was given priority on the agenda of post-apartheid government. The Department of Public Works and the National Treasury led the process—supported by a jointly established Procurement Forum—and by 1997 had produced the Green Paper on Public Sector Procurement Reform. The paper advocated and mapped out the process for breaking up the tender boards. Under the Public Finance Management Act and the Municipal Finance Management Act public procurement managerial powers were devolved to the accounting officers and authorities of individual departments and other organs of state. The paper also argued for simplifying procurement procedures and documentation, reducing or eliminating upfront costs such as performance guarantees and the price of bid packs, and unbundling large contracts. These widely implemented reforms were intended to facilitate the participation of smaller, emerging suppliers.

Preferential procurement, written into the 1996 Constitution as s 217(2), would also be mobilised to address the inequalities generated by colonialism and apartheid. The Preferential Procurement Policy Framework Act (PPPFA) of 2000 formalised this in a rigid 80/20, 90/10 price and preference points system.[4] The PPPFA was aligned with broad-based black economic empowerment (B-BBEE) legislation and was to become a keystone of its architecture.

The Green Paper also emphasised the need for a more sophisticated, regulatory approach. It argued that a National Procurement Compliance Office should be established to steer the process of reform and the ongoing evolution of the procurement system, using robust powers and functions of standard-setting, monitoring, and enforcement.[5] The office was, however, never created and the Green Paper left its institutional location undecided. Instead, dedicated regulatory authority over public procurement was demoted to National Treasury's residual, multi-purpose Specialist Functions division. Regulatory powers were also dispersed across a number of National Treasury divisions and beyond, into entities like the Construction Industry Development Board under the Department of Public Works, which was made responsible for regulating construction procurement.

[3] Brunette, R., Klaaren, J., & Nqaba, P. (2019). Reform in the contract state: Embedded directions in public procurement regulation in South Africa. Development Southern Africa, 36(4), 537–554. See https://pdfs.semanticscholar.org/86b5/f274722ec8afeb18d389a3725630504fcfce.pdf.

[4] 80/20 preference point system for acquisition of goods or services for Rand value equal to or above R30 000 and up to R50 million; 90/10 preference point system for acquisition of goods or services with Rand value above R50 million.

[5] Notice 691 of 1997: Green Paper on Public Sector Procurement Reform in South Africa. [Web log post]. (1997, April). Accessed on 10 October 2019 at https://www. gov.za/sites/default/files/gcis_document/201409/17928gen6910.pdf.

In 2013 the creation of the O-CPO began to elevate and integrate public procurement regulatory powers and functions which until then had been submerged and disaggregated. The major reform effort announced in the budget speech of that year was a continuation of a reform process begun almost two decades earlier.[6]

1.2 The importance and scale of public procurement

Since the 1980s, states across the globe have made fundamental changes to the ways in which they administer their public functions. The shift from direct provision of services by the state's in-house personnel toward indirect provision through outsourcing—contracting of private providers—is a notable feature. South Africa has been no exception to this trend.[7]

Public servants report a massive expansion of the scope of public functions that are now contracted out, which often extends into what are ordinarily considered core public functions. Policy design and analysis processes are often outsourced. It is common for consultants to finalise basic documents, such as Integrated Development Plans and financial statements. Service providers have become central to the formulation and implementation of major administrative reform initiatives.

Officials in administrative and technical operations report that they spend more and more time on specification and management of contracts. Indeed the capacity to perform these functions has been hollowed out by excessive recourse to contracting. The latter excludes personnel from implementation work and thereby undermines learning and broader career prospects, which in turn makes state employment a less attractive prospect for young professionals. Even the contracting function itself is often contracted out to so-called, often infamous, 'purchasing management units'.

The scale of South African public procurement can also be measured quantitatively. In 2017, based on South African Reserve Bank statistics, 967 billion rand was channelled through public procurement. In the two preceding decades, public sector procurement expenditure rose in relation to total employee compensation, from a ratio of 0.97 to 1.3. In the same period, public procurement as a proportion of gross domestic product increased almost five percentage points, from 14.79 per cent to 19.5 per cent. In 2017 almost a fifth of the South African economy passed through public contracts.[8]

[6] Brunette, R., Klaaren, J., & Nqaba, P. (2019). Reform in the contract state: Embedded directions in public procurement regulation in South Africa. Development Southern Africa, 36(4), 537–554. See https://pdfs.semanticscholar.org/86b5/f274722ec8afeb18d389a3725630504fcfce.pdf.

[7] Brunette, R., Chipkin, I., Tshimomola, G., & Meny-Gibert, S. (2014). The contract state: outsourcing and decentralisation in contemporary South Africa. Johannesburg: Public Affairs Research Institute. See http://www.pari.org.za/wp- content/uploads/PARI-The-Contract-State-01082014.pdf.

[8] Brunette, R., Klaaren, J., & Nqaba, P. (2019). Reform in the contract state: Embedded directions in public procurement regulation in South Africa. Development Southern Africa, 36(4), 537–554. See https://pdfs.semanticscholar.org/86b5/f274722ec8afeb18d389a3725630504fcfce.pdf.

The significance to South Africa of the public procurement system goes beyond its broad scope and huge size. Not only is public procurement an increasingly important feature of public administration, but it is also an increasingly important factor in politics. Political competition for public office is often about access to public procurement opportunities. Preferential procurement operates in accordance with a company's B-BBEE score, which includes the extent to which companies themselves contract to suppliers with high scores. Public procurement, therefore, cascades across the South African economy, and acts as a massive lever for demographic and structural transformation.[9] A second important extension of public procurement into economic policy occurs by way of the Department of Trade and Industry's local content programme, which specifies that a percentage of the price of designated public tenders must go to local producers.

2. WHY DOES PUBLIC PROCUREMENT NEED REFORM?

There is a lamentable paucity of large-scale and quantitative data—either published or within the public service itself—on the performance of South Africa's public procurement system. The O-CPO has alluded to some of the reasons for this. It notes that there has been a proliferation of information and communication infrastructures and procedures dealing with public procurement, as well as in related areas like public finance, personnel, logistics, taxation, company registration and so on. The O-CPO argues that the failure to ensure uniformity and integration between these structures has resulted in problems with data quality, comprehensiveness and measurement that undermine comparability between organs of state and across time.[10]

This has, however, not hindered, neither should it be allowed to hinder, the development of a thoroughgoing reform effort. Certainly, more precise and comprehensive evidence can aid reform; its systematic and continuous development ought to be an objective of reform. Information, however, has costs in terms of time and money. Knowledge is never complete and there is an irreducible element of uncertainty in all reform decisions. Calls for more evidence, therefore, can amount to a counsel of perfection against pragmatism—a recipe for conservatism instead of progress.

The extent and variety of the available evidence—from auditor-general reports, from existing and, too often, confidential government studies and investigations, from the public statements of governmental actors, from wide-ranging academic interviews and news media exposés—is such as to render public procurement reform a matter of urgency. A general consensus has thus emerged that public procurement has descended into a veritable crisis of non-compliance, corruption and

[9] Bolton, P. (2006). 'Government procurement as a policy tool in South Africa'. Journal of Public Procurement, 6(3).

[10] National Treasury (2015) Public Sector Supply Chain Management Review. Accessed on 10 October 2019 at http://www.treasury.gov.za/publications/other/ SCMR%20REPORT%202015.pdf.

operational inability to secure the right goods and services, at the right price, in the right place, at the right time.

Public procurement is producing large, deleterious effects in the tone and substance of South African politics. While there is ample reason to believe that it has facilitated a significant redistribution of market share, managerial responsibility and employment in the economy, there are grounds for arguing that it has not done enough and that it too often fails to foster emerging suppliers that are sustainable and productive.

It can be argued, furthermore, again from the same sources of evidence, as well as from international experience, that positive changes to this system can be developed based on what we already know about the causal underpinnings of the crisis in public procurement. More than that, in all existing policy processes, evidence-gathering does not simply precede implementation; instead, they are interwoven, in the sense that implementation also precedes evidence.[11] Put another way, one sees how something 'works' by making incremental adjustments to it. The sorts of institutional adjustments advocated here are, like experiments in physics, ways of rearranging variables in order to illuminate causality. They are, again, ways of doing this are, by available evidence, more than likely to improve the public procurement system. They are designed to produce minimal expense and disruption.

3. WHAT CAUSED THE PROBLEMS?

The South African public procurement system is complex. It is operated by over a thousand organs of state that delegate to tens of thousands of divisions, field offices, schools, hospitals, and so on, with hundreds of thousands of registered suppliers entering into over two million transactions annually. The causes of its problems can, however, without great violence to this complexity, be reduced to the five that follow.

3.1 Political interference and lack of enforcement

Political interference in procurement operations is enabled by *a system of political control over appointments, promotions, and dismissals* across South Africa's public administration.

Integrity in public procurement relies on a system of checks and balances. In South Africa, in order to achieve this integrity, responsibilities are divided across the stages of the procurement process between end-user departments, supply-chain-management units, bid-specification committees, bid-evaluation committees and bid-adjudication committees—not to mention a range of oversight authorities. The idea is that no single person or group is in a position to control outcomes across stages and direct contracts illicitly to themselves or to their

[11] See Simon, H.A. (1947) Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization. New York, N.Y.: Macmillan Inc.; March J.G. and H.A. Simon (1958) Organizations. Hoboken, N.J.: John Wiley and Sons Inc.

connections. However, when small groups of politicians appoint their allies at the key points across this process, or otherwise bend public servants into submission by threats of curtailment of their career prospects and more, then the system of checks and balances ceases to function and the stages of the process are bridged by politics.

It is evident that this sort of politicisation of essentially administrative procurement operations is a pervasive feature of South Africa's procurement system. Politicisation is—with an influence that extends even into the criminal justice system—a fundamental cause of the lack of enforcement of compliance in the public procurement system and the consequent erosion of rules, procedures and discipline associated with corruption. The outcome is a loss of control that has become a major impediment to operational efficacy and to incentivising the formation of sustainable and high-level capacities in suppliers.

Because political interference and how to address it is the subject matter of the chapters on personnel practices in the public service and municipalities and in the criminal justice institutions, this chapter focuses on causes and solutions more specific to public procurement.

3.2 A lack of capacity

A second cause, in part interlinked with the first, is *a lack of capacity within regulatory authorities and procuring entities*, which amounts to a lack of sufficiently skilled public procurement personnel employed in sufficient numbers, within appropriately designed organisational structures. Public procurement has grown in scope and scale. Non-compliance, corruption and poor performance have attained epidemic proportions. Efforts to provide adequate staffing and training for public procurement regulation and operations are not commensurate with the enormity of the problem.

The O-CPO is charged with modernising and regulating a procurement system that churns out millions of contracts annually. In 2016, it had just 68 employees. The provincial treasuries operate supply chain management support units that complement the O-CPO in provinces and so-called 'delegated' municipalities, which include all except 17 of South Africa's largest municipalities. The 204 employees of these units brought the total in 2016 to 272, 27 per cent short of the 374 funded posts available.

A large number of these employees are directly involved in procurement processes like transversal contracting, and the establishment and maintenance of information and communication technology systems. Only 157 employees were involved in traditional regulatory functions: policy, norms and standards, monitoring, supporting and enforcing. Employees tend to have reasonable levels of educational attainment—most have postgraduate qualifications—but very few have extensive formal education in procurement or related fields such as supply-chain management and logistics. Few are members of public procurement professional bodies, specifically the Chartered Institute of Procurement and Supply (CIPS).

A number of other state employees, in divisions like the Office of the Accountant General in the National Treasury, and in other entities like the Auditor General and the Construction Industry Development Board, deal with public procurement regulation as part of more general responsibilities and focusing on particular aspects. There are strong arguments, however, based on subject matter specificity and specialisation, for dedicated public procurement regulation, which appears to have been woefully under-capacitated. The O-CPO reports, for instance, that in the ten months preceding February 2018, 2,704 state employees were doing business with the state, with R8 billion in payments. Furthermore, gaps in the data mean the actual figures for employees doing business with the state are understated.[12] In fact, regulations prohibiting state employees from doing business with the state only cover the tip of a vast and unquantifiable iceberg; the usual practice is to register family members, friends and other personal and political relations as directors of businesses to hide their provenance. Nevertheless, in 2016, only 55 personnel in the O-CPO and provincial treasuries dealt specifically with public procurement monitoring and compliance.

Public procurement practitioners involved in operations in broader organs of state display a similar profile of skills and professionalisation; they are relatively well-educated, but not widely in procurement and related fields. Most are not enrolled in public procurement professional bodies. Anecdotally, personnel numbers in relation to workload are more balanced here, but people involved in procurement processes often report in interviews that due diligence is attenuated by overburdening. Earlier and later stages in supply chain processes are often neglected in organisational design and staffing, which is to say that organs of state focus on purchasing and logistics, but do not adequately address demand management, procurement planning, contract management and performance evaluation. Professionals such as engineers and architects report that over-outsourcing reduces them to glorified contract managers, which contributes to deskilling, reduces the appeal of public sector careers, and hollows out public procurement capacity.

3.3 An excessively complicated, fragmented, and inconsistent legal regime

A third cause is the state of the legal regime for public procurement. The *regulatory framework for South Africa's public procurement laws is unnecessarily complex, fragmented and inconsistent*. The four most important statutes are the Public Finance Management Act, the Municipal Finance Management Act, the Preferential Procurement Policy Framework Act and the Construction Industry Development Board Act, but many of the significant and decisive rules are contained in diverse sector statutes. There are about 22 pieces of primary legislation that deal with

[12] National Treasury (2018) State Employees Conducting Business With Government. Accessed on 11 October 2019 at http://ocpo.treasury.gov.za/Resource_Centre/ Publications/Report%20 Employees%20of%20State%20doing%2 0business%20with%20government.pdf.

public procurement in a significant way. Regulatory authority, including to set legal rules, is dispersed across multiple national organs of state of which the most important are the National Treasury and the Construction Industry Development Board. An unsystematic, uncoordinated approach to legal elaboration, often the result of ad hoc responses to emerging problems of corruption and poor performance, has produced subordinate legislation that brings the total of distinct pieces of law to around 85. There is uncertainty as to the legal status of instruments at the lower end of this regulatory architecture. Although the binding nature of National Treasury practice notes and guidance documents is sometimes asserted, it is open to question.[13]

There is real difficulty, even for those experienced and expert in public procurement, in determining which laws are applicable to which intended procurements. Procurement practitioners, forced to cobble procedures together from this welter of regulation, often come out with incoherent processes that are open to court challenge. The complexity of the regulatory framework—combined with a general lack of consequence management—further disincentivises compliance, disrupts routine, and thus undermines control. Unnecessary differentiation of procurement procedure across different organs of state makes training of procurement practitioners—and therefore, capacitating functions—more costly.

3.4 A sub-optimal relationship between integrity and flexibility in the construction and application of rules

Not only does the regime exhibit an excessively complex, fragmented and inconsistent legislative framework, but it also fails to optimise trade-offs between, on the one hand, the procedural integrity necessary for fairness and to protect public funds, and on the other, the flexibility associated with the operational substance of purchasing. A fourth cause of problems in public procurement in South Africa is that the balance between procedural integrity and operational flexibility has not been optimal.

The provenance of this reality is easy to comprehend when viewed through the lens of South Africa's British administrative inheritance, in which public procurement was traditionally seen as a public financial competency. As noted above, in terms of the Constitution and subsequent legislation and practice, public procurement regulation was not only placed within the National Treasury, but was also effectively demoted from an agency—the State Tender Board, which was responsible to the Minister of Finance—to a series of subdivisions, known as the supply chain management (SCM) Office, within the Specialist Functions branch of National Treasury. When procurement operations were decentralised to procuring organs of state, these were guided toward placing their SCM units under

[13] Quinot, G. (2014). An institutional legal structure for regulating public procurement in South Africa. Research report on the feasibility of specific legislation for National Treasury's newly established Office of the Chief Procurement Officer. http://africanprocurementlaw. org/wp-content/uploads/2016/01/OCPO-Final-Report-APPRRU- Web-Secure. pdf.

their chief financial officers. In this institutional architecture, procurement practitioners struggled to express themselves in public procurement policy processes. Public financial management, which was more concerned with integrity, subordinated public procurement to a public financial logic. In response to the growing crisis of non-compliance and corruption, National Treasury, the auditor-general, and related agents of regulation tightened interpretations of rules and procedures. In the process, there was a tendency for the operational substance of public procurement to be displaced.

Whereas the legal framework for public procurement provides for some flexibility in the choice of purchasing method, and for deviations, rigid compliance orientation has tended, increasingly, to constrain these possibilities and has fixed procurement processes in austerely defined procedures and timeframes. The Preferential Procurement Policy Framework Act has often been interpreted to exclude functionality as an adjudication criterion and to confine purchasing decisions to price and preference. This makes it exceedingly difficult to secure the right goods and services where products are complex and highly differentiated. Justifications for deviations are often too strictly construed, especially given capacity constraints in drawing them up. To the extent that this tightening is the only mechanism available to public financial regulators for improving compliance, it is understandable.

Stricter rules, however, are a problematic substitute for enforcement. The inevitable reality is that rigidity has simply constrained those practitioners who already displayed integrity and intend to follow the rules and procedures. Politicians and public administrators who have bridged checks and balances with their political connections are still able to break the rules with impunity. In fact, they have often used these rules to pull power away from practitioners with more operational concerns, loosening the control of public service professionals and thereby freeing up space for illicit activities.

The imperatives of corruption and anti-corruption have eaten away at public procurement from both ends. The inefficiencies associated with corruption have been augmented by the inefficiencies associated with anti-corruption.[14]

3.5 A failure to match procurement procedure to developmental objectives

The fourth cause is related to the fifth and consists in a *mismatch between procurement operations and the development objectives for public procurement*. South Africa is committed to using public procurement to foster the formation and viability of firms that are owned, operated, and staffed at all levels by categories of previously disadvantaged people, along with those that assist in developing the capacities of disadvantaged people through skills development, supplier and enterprise

[14] Brunette, R., Klaaren, J., & Nqaba, P. (2019). Reform in the contract state: Embedded directions in public procurement regulation in South Africa. Development Southern Africa, 36(4), 537–554. See https://pdfs.semanticscholar.org/86b5/f274722ec8afeb18d389a3725630504fcfce.pdf.

development, and broader socioeconomic development efforts. Moreover, the Department of Trade and Industry has developed the local content programme to leverage public procurement to the advantage of local industrial development.

Although government has not maintained a comprehensive time series of the extent to which these objects have been achieved, the data available suggests significant gains, even if these can be improved on. In 2018, the O-CPO reported that 66% of registered suppliers were B-BBEE Level 1, the highest level of contribution to black economic empowerment; 57% of suppliers were majority owned by black people; 22% were majority owned by black women; 23% were majority owned by youth; and 18% were majority owned by black people living in rural areas or townships.[15] It is reasonable to assume that many suppliers were still in the process of updating their credentials on the Central Supplier Database (CSD), from which these figures were drawn. O-CPO statistics, admittedly incomplete, and drawn from government's payment system, indicate that in the last eight months of 2017, 36% of national and provincial procurement budgets went to Level 1 contributors, a further 17% went to Level 2 contributors, and that the total up to Level 4 contributors was 75%.[16]

Gaps in the data notwithstanding, it seems clear that although demographic parity in public contracting has not been achieved, it is equally apparent that great strides have been made toward it. The local content programme has faired less well. Government reported that between March 2015 and July 2017, R59.95 million was 'locked into the country' by this programme.[17] So, although it can be assumed that a much larger proportion of the procurement budget was spent domestically, the local content programme itself failed to breach 5% of the total (R967 billion).

Beyond these absolute figures, serious questions exist about the viability of the firms being fostered by public procurement. When suppliers are politically or personally connected, political and personal considerations will tend to attenuate good procurement planning, specification, contracting and performance management. Deficits in administrative capacity can result in a similar looseness. Where procurement plans are unpublished and unreliable, where contracting is subject to the winds of political change and arbitrariness, where suppliers are not reliably compelled to perform at appropriate levels, then they are unlikely to build the productive capacities necessary for doing so. Middleman suppliers, which function simply by purchasing supplies and services in the market and then selling these to government at a mark-up, are common. Many suppliers that win contracts amount to little more than shelf-companies. Cutting corners in contracting and delivery is rife.

[15] http://ocpo.treasury.gov.za/Resource_Centre/Publications/Report%20State%20of%20Gov%20Suppliers%20Report.pdf.

[16] http://ocpo.treasury.gov.za/Resource_Centre/Publications/2018%20State%20of%20procurement%20spent.pdf.

[17] https://www.gov.za/sites/default/files/gcis_document/201805/industrial-policy-action-plan.pdf.

The issue is, however, not only the failure to construct compliant and capacitated procurement functions; there is also a broader mismatch between the basics of the public procurement regulatory regime and its expressed developmental objectives.

At its centre the regulatory regime favours annual contracting through competitive processes. Contracts are small and competition is on the basis of price and preference, as defined in B-BBEE scores. In most activities a year is not enough time to foster the productive capacity of a supplier. Indeed, short time horizons encourage suppliers to seek quick profits by depressing production costs. The level of competition in South Africa is often so intense as to be destructive. It is not uncommon for hundreds of suppliers to vie for a single tender, often pushing prices below the costs of production in the hope that this can be made up later with contract deviations and the cutting of corners. Contracts are unbundled to smaller suppliers with little regard for attaining the economies of scale needed by competitive enterprises. The focus on price marginalises functionality and broader value for money. Preferences are rigidly fixed in statute and B-BBEE scoring applies to the whole firm instead of to its offer on a specific tender, which means that the system fails to fully explore opportunities for maximising black economic empowerment on a contract-by-contract basis, where associated costs can be minimised.

4. IDEAS FOR REFORM

The O-CPO and the National Treasury are involved in an ongoing reform drive, which should be supported and, where appropriate, built upon. The following reform ideas are responsive to the causes of problems in public procurement described above.

4.1 Data and transparency

The O-CPO has begun to publish reports on the state of the public procurement system. The gCommerce platform, central supplier database, and e-tender portal are welcome opportunities to generate rich, longitudinal data about this system. However, maximising these opportunities is hampered by the archaic, unintegrated, and deteriorating nature of government's broader information technology systems—most prominently: BAS (the accounting system), PERSAL (personnel), and LOGIS (logistics). The State Information Technology Agency (SITA), National Treasury, and the Department of Public Service and Administration have been working on modernising government's information technology with the Integrated Financial Management System (IFMS). However, progress has been slow and the procurement process for the new system has been mired in allegations of corruption. The O-CPO has also not indicated what data it is collecting and whether it plans to do so over a sufficiently long period to begin to discern trends in public procurement.

The new information technology that deals with public procurement also offers opportunities for publishing data and other information on the procurement system and, in fact, on procurement processes in real time. Currently, too much valuable information is not in the public domain. Much more can be done to promote transparency in South Africa's public procurement, along the lines of international initiatives such as the Open Contracting Partnership and the Construction Industry Transparency Initiative.

4.2 Insulating, capacitating and professionalising public procurement

Because politicians have the power to set overarching laws and policies and direct impartial implementation thereof, they should not be directly involved in decision-making in procurement, which is a quintessentially administrative function. Public procurement reformers must be centrally concerned, then, with insulating public procurement processes from political interference. What this entails is support for the proposals, set down in previous chapters of this book, on the reform of personnel practices.

Issues of capacitation and professionalisation are more closely entangled in specifically public procurement policy. In regard to capacitation, it seems clear that the O-CPO needs to build the internal capacity required to design and drive modernisation, and monitor, investigate and ensure compliance and anti-corruption. A number of the ideas offered here require further, although not prohibitive, financial outlays for staff. Generating data and monitoring trends and emerging issues in public procurement requires work hours, as does, for instance, maintaining transparency of the system. Although budget formulators may baulk at extra expenditure, austerity should not become a justification for not spending money that will have the net effect of saving money.

It is likely that a similar initiative will be needed for provincial treasuries and for procuring organs of state themselves. The same can be said for studying and attaining the appropriate balance between insourcing and outsourcing in organs of state. These will necessarily require a longer term, more decentralised and difficult process, which the O-CPO can begin to address by generating and publishing data on capacity.

In the area of professionalisation, the National Treasury has recently established a Supply Chain Management (SCM) Interim Council responsible for developing a roadmap for public sector supply chain professionalisation and coordinating stakeholders into the effort. The SCM Interim Council has a bearing on political interference inasmuch as membership of professional bodies and the induction of procurement practitioners into the norms and standards of professionalism will create resources for and inclinations toward resistance against unwarranted political interference. Professional requirements for training and continuous education have obvious, important consequences for capacitation. There is considerable scope for a broader set of actors to assist this Interim Council in its work, especially by

lobbying professional organisations and universities to develop appropriate supply chain management programmes.

4.3 A single statute that coheres and provides for reform of the public procurement legal landscape and system

Since 2016, government has been committed to introducing a Public Procurement Bill into Parliament. The Minister of Finance has promised to table it in Parliament in the course of the current financial year. The Bill responds to the problems of fragmentation and inconsistency in the present public procurement legal framework and will play a significant role in enabling and constraining the process of wider reform, including for the reform ideas canvassed in this chapter.

4.4 A single regulatory authority with jurisdiction over the whole system

The O-CPO should be empowered to drive the process of cohering and continuously adjusting the public procurement system. These powers must traverse the whole system—in provincial and local government and public entities. This may involve subsuming all or some of the powers of regulators like the Construction Industry Development Board and the State Information Technology Agency. It might work with the provincial treasuries, which have occasionally been important sources of experimentation and innovation in the public procurement system, but with a clear, if arms-length, line of authority from the O-CPO down.

The appropriate location of this regulatory authority is a recurring debate among reformers, which goes back to the 1997 Green Paper. The O-CPO is currently the main contender, but its position must be formalised in statute. The advantages of the O-CPO, as presently instituted, are that it can ride on the powers of National Treasury under section 216 of the Constitution and draw on its capacity and prestige. Perhaps most importantly, the O-CPO can benefit from the relative immunity of National Treasury from political interference, demonstrated in market and public resistance to President Jacob Zuma's removal of finance ministers in 2015 and 2017..

It has been argued, not implausibly, and even though the emergence of the O-CPO represents progress in liberating public procurement from a narrow concern with public financial management, that retaining the O-CPO in National Treasury carries the risk of perpetuating the subordination of procurement. There are also conflicts between National Treasury's role as a public procurement regulator, on the one hand, and as a procuring entity in its own right, on the other. On these grounds, some reformers have proposed that the regulatory functions of the O-CPO should be consolidated and carved out into a public entity responsible directly to Parliament.[18]

[18] Quinot, G. (2014). An institutional legal structure for regulating public procurement in South Africa. Research report on the feasibility of specific legislation for National Treasury's newly

These and a range of other options bring into play a number of values that are difficult to adjudicate on any single scale. Whatever the ultimate decision, reform-minded people should be agreed that the regulatory authority remain free of political interference. The risks, in this relation, of moving the O-CPO beyond the National Treasury are high, so special protections will be necessary to avoid them.

4.5 A principles-based, strategic, developmental approach to procurement

Jurisdictions across the globe are engaging with reform and improvement of their public procurement systems. A common question is how to optimise the relationship between procedural integrity—which in South Africa has meant the elaboration of more rigid rules—and the operational flexibility, especially in more complex processes, needed to achieve efficiency, effectiveness, and the promotion of social policy. The answer is often presented in terms of *principles-based regulation and strategic procurement*.

In 2009, the Organisation for Economic Co-operation and Development (OECD) proposed a set of integrity principles designed to counter corruption in a public procurement system.[19] The World Bank, through its research initiative, Benchmarking Public Procurement, has also developed indicators closely based on the principles it believes underpin a good public procurement system.[20] These and other sets of principles are part of a shift in regulatory strategy away from rules and towards the use of standards and results monitoring to improve public procurement systems.[21] In developing such an approach, South Africa can use the principles in section 217 of its Constitution, which states that public procurement should proceed within a system that is fair, equitable, transparent, competitive and cost-effective.

In practice related to principles-based regulation, strategic procurement often involves a more pragmatic, flexible and differentiated approach to procurement methodology.[22] In answer to this approach in its own operations, the O-CPO has a Chief Directorate: Strategic Procurement. The basic idea of strategic procurement is that it recognises the importance of ensuring added value across each stage of the procurement process, from demand management, market research and specification, through purchasing, to contract and relationship management and review.

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established Office of the Chief Procurement Officer. http://africanprocurementlaw. org/wp-content/uploads/2016/01/OCPO-Final-Report-APPRRU- Web-Secure. pdf.

[19] Organisation for Economic Co-operation and Development. (2009). OECD principles for integrity in public procurement. OECD Publishing.

[20] World Bank, 'Benchmarking Public Procurement 2016: Assessing Public Procurement in 77 Economies' 2016, http://bpp.worldbank.org/~/media/WBG/BPP/ Documents/Reports/ Benchmarking-Public-Procurement- 2016.pdf.

[21] Black, J. (2008). Forms and paradoxes of principles-based regulation. Capital Markets Law Journal, 3(4), 425-457. https://doi.org/10.1093/cmlj/kmn026.

[22] Kraljic, P. (1983). Purchasing must become supply management. Harvard business review, 61(5), 109–117. See also, http://www.treasury.gov.za/publications/other/ SCMR%20REPORT%202015. pdf.

Although strategic procurement accepts that certain products—say those that are very price sensitive or for which there are many suppliers and competitive markets—are best purchased through competitive bidding, it argues that the range of products is such that significant differentiation in purchasing approach is needed along lines of product-type, sector, and purchasing entity. In many cases, for instance when products are complex, highly specific in their applications and few suppliers exist, a more relational, long-term and performance-based procurement methodology is necessary. This sort of differentiation is already advanced in the area of infrastructure procurement. The approach opens out into a recognition of the importance of a range of other adjudication criteria for public procurement, beyond price and preference, to include functionality, total lifecycle costs, and so on.

Developmental procurement refers to the use of public procurement to achieve broader developmental policy objectives. There are good arguments for the proposition that the Preferential Procurement Policy Framework Act, along with the Broad-Based Black Economic Empowerment Act, have been too rigid in their establishment at statutory level of the 90/10, 80/20 points system, which are based on firm-level B-BBEE scores rather than contract-level scores. There are also a range of policy concerns, such as green procurement, that have no expression in preferences. Beyond the points system lie strong complementarities between principles-based regulation, strategic procurement, and such developmental concerns. These complementarities can help create the flexibility needed to build new productive capacities in the private sector by way of mechanisms such as longer term, performance-based relationships around larger contracts that attain economies of scale.

South Africa should set its sights on this emerging vision of a principles-based, strategic, developmental procurement system that is better able to tailor its processes to its operational and social policy subject matter. This approach also recognises that procurement law and procedure is a means to achieve governmental aims and is not an end in itself.

The process, however, of moving towards such a system will be complicated and may involve broader institutional reforms in organs of state, for instance, the creation of chief procurement officers elevated to sit alongside chief financial officers and chief operations officers in strategic management. It will need to be rolled out in a tightly controlled, incremental manner alongside efforts to depoliticise and professionalise public procurement. Reform-minded people need to monitor this process and its vital interconnections. We propose to deal with this initially as a statutory matter in which statutory room must be created for the process to evolve.

The public procurement regulator, as part of a principles-based, strategic, and developmental approach to public procurement, should also have stronger powers to compel organs of state into transversal contracts, to intelligently leverage government purchasing power and foster economies of scale in strategic sectors. It

should be able to set price bands within which purchases must fit, to avoid rampant over-expenditure in key areas such as housing.

4.6 Enhanced enforcement mechanisms

Capacity and political considerations have tended to undercut oversight and enforcement operations in South Africa's public procurement system. Capacity shortfalls have resulted in a tendency to ration these functions, which has opened up regulatory gaps. Addressing this in public procurement requires capacitation of a central regulatory authority.

The most direct way in which political considerations have impinged upon regulatory decision-making has been through politicisation of the personnel practices of broader criminal justice institutions, such as the South African Police Service and the National Prosecuting Authority. In organs of state, oversight functions have suffered a similar fate; these issues are addressed in the chapters on personnel practices in the public service, the municipalities, and the criminal justice institutions.

Indirectly, regulatory functions that have not been directly politicised have generally held back enforcement actions, especially where these would implicate more powerful politicians and political networks. To avert the ever-present threat of direct politicisation, regulatory functions are compelled to reduce their exposure to political risks, by operating in accordance with political considerations.

The civil recovery and criminal enforcement mechanisms available to regulators and the leadership of procuring organs of state, have been undermined by these dynamics. The Public Audit Amendment Act, now law, gives the Auditor General the power to take appropriate remedial action, to issue certificates of debt where accounting officers and authorities fail to comply with this action, and to refer matters for criminal investigation. Although this is a welcome development, the Auditor General is nevertheless unlikely to fully escape the limited capacity and politicisation that have attenuated the efforts of other independent, public sector oversight and enforcement agencies. There is a long history of other countries that have developed creative and refined enforcement mechanisms to fill such gaps. These hinge on what is known as *qui tam*, shorthand Latin for 'he who sues on behalf of the King as well as for himself'. Any *qui tam* mechanism includes a law that defines an offence or an infringement of a right, coupled with a penalty or forfeiture that might be extracted from a person who violates or infringes the law. In public procurement, for example, fraud committed against the state might give rise to a claim for damages by the state. What distinguishes a *qui tam* mechanism, however, is that it amounts to a statutory grant of a general private right to enforce a specific law *for* the state, with efforts in this direction incentivised by a share of the resulting penalty or forfeiture.

Qui tam has an ancient pedigree. It originated in late-republican Roman law more than two thousand years ago and was developed in English law, especially from the fourteenth century. Today, in the US, *qui tam* is arguably the most effective technique available to the federal government for rooting out corruption and

fraud in public procurement. The US Department of Justice reported *qui tam* settlements and judgements of over 3 billion dollars in 2017, or 92% of all damages for 'false claims', which American law defines as fraud or 'reckless disregard for truth or falsity' in dealing with the state.[23]

A number of features of modern *qui tam* account for its success. While public investigators and prosecutors might defer to political interests, *qui tam* enables private actors to pick up the slack. Evidence gathering by public investigators and consultants is costly in terms of personnel time and money. Although whistle-blowers can save the state these outlays by bringing inside information out into the open, there are prohibitive disincentives for whistle-blowing: whistle-blowers are commonly dismissed from their jobs, informally blacklisted in the job market, socially ostracised, subjected to counter-investigations and litigation, and worse. *Qui tam*, however, evens them up for their commitment to public integrity, with the prospect of a large reward with which to establish themselves in another professional field, geographical location, and so on, with the costs being borne not by the government, but by corrupt combinations themselves, in the form of damages they must pay to the state.[24] Further to these points, US law provides for triple damages in *qui tam* actions, to enhance incentivisation and avoid prejudice to the fiscus.

Qui tam actions are often launched by whistle-blowers employed in the state, who link up with law firms that specialise in these kinds of lawsuits. It is a civil action, with the burden of evidence on a balance of probabilities. It is not a replacement for, but a complement to traditional public enforcement. Evidence gleaned from *qui tam* proceedings can be used subsequently in criminal actions.

There are a number of other features of modern *qui tam* that constrain any possibilities for its abuse. A *qui tam* litigant, known as a 'relator', must be an 'original source' of information, in other words, they either voluntarily bring forth information before any public disclosure or provide additional information that is independent of, and materially adds to, publicly disclosed allegations. Relators must file, with the relevant information under seal for a specified time period — 60 days in the US — to give government and the Department of Justice an opportunity to investigate and decide whether to intervene and take up the action; decline to intervene and allow the relator to act on behalf of the state; or, move to have the action dismissed with the possibility of review by a court. In the US, if the government joins, the relator is entitled to a minimum of 15 and a maximum of 25 per cent of the recovery in the event of success. If the government declines to join, the relator is entitled to a minimum of 25 and a maximum of 30 per cent to cover the costs of litigation. These arrangements amount to a sophisticated series of checks and balances between *qui tam* litigants, the government, and the courts. The effectiveness of specialist law firms in particular, as repeat players, is dependent on

[23] https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.

[24] Braithwaite, J. (2008). Regulatory capitalism: How it works, ideas for making it work better. Edward Elgar Publishing.

their trustworthiness; a reputation for vexatious and frivolous lawsuits may lead to penalties and a failure to be taken seriously by both government and the courts in future proceedings.[25]

Ordinary laws that apply to fraud, defamation, and so on also apply to *qui tam* litigants. Courts will adjust rewards between the minima and maxima according to such factors as the quality of the information provided, the expertise and legwork performed by supporting lawyers, and the litigant's complicity in giving rise to fraud against the state.

The available evidence suggests that arguments raised against *qui tam*, around the possibility of its abuse, are largely unfounded. In South Africa, a serious concern with corruption in public procurement should lead naturally to a serious consideration of *qui tam* as a remedy.[26]

CONCLUSION

This chapter has sketched the set of challenges facing the public procurement system in South Africa, drawing on earlier published research and identifying five problems with the current regime. Just as importantly as diagnosing the problems, this chapter has suggested and motivated for a set of necessary and urgent reforms, beginning with bolstering the professionalism and capabilities of the civil servants operating the system itself. These reforms extend beyond those contained in the Public Procurement Bill. The chapter has pursued the vision of a public procurement system that is better designed and capacitated to play its constitutionally intended role in supporting economic and social development, calling for principles-based regulation and strategic procurement that is also developmental. It has advanced proposals to increase procurement policy coherence across government and to enhance enforcement against those who attempt to subvert the system.

Implicit in the analysis above is a call to mobilise people and organisations in broader society behind public procurement reform. Civil society organisations, firms and individuals from the business sector, and trade unions should engage with the ongoing albeit very slow reform process, applying pressure both to push such a reform process forward and to craft its details.

[25] Ibid.

[26] See Klaaren, Jonathan, and Ryan Brunette. 2020. 'The Public Procurement Bill Needs Better Enforcement: A Suggested Provision to Empower and Incentivise Whistle-Blowers' African Public Procurement Law Journal 7 (1): 16–25. https://doi.org/10.14803/7-1-28.

APPENDIX

Position Paper Proposals for Public Procurement Reform

In relation to *data and transparency*, which is currently poorly provided for and a problem for assessing deterioration and improvement in procurement performance:

Proposal 1

National Treasury should update the public on progress and timeframes for the implementation of its Integrated Financial Management System. It should report on investigations being conducted into procurement of this new system and on processes for consequence management.

Proposal 2

The Office of the Chief Procurement Officer (O-CPO) should develop, with relevant stakeholders, then publish and commit to, a schedule of data to be collected and kept on a longitudinal basis.

Proposal 3

The O-CPO should commit to an open-data and open-contracting standard, and to publishing procurement information in accordance with a schedule developed with relevant stakeholders.

Considering that insulation of the public procurement function is currently addressed in the other position papers in this series, proposals in relation to *capacitation and professionalisation* are:

Proposal 4

The National Treasury and the O-CPO should conduct a scientific study of work in relation to the task of reforming and directing, monitoring, supporting, and enforcing development of the procurement system. It should present a business case for bringing the O-CPO up to a staff complement and skills mix appropriate to these efforts

Proposal 5

The Supply Chain Management (SCM) Interim Council should commit to keeping concerned civil society, business, and other experts in the procurement field informed of its vision and road map for professionalisation. Such persons should commit to assisting the SCM Interim Council in realising this vision, by leveraging its contacts in broader society.

In relation to cohering the legal landscape and providing the legal underpinnings for public procurement reform, *a new Public Procurement Bill* should provide for the following:

Proposal 6

A single statute for public procurement should be legislated. It should incorporate, and provide for the repeal of, all other statutes that deal with public procurement. It should, in addition, provide for the following:

1. A single public procurement regulatory authority with jurisdiction over the whole public procurement system, including all organs of state currently under the Public Finance Management Act and the Municipal Finance Management Act.
2. Insulation of this single authority from political interference, either by retaining it within the National Treasury or providing special protections against political interference over and above those of an ordinary, independent public entity.
3. A flexible set of procurement principles and methods—i.e., just, open, limited, and direct methods to be defined and combined into a broader set of methods—which can be incrementally differentiated along lines of product, sector, and so on, in the course of evolving a principles-based, strategic, and developmental procurement system.
4. The statute should open the door to a wider set of goals in procurement processes, beyond price and preference alone, including in adjudication, to include functionality, life-cycle costs, industrial development, employment, green procurement, and so on.
5. Stronger powers for the public procurement regulator to compel organs of state into transversal contracts.
6. The ability to set price bands for purchases, e.g., R50 to R80 for a ream of 500 pages of A4 white paper.
7. The statute should, as per Proposal 5 above, establish the Supply Chain Management Interim Council, as a professional body with the relevant powers and functions.
8. The statute should, as per Proposal 3, include a justiciable open contracting and open data provision for public procurement.
9. Establish the basis for modern qui tam actions, giving a private right to enforce public procurement law, and incentivise private action through guaranteed minima for civil recoveries.

Sub-clauses (3), (4), (5), and (6) include opportunities to strike a better balance between concerns for procedural integrity and the need for operational flexibility in public procurement. They open out into a vision of what is defined here as a *principles-based, strategic, and developmental procurement system*, which this chapter gestures towards incrementally creating.

In relation to enforcement, the chapter argues that to close gaps in governmental will and capacity, *a general private right to enforce public procurement law* should be included in statute. This should take the form of civil actions for recovery of damages that result from procurement fraud, incentivised by a guaranteed

minimum share of recoveries. This mechanism, known as *qui tam*, has been tried and tested elsewhere in the world.

Proposal 7

Government must include a *qui tam* provision in the upcoming Public Procurement Bill. It may be necessary to draw on local and international expertise to draft this provision. PARI offers to support development of such a proposal, working in collaboration with a network of experts from civil society and academia. Beyond this, the O-CPO should develop a business case that defines the institutional parameters and capacity requirements for operationalisation of a *qui tam* provision, an initiative with which such a network could also assist.

This short policy-oriented book analyses three distinct and key parts of the South African public administration: the system of recruitment and appointment of public servants, high-level appointments within the criminal justice sector, and public procurement. The three chapters argue for feasible and effective reforms within each of these parts of the state.

"This is a highly impressive, timely, and relevant collection of reviews and proposals.
The chapters are carefully grounded in research, with some original ideas, and well written. The summary of practical proposals for reform at the end of each chapter is constructive, especially given the many challenges faced by the public service. This book is mandatory reading for those seeking to realise the constitutional values of accountability, responsiveness and openness."

Prof Hugh Corder, University of Cape Town, Faculty of Law

"The building (and the rebuilding) of a capable state is a crucial task in our society. The proposals collected by PARI in this brief book identify several places where it is urgently needed to begin this work. It will be up to all of us – as engaged citizens, political leaders, and hardworking civil servants – to take these ideas forward."

Ms Pam Yako, Zenande Leadership Consulting, former Director-General, Department of Water Affairs, and former Director-General, Department of Environmental Affairs and Tourism

"Reforming Public Administration in South Africa: a Path to Professionalisation delivers an incisive critique of why the progressive aims of building a professional and ethical democratic public service have faltered. With a focus on the corrosive effects of political interference on recruitment, appointments and dismissals, and procurement, the contributors offer a concrete plan for rebuilding the institutional integrity of the South African public service from the inside out."

Dr Vinothan Naidoo, University of Cape Town, Department of Political Studies

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