



PREVENTING STATE CAPTURE IN FUTURE

Public Servants Association

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Introduction

There are many lessons to be learned from the era of state capture, which is the most visible legacy of former President Jacob Zuma. As Mr Zuma has been hauled before the courts on the 6 April, it is well to remember that he was not alone in entrapping the state in the web of corruption or what we have come to know as state capture. Those who abetted these practices still hold influential positions in government. The path towards reforming governance and ridding the country of the vestiges of state capture is a treacherous one.

With much still to be exposed through the Commission of Inquiry into State Capture, led by Judge Raymond Zondo, with possible prosecutions following thereafter, it may be a while before we understand the full extent of the state capture phenomenon. Remnants of venality remain deeply lodged in the soul of the state and its operations through the channel of ministers who served under Mr Zuma, and who have now been retained by President Cyril Ramaphosa. Many bureaucrats who facilitated corruption are still in their position, since we don't have any single case of successful prosecution.

As we enter a new political dispensation under Mr Ramaphosa, it is important to consider how the problems of the past decade came about and what legacy do we still have to contend with before an entirely new chapter in our politics and public institutions is opened. While many would of course point to a specific administration as the root cause of the problem, there were more systemic failures that enabled that administration to circumvent the various legal and institutional mechanisms that are meant to prevent abuse of office.

The fundamental challenge is to redefine the government bureaucracy in such a way as to prevent future abuse, and to consolidate institutional quality. Before we explore possible interventions, it is important that we take a quick look at the elements that undermined the state.

Institutional erosion

There are essentially three components that are worth highlighting.

First, corruption begins like a seed which, when it falls on a fertile ground, can grow into a wild and deadly thorn bush. The most immediate area often targeted by those who are intent on milking the state is that of government procurement. Capturing this instrument is their biggest prize. The classical model for this corruption is the awarding of contracts to bidders that are linked to politically-connected individuals and friends. While this sometimes takes the form of directly awarding contracts to these connected individuals, it is more commonly facilitated by the formation of consortiums, where legitimate companies partnered with shell corporations that are a holding place for cronies to funnel ill-gotten gains through tenders. Trusts become an attractive instrument for them to structure their wealth, since regulation of Trusts is weak, and still governed by the 1985 Trust Property Act. Even law enforcement authorities require permission from the trustees in order to obtain further information for investigation. Beneficiaries of trusts in South Africa remain hidden through secrecy provisions. Part of the required reform measures is to pierce through corporate structures and legal arrangements such as Trusts to understand precisely how proceeds of corruption are managed and masked. There are some studies that have estimated money laundering by the Gupta-linked companies through shell companies to tax havens to be over R10bn. This figure is likely to be much higher, especially when ill-gotten gains laundered by other politically-connected individuals are taken into account.

The second feature of state capture is the strategic placement of individuals in key positions in state-owned enterprises (SOEs) and government departments. In the case of SOEs, executive and Boards were part of this net of state capture. Boards would be packed with cronies and inexperienced individuals, and whose mandate is to ensure there is ethical laxity in these institutions. As a result, corporate governance is severely compromised. 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.

Third, there 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 system. Law enforcement agencies such as the Hawks, the Public Protector, and the National Prosecuting Authority were crippled during this time. Individuals that were politically connected escaped the arm of the law. Law enforcement agencies became politicised. Society should not be deceived by the sudden activism of these law enforcement authorities in prosecuting those close to Zuma as well as Zuma himself.

That they waited for a politically expedient time, at the end of Zuma's term of office, show that they are not as independent as they project themselves to be. What we can surmise from their actions is that they are happy to act according to the whims of politicians in power at the time. This turn of event in the last decade of South Africa's democracy since Zuma was elected to lead his party in 2007 has had a damaging effect on politics, economy, and civic spirit.

Overcoming a terrible legacy

There are at least four critical areas where this dark legacy has had an imprint.

The first is on the spirit and psyche of the nation. Zuma's presidency has left deep cynicism about politics and the meaning of political leadership. Very few still regard politics as a domain of honourable men and women. The image many have of political leadership is that of crooks and swindlers.

This is unfortunate as there are individuals who are committed to advancing the country, and who work hard to bring about positive change in society. Many civil servants have devoted the best years of their lives building government and working to improve the quality of life of our citizens. This image of political leaders that the last decade has indelibly etched on our minds is the opposite of how the founding fathers of our democracy, leaders such as Nelson Mandela, conducted themselves. Their brand of leadership was transformative, self-sacrificing, and oriented towards collective upliftment, in contrast to the pervasive transactional leadership that is driven by greed.

Second, the bar of who qualifies to be a leader in government has been lowered drastically. Many under-qualified individuals were placed at the helm of government as ministers. Their actions destroyed value in some of the critical ministries that interface with the economy and social welfare. All of a sudden, it seemed that anyone can become a leader irrespective of their level of competence or moral character. As a country, we have come to accept any standard as long as it is slightly better than the one used by the previous era. As such our potential to dream has become stunted.

Third, the era of Zuma's leadership has also undermined South Africa's economic potential. There have been massive job losses in key sectors of the economy such as mining and manufacturing. During this period, there has been absence of the kind of leadership that inspires confidence.

Fourth, as we have already noted the rule of law has been weakened. The politicisation of critical law enforcement agencies such as the National Prosecuting Authority, the Hawks, and the South African Revenue Services has seriously undermined efforts to deal with organised crime. This defect diffuses itself across society, with criminals no longer fearing law enforcement authorities. To turn this tide will be very difficult.

In short, the 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 the destruction of value in public service and weakening of the norms of accountability and transparency.

Overhauling this legacy will require major interventions. We take a look at some of the possible interventions below.

Strengthening procurement

State procurement is, unsurprisingly, already one of the most stringently developed segments of government policymaking, even though it was becoming weakened during the era of state capture. 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 in the case of state-owned enterprises. 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 embedded 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

Changes will also need to be made to the way bidding consortiums are evaluated. Many of the state capture scandals resulted from large, established firms partnering with consortia or development partners that had access to influential people. The two examples above 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, without doing much work that creates value. Many of these consortiums used required development partnerships, for example the 30% set aside for SMMEs - to circumvent deeper scrutiny, relying on the reputation and capabilities of the lead bidder to hide the deficiencies in the politically-influential company or phony SMME.

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 and be evaluated accordingly. Unusually small firms or firms without experience must be considered as posing risks. This requires extensive due diligence to be undertaken on the subcontractor or partners in a consortium. 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 ensuring 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, there 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.

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 implicated in dodgy contracts, and those such as SAA being dogged by incompetent management and a politically-connected board until recently. Untangling the quagmire at SOEs is an incredibly tough challenge. Privatisation of certain SOEs is similarly an attractive option, but organisations 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 go far enough in closing 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.

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 – and possibly decentralised power generators in future. The public utility is burdened by extreme debt overhang and an excess generation capacity. 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 other companies to rely on Transnet 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 areas such as energy and transport infrastructure, so that private providers can pick up the slack when SOEs fail.

Breaking SOE monopolies will require a range of changes for each SOE. So, this will have to be on a case by case basis. 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 independent power producers. In the case of Transnet, complex procurement processes will be needed, regarding which firms bid to manage key components of national transport infrastructure. This will need to be very carefully managed, to avoid debacles such as was the case with E-tolls, in which private sector rates are not feasible for those using the infrastructure.

Blanket privatisation is not desirable. State enterprises, with their scale and experience, should remain active and competitive in areas such as energy and infrastructure. Better regulation is required, and market concentration should be dealt with. 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.

Reforming municipal governance

Similar options are not available in the case of municipal governance, which must be directly fixed. Doing so is again very difficult. Municipal government is among the weakest in the country, dogged by capture and corruption.

The Auditor-General latest report noted 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. Crucially, governance reforms at the municipal level can go a long way in preventing state coffers from being captured by politically-connected individuals.

Municipalities will need to build capacitate civil services, improve financial management expertise, and be presided over by effective and ethical leaders. Second, municipalities should be considered as potential breeding grounds for those who may later occupy positions in national government. 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 practice. For the municipalities, such an approach would feed municipalities with talented officials. 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.

Rethinking civil service progression

The politicisation of senior positions in the civil services played a powerful role in laying the groundwork for state capture. The state should recruit on the basis of meritocracy rather than political deployments. 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 at a risk when resourced through politicians. Demand for patronage grows faster than the supply of jobs in government, leading to the establishment of unnecessary departments or deploying politically connected individuals even in junior roles in government. This slows down efficiencies and leaves the public service vulnerable to corruption.

Abolishing the practice of political deployments in the public service and encouraging the development of a second layer of properly trained cadreship in the public service can go a long way in injecting dynamism and stemming corruption.

Conclusion

We are still a long way from cleaning up the public service and various state-owned enterprises from the contamination of state capture.

There is a need for a greater sense of urgency in implementing governance reforms. There is yet to emerge a clear roadmap on reforming the public sector, strengthening law enforcement agencies, and repositioning other public institutions for optimal performance. Failure to act boldly may lead to some of the perverse practices that germinated in the last decade to fester under the radar, especially in local and provincial government.

Cross-cutting interventions will be needed to supplement the structural changes proposed here. The key is to improve transparency and accountability in the way government functions. Introducing tighter regimes in procurement could be a low-hanging fruit. In the end, organisational culture in government will need to change to align with the renewed vigour to build institutions and improve governance, especially among law enforcement institutions which have been badly compromised.

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. That does not seem to have changed. 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.

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^{iv} Ibid.

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