

Learning from state capture: administrative reforms to prevent future corruption

Capturing the South African government is no small feat. The structure of government features numerous layers of oversight, with complex procurement systems, rigorous approval processes, and well developed accountability systems. And yet somehow the dominant political narrative of the last five years has been the systematic capture of the South African political system by those looking to enrich themselves. As we emerge into a new political disposition under President Ramaphosa, it is important to consider how the problems of the past decade came about. While many would of course point to a specific administration as the root cause of the problem, there were more systematic failures that enabled that administration to circumvent the various systems that are meant to prevent abuse. The fundamental challenge is to redefine the government bureaucracy in such a way as to prevent future abuse. The unpredictability of the political system means that only a cleverly designed system, which is vigorously defended by civil servants, can prevent future capture of the political system.

‘State capture’ is a highly contested term, and one that is politically charged. Nevertheless it is a useful shorthand for a real process that is complex, multifaceted, and isn’t simply limited to one set of people or a couple of major events. Simplification is nevertheless necessary to provide a base understanding for the reforms that need to be made. Simplifying greatly, state capture, as referred to in this report, refers to three core problems.

First, and most famously, is corruption in the procurement processes of a wide-range of state owned enterprises, municipalities, and government departments. The classic model for this corruption is the awarding of contracts to bidders that are linked to influential politically-connected individuals. While this sometimes took the form of directly awarding contracts to these connected individuals, it was more commonly facilitated by the formation of consortiums, where legitimate companies partnered with shell corporations that could assure they win major procurement contracts.

The flip-side of this arrangement, and the second major feature, was the strategic placement of individuals in key positions in SOEs and government departments. In the case of SOEs, this included both senior officials and their oversight structures, such as national departments like Public Enterprises, and the boards of individual enterprises. Boards were increasingly packed with compliant members, who didn’t challenge problematic executives, or who were actively involved in many of the worst problems. In the case of the civil service, the strategic appointment of captured individuals was facilitated by the politicization of senior civil service positions, which created an enabling environment for corruption. These more famous shifts at SOEs and national departments was predated by serious and endemic corruption at local government level, where a string of scandals across many municipalities signalled a fraying of procurement controls and the onset of endemic corruption.

Third, was the strategic capture of the organs of state charged with oversight and accountability, and the undermining of the bodies meant to prevent exactly the type of corruption that permeated the systems. This eventually included the Hawks, the Public Protector, and the

National Prosecuting Authority. This was, firstly, to avoid prosecution and undermine accountability for corrupt officials. But it was also about utilising these same processes to eliminate those who opposed state capture, by either utilising false accusations, or by selectively applying regulations, against the spirit of accountability that underpin them. Lack of accountability is a deep problem that should be on everyone's mind during the period of unravelling of state capture. While there is some hope, such as arrests of prominent people accused of state capture, a number of the most corrupt individuals remain in senior government officials. The breaking of systems of accountability will lead to further capture in the future, unless changes are made.

These three shifts - corruption in procurement, strategic placements of corrupt individuals, and the capture of oversight mechanisms - were made possible by a range of small changes or bending of the rules, which over time led to a crumbling of the systems of checks and balances that should have protected the government from capture. Closing these gaps is essential to preventing future state capture. A number of different explanations exist of which changes made state capture possible, but a useful guideline are the five key points identified by the Betrayal of the Promise report, a cooperative effort by multiple academics investigating state capture. They include:

1. The ballooning of the public service to create a compliant politically-dependent, bureaucratic class.
2. The sacking of the 'good cops' from the police and intelligence services and their replacement with loyalists prepared to cover up illegal rent seeking
3. Redirection of the procurement-spend of the SOEs to favour those prepared to deal with the Gupta-Zuma network of brokers (those who are not, do not get contracts, even if they have better BEE credentials and offer lower prices).
4. Subversion of Executive Authority that has resulted in the hollowing out of the Cabinet as South Africa's pre-eminent decision-making body and in its place the establishment of a set of 'kitchen cabinets' of informally constituted elites who compete for favour with Zuma in an unstable crisis-prone complex network;
5. The consolidation of the Premier League as a network of party bosses, to ensure that the National Executive Committee of the ANC remains loyal.

Correcting these changes will require multiple interventions. Many of these will be need to happen at the level of individual units in government - such as making it easier to report suspected corruption, improving management and oversight, and improving data collection - but others will require more holistic change. This article will explore five cross-cutting interventions that could protect against future capture. These include: changes to procurement regulations, the reform of State Owned enterprises and state institutions, reforms to municipal governance, changes to civil servant progression, and the launch of new accountability measures.

Changes to procurement regulations

State procurement is, unsurprisingly, already one of the most stringently developed segments of government policymaking. The National Treasury has driven the development of a complex set

of regulations, framed by the Public Finances Management Act and Municipal Finances Management Act, which require competitive bidding processes with transparent documentation, and which include a number of checks and balances, such as inspections by the Auditor-General and oversight by boards. Procurement regulations are more often than not criticised for being too onerous, straining both the internal capacity of government, and placing barriers to bids by smaller firms. Efforts to utilise government procurement to encourage development, such as through local content requirements, has constantly struggled against these requirements. And yet streamlining existing regulations risks exposing procurement processes to manipulation and corruption.

One of the key lessons of the state capture debacle was how it exposed the limits of procurement regulations. Complex and impressive systems of rules can only do so much when they're imbedded in a system in which the most senior officials in a government department or institution are willing to circumvent those rules. Many of the most serious scandals - such as Trillian's R1,6 billion consulting contract with Eskomⁱ, or Neotel's winning of a R300 million contract to provide IT equipment to Transnetⁱⁱ - were not technically in violation of procurement processes (although they may have been in violation of other laws). Rather, they followed the required paperwork and ticked the necessary boxes, while the final bid result was still manipulated.

The challenge of changing procurement rules is therefore to find a way to prevent technical compliance from allowing unchecked manipulation. Some efforts are already underway. President Ramaphosa mentioned in his first State of the Nation address that "(we will remove board members from any role in procurement and work with the Auditor-General to strengthen external audit processes."ⁱⁱⁱ Boards are empowered to bend procurement regulations in ways that benefit certain bidders, such as by confining procurement contracts to a single bidder, and efforts to create greater oversight over this role is certainly needed.

Changes will also need to be made to the way bidding consortiums are evaluated. A number of the largest state capture scandals resulted from large, established firms partnering with consortia or development partners that had access to influential people. The two examples above both included such partnerships - of multinational consulting firm McKinsey with Trillian, and Neotel with Homix. In these and other cases, the consortium partner would effectively serve to secure the bid through their political connections, and would thereafter receive payouts from their participation in the consortia. Many of these consortiums used required development partnerships to circumvent deeper scrutiny, relying on the reputation and capabilities of the lead bidder to hide the deficiencies in the politically-influential company.

This problem can be more readily addressed by moving to a system of **whole-consortium bid evaluations**. The underlying principle of this type of evaluation must be that every partner must do the work in question. Unusually small firms or firms without experience must be considered as heavy detriments to any potential bid, to make it more difficult to use the consortium approach to channel money to political influencers. This has the additional effect of preventing misuse of the development partnership model, by forcing lead bidders to seek the best possible

development partner, thus encouraging the development of these firms, and protecting them from being squeezed out of the market by the politically connected. Whole-consortium evaluation would need to be ongoing, assessing both the technical capabilities of the bidding firm, and assuring that the firm is involved in the execution of work throughout the life of the contract.

Procurement regulations perhaps also need to expand beyond transparency with regard to the bidders, and into greater transparency with regard to those who evaluate the bids, such as senior officials. While senior officials are subject to a degree of transparency in general, their needs to be specific transparency with regard to their dealings with bids and bidders. One simple rule would require that **officials report interactions with anyone who stands to benefit from the awarding of a procurement contracts**. This would, for example, require reporting of any trips to Dubai in order to meet potential bid-winners. Such oversight would make it easier to quickly identify unusual activity, and to isolate that activity to the individual involved.

But it would also help address a broader problem with fighting corruption, that being that it is relatively easy to identify webs of likely conspiracies, but much harder to prosecute those webs. Equipping investigators with a low-bar set of violations - by making multiple violations of reporting a crime - would provide a few easily winnable prosecutions that could be used to both stop corrupt officials and encourage low-level officials that have been facilitating corruption to turn on those who are more centrally placed in corruption networks.

These and other procurement reforms will only work if they're accompanied by reforms at the two types of institutions that have been at the very centre of state capture: SOEs and local government.

Breaking SOE monopolies

State owned enterprises were at the centre of the largest cases of state capture: with Eskom, Transnet and Denel accused of being party to dodgy contracts, and the likes of SAA being dogged by incompetent management from a politically-connected board. Untangling the mess at SOEs is an incredibly daunting challenge. New oversight measures can be introduced, but many will be sceptical of their efficiency, after old controls were simply discarded when they became inconvenient. Privatisation of certain SOEs is similarly an attractive option, but firms of the scale of Eskom and Transnet would arguably be as influential whether owned by the state or not, and privatisation without reforms to their market dominance would result in a loss of oversight without improvements in performance.

President Ramaphosa has proposed to strengthen board membership and change board membership in procurement processes (discussed above), while also undertaking a "process of consultation with all stakeholders to review the funding model of SOEs and other measures."^{iv} These changes are important, but again don't close many of the gaps that were exploited during state capture. At both Eskom and Transnet, board members may have been complicit in corruption, but it was senior executives that most directly facilitated questionable deals. While

these executives should be accountable to their boards, in reality there is often a close relationship that develops between those executives and their board members, which can make it easy to miss problem areas, or to lapse into a relationship of compliance.

Reforms to SOEs also need to take heed of the fact that, while corruption and state capture are a problem, many of the challenges facing these organisations are structural. Eskom's business model is under threat from a shift in the nature of energy generation, away from large centralised distribution, to smaller power plants and embedded generation; while the company itself is burdened by extreme debt loads and an excess of generation capacity at a time of stagnating power demand. Transnet's problems are largely of their own doing, but weakness in core services like rail development have prompted such a decay in trust in Transnet infrastructure, that it will take years for firms to rely on the company again. SAA is perhaps the most obvious case of poor management, but turnaround strategies in an industry with high sunk-costs and large scale commitments can often take a long time to implement.

As a new set of reforms are targeted for SOEs, the focus should rest less on building perfect SOEs, and more on reducing the impact of those SOEs in cases where they are in crisis. In most cases, that means **introducing competition** in the likes of energy and transport infrastructure, so that private providers can pick up the slack when SOEs fail. To be clear: this is not the most efficient solution in abstract, with large single providers generally better equipped to serve markets with huge infrastructure costs and complex interconnecting systems. But while breaking SOE monopolies stops the benefits of a perfect SOE from being realised, it also prevents an SOE in crisis from causing massive disruptions to essential national services. Across the long-term, having choice and competition can strengthen SOEs, while removing their power to cripple the country.

Breaking SOEs monopolies will require a range of changes for each SOE. In the case of Eskom, municipalities will have to be empowered to choose where to procure their energy from, and Nersa will have to change energy regulations to simplify the process of registering as a power producer. In the case of Transnet, complex procurement processes will be needed, in which firms bid to manage key components of national transport infrastructure. This will need to be very carefully managed, to avoid debacles like that of tolls, in which private sector rates are not feasible for those using the infrastructure.

While complete privatization is likely to return to the national debate, it is not necessary, so long as state companies are kept in check by fair competition from private providers. State enterprises, with their scale and experience, should be the most competitive in areas like energy and infrastructure. Competition from the private sector can help these SOEs unlock the changes that need to be made to utilise their competitive advantages, and move towards more sound service delivery.

Reform to municipal governance

Similar options are not available in the case of municipal governance, which must be directly fixed. Doing so is a daunting task. Municipal government is among the weakest in the country,

dogged by capture and corruption. The Auditor-General reports that only 48 of 262 municipalities received an unqualified opinion without findings, while 35% of municipalities failed to receive an unqualified audit.^v Beyond the issue of compliance, municipalities have serious operational problems, with weak structures and a revenue model that is not sustainable. The majority of municipalities are dependent on the sale of energy for the bulk of their income, and are being squeezed by both pressure on Eskom and the impact of customers reducing their grid energy use. Municipal civil servants are often caught in the middle of these pressures, and struggle for both meaningful work opportunities and the protection of their benefits and position.

There are no easy options on the table for the reform of municipal governance. Municipalities will need to build robust civil services structures, under sound leadership, while coping with a context of limited resources, weak capacity, and high developmental needs. With no quick fixes available, focus should be placed on building an institutional framework that can make changes in the long-run. This must involve, firstly, a **re-prioritisation of the Department of Cooperative Governance and Traditional Affairs (COGTA)**, and improvements to the state of the department. COGTA has a vital role to play in both intervening in troublesome municipalities, and in creating shared municipal structures, such as large national funds, which can attract the scale of funding needed to address pressing challenges.

Second, municipalities should be considered as potential **proving grounds for new government officials**, who could work in municipal government on the path to national positions. This is a common strategy in many developing countries, notably in China, and aims to move government officials closer to the ground, to gain greater understanding of how policy plays out in practise. For the municipalities, such an approach would provide talented officials to under capacitated municipalities, and would create a stream of staff members who are 'outsiders', and thus well positioned to provide some sort of oversight that could help combat corruption at local government level. Incentivising civil servants to take the municipal government route can be achieved in numerous ways. Soft incentives, such as taking special consideration of local government experience in future hiring decisions or recruiting local government staff from the National School of Government, could make a contribution; while more stringent methods, such as requiring public service in municipalities, are also available.

As a long-run aim, a **new funding model for municipalities** must be identified, one that lifts the financial burden from the sale of electricity and devises a new, working formula that empowers the municipality without overly taxing residents. In all likelihood, this will need to come from a redefinition of the equitable share formula and other transfers from national government, to allow national funds to find their way to local government. Supplementary changes, to rates and local taxes, may be needed, but are not a viable way forward for the poorest municipalities, which have the weakest capacity to raise local revenues and the greatest need for those revenues.

Changes to civil servant progression

The politicisation of senior positions in the civil services played a powerful role in laying the groundwork for state capture. The state should ideally be headed by political deployees, who

represent the will of the people, but are guided by civil servants, who can convert political desires into practical policy instruments. The stability and expertise inculcated in the civil service is absolutely essential to building a capable state, and developing a cadre of talented and principled civil servants can place observers inside government who are able to call out corruption or block inappropriate political influence in the bureaucracy.

The professional civil service is, however, at risk by the increasing politicians of senior government roles. As political actors take up senior civil services position, their influence tends to spread into more junior roles, as over time those officials bring in people they feel comfortable working with. At best, this creates a problem of political short-termism in the civil service, and undermines long-term planning and implementation efforts. At worst, it results in strategically placed connections who are vulnerable to influence from powerful political figures who are seeking to influence decision-making in the civil service.

Part of the politicisation story is that the civil service is structured in such a way as to encourage capture of certain positions. A highly hierarchical structure, in which advancement means moving up further into management, promotes a culture in which dedicated civil servants often struggle to advance beyond a certain part, and where political barriers to promotion encourage an up-and-out model for talented civil servants. Encouraging the development of a second path for subject area experts would help avoid this scenario, and keep the civil service stocked with talented senior professionals who are well placed to identify and blow the whistle on issues of corruption.

This **specialist stream** would sit alongside the director-stream, and would contribute the professionalisation of the civil service, which is essential to improving implementation of government policy objectives. Specialists would need to meet a set of predetermined criteria that demonstrates technical skills, and would thus be less easy to capture. The technicians would also have less sway in issues like procurement, and therefore wouldn't be as desirable a target. Specialists would therefore be more isolated from political influence, while still being senior enough to offer a substantial counterweight to those politically-connected officials trying to unduly influence decision-making.

Accountability and prosecutions

Cross-cutting interventions will be needed to supplement these structural changes, and core among them must be the rise of a new regime of accountability, in which those who have proven to be incompetent or corrupt are punished for their actions. This is an incredibly difficult prospect. While a culture of accountability can be promoted by principled leadership, it is difficult to build a system that can provide this accountability even in the face of pressure from those in power. Incompetent leaders can be reassigned or given cushy jobs elsewhere, while corruption can be pursued but is hard to prosecute when the relevant investigative services are undermined.

Efforts to rebuild prosecution capacity need to be balanced against the fact that existing law enforcement and oversight mechanisms have consistently been captured by political actors, and

used as a means to prosecute opponents. Bodies such as the Hawks and the National Prosecuting Authority have been used for blatantly political purposes, while bodies like Independent Police Investigative Directorate (IPID) have been systematically destroyed, and others like the Public Protector have been weakened by poor appointments and poor decision making.

There are no clear answers to fixing the accountability issue. Prosecuting and investigating authority will need to be rebuilt, but as it stands an accountable police service is also one that is open to being captured by those who oversee it. Greater work is needed on rethinking how accountability systems work in South Africa.

These five shifts, along with other changes, can make a difference to preventing future state capture. But they are no substitute for honest governance. In a democratic system, every rule can be rewritten and every system can be changed. A government that is committed to enriching itself probably will succeed in doing so in the short-term. The ultimate lesson of state capture is that it is best stopped by an open and aggressive media, civil society, and justice system. But all these countermeasures only work to stop problems once they emerge. Clever reforms to the civil service should try and limit these extent of these problems in the first place. As limited as they may be, our national conversation needs to now focus on those systems, and on trying to make them work.

ⁱ amaBhungane, 14 Sep 2017, "The McKinsey dossier part 1 – how McKinsey and Trillian ripped R1.6bn from Eskom", <http://amabhungane.co.za/article/2017-09-14-how-mckinsey-and-trillian-ripped-r16bn-from-eskom-and-planned-to-take-r78bn-more>

ⁱⁱ amaBhungane, 8 Dec 2016, "Exclusive: Guptas "Laundered" kickback millions - here's the evidence", <http://amabhungane.co.za/article/2016-12-08-exclusive-guptas-laundered-kickback-millions-heres-the-evidence>

ⁱⁱⁱ The Presidency Republic of South Africa, 16 February 2018, "State of the Nation Address by President of the Republic of South Africa, Mr Cyril Ramaphosa", <http://www.thepresidency.gov.za/speeches/state-nation-address-president-republic-south-africa%2C-mr-cyril-ramaphosa>

^{iv} Ibid.

^v Auditor General South Africa, 21 June 2017, "Media release: Auditor-general reports marginal improvements in local government audit results", <http://www.agsa.co.za/Portals/0/Reports/MFMA/201516/MR/2015-16%20MFMA%20media%20release.pdf>