



Challenges in integrity management: The case of the National Prosecuting Authority (NPA)

Marianne Camerer ¹

¹ Marianne Camerer, Senior Lecturer, Nelson Mandela School of Public Governance, University of Cape Town

I: Introduction

The University of Cape Town's Nelson Mandela School of Public Governance is committed to forging a research agenda based on detailed case studies that support rebuilding the resilience of democratic state institutions and structural economic and social transformation.

This paper looks at recent challenges to integrity and public administration in South Africa¹. It attempts to show how a politicised appointment process in the senior ranks of the public service (in particular those charged with criminal justice) has served to undermine independence, trust and institutional capacity by looking in particular at the case of the National Prosecuting Authority (NPA). This approach to recruitment enabled the prevalence of corruption and state capture, particularly during the Zuma years. Rebuilding a high integrity public service needs to reinstitute merit and professionalism over politics in the appointment of senior public officials.

It can be noted that prosecution agencies, such as the NPA, are by their very nature different from mainstream government departments, the traditional terrain of public administration; they have a higher "independence" threshold when it comes to operations.

To a packed parliament on 20 June 2019, President Cyril Ramaphosa, who had come to office almost 18 months earlier following a bruising internal African National Congress (ANC) factional battle, conceded that South Africa, 25 years on from formally shedding Apartheid, faced some big challenges: "Our economy is not growing. Not enough jobs are being created. This is the concern that rises above all others" (Ramaphosa 2019).

The link between corruption and economic growth has been well documented with perceived corruption linked to a failure to attract investment. In South Africa, along with corruption and state capture, additional factors such as "rising costs of doing business, electricity supply constraints, our skills crisis, declining productivity and competitiveness, labour volatility, and policy and political uncertainty" have, according to former deputy finance minister, Mcebisi Jonas, played a significant role in South Africa's economic decline and directly impacted on investment confidence: "Under state capture, effective governance, especially of state-owned enterprises (SOEs) was sacrificed, a pliant and factional security cluster was established and state capacity was hollowed out as the organs of state were repurposed to serve corrupt patronage interests" (Jonas 2019: 6–7).

Referencing the 2012 National Development Plan, Ramaphosa said a priority of his new administration was to build "a capable, ethical and developmental state... that not only provides the institutions and infrastructure that enable the economy and state to operate, but has the means to drive transformation". Building an ethical state "in which there is no place for corruption, patronage, rent-seeking and plundering of public money" required "a corps of skilled and professional public servants of the highest moral standards – and dedicated to the public good".

In order to end state capture and fight corruption he noted that steps were being taken to improve success rates in investigating and prosecuting crimes, and to ensure better training and professionalisation throughout the criminal justice system. The newly appointed National Director of

¹ This is an earlier version of a paper, "Public administration and integrity in South Africa: the case of the National Prosecuting Authority," that will be published in *Handbook on Corruption, Ethics and Integrity in Public Administration* Adam Graycar (editor), Edward Elgar 2020 Cheltenham, UK and Northampton MA USA.

Public Prosecutions (NDPP), Advocate Shamila Batohi, had been tasked to develop a plan to significantly increase the capacity and effectiveness of the National Prosecuting Authority (NPA), including to ensure effective asset forfeiture. With growing despair by the general public and investors at the seeming inability of the criminal justice agencies to bring corrupt politicians and civil servants to account, this was a call to exercise patience.

II: A brief history of public administration in South Africa

In looking at the South African case, it is necessary to revisit the bureaucratic challenges that the new democratic state faced at the time of transition in 1994 and the logic that led to transformation being achieved through politicisation of the public service over a merit-based professional bureaucracy.

South Africa's constitution adopted in 1996 sets out the parameters and values of public administration for a new public service which for the first time would serve all South Africans. The major challenge was to move from a system which provided services predominately to its white constituency, at the time around 4 million people, to 44 million citizens. "Public service reform in South Africa has in many ways been a remarkable transition from apartheid based, internationally outdated public service to a more democratic administration" (Cameron and Thornhill 2009: 898–9).

Chapter 10 of the Constitution lists the basic values and principles governing public administration (Act 108 of 1996). Section 195 (1) states: public administration must be governed by the democratic values and principles enshrined in the Constitution, and it outlines a set of principles, the first being that a high standard of professional ethics must be promoted and maintained.

A sunset clause in South Africa's constitution meant that public servants previously employed under the Apartheid regime would be retained for the first five years of transition (until 1999). Could these public servants be relied upon to uphold the values of the new democratic constitution?

The Apartheid bureaucracy was regarded as unfit to carry out the orders of the democratic government, not least because it was staffed at senior levels by largely white, Afrikaans-speaking men – the very people responsible for implementing the racist programmes of the former government (Picard 2005: 302 in Chipkin 2016: 7). The ANC believed it had inherited a state which was illegitimate and structured to serve the interests of a white minority and was itself a "seedbed of corruption and criminal activity both within the country and abroad". As such the Apartheid state had to be destroyed in a process of fundamental transformation and the new state should be, by definition, "the antithesis of the apartheid state" (ANC 1998, in Chipkin 2016: 7). In order to transform the state a model of recruitment that privileged political considerations over purely administrative ones was introduced. This, according to a former minister of Public Service and Administration, was "to establish control over the bureaucracy and to inculcate a new value system and philosophy, in tune with the agenda of the ruling party" (Fraser-Moleketi 2006: 20 in Chipkin 2016: 11–12).

III: Politicisation of the public service

Politicised appointments within the civil service are a key feature of South Africa's democratic transition and essential to understand as a backdrop to any discussion of public administration. Rather than primarily merit and competence, ideological and political considerations would be taken into account, particularly in appointing senior public officials. Given the ANC's need to fundamentally transform the Apartheid basis of the South African state it is perhaps not surprising that the South African public service is highly politicised for as a former minister of Public Service and Administration explained, "you brought in people you could trust, namely old comrades from years of struggle" (Cameron 2010:687).

In 1997 the ANC's Cadre Policy and Development Strategy was formally introduced which politicized appointments of senior positions in the public service. The final report to the 50th National Conference of the party explained why this was necessary to effect public service transformation: "We have experienced serious resistance to the transformation of the public service, with representatives of the old order using all means in their power to ensure that they remain in dominant positions. Some among these owe no loyalty to the new constitutional and political order nor to the government of the day and have no intention to implement our government's programmes aimed at reconstruction and development" (ANC 1997 in Chipkin 2016:11).

The policy made no reference to the need for administrative competence (Cameron 2010), and so to some extent obscured the notion of merit (See Naidoo 2013). To accommodate the dual imperatives of political alignment and transforming the racial representation of public service management, this policy would have severe consequences, not least the mismanagement of public resources. Whilst incoming governments should have the right to replace staff in selected senior positions with individuals who share their ideological beliefs, Cameron (2010) argues this should be provided that they are administratively competent. Some of the first wave of ANC appointees met this criterion, but many of the second-wave appointees seem to lack managerial competence.

According to Cameron politicisation of the public service then seemed to shift away from appointing people with similar ideological positions towards deploying ANC card-carrying cadres. There also emerged a third category of political appointees, namely a cruder form of patronage which involves the appointment of families and friends to government posts, the latter tendency most pronounced at local government level (not part of the public service). This form of patronage is less susceptible to political control and tends to be a reward for political loyalty (Cameron 2010).

The Zuma administration (2009–18) was characterised by these type of appointments leading to a bloated public service with many people, often incompetent and unethical, employed primarily on the basis of their loyalty and alignment to a particular faction of the ruling party.

IV: An ethical, capable developmental state?

The ANC government has since the late 1990s referred to itself as a "developmental state" both in terms of its economic policies and international relations. However, as Chipkin and others pointedly note, there are some differences as to how South Africa was, or is, able to apply this concept. Since the developmental state is premised on a strong interventionist "activist" state and intended to simultaneously promote economic growth and social objectives such as poverty alleviation, Levin (2007) has argued that the public service or administration of a development state has to be strong and capable of intervening, planning and challenging societal resources towards resolving national development strategies (in Cameron 2010).

The current lack of skills in the public service makes the achievement of developmental state goals unrealistic. For one, South Africa does not have the skills base that the East Asian developmental state enjoyed (Butler 2008: 2–3 in Cameron 2010:695). Meritocracy forms the basis of the public service in these developmental states where the bureaucracy is composed of some of the country's best thinkers and highest achievers, whose careers are not dependent upon the whim of politicians (Southall 2006:xxv in Cameron 2010:695).

Chipkin (2016:17) draws attention to the Public Service Commission's 2014 report (pp. 22–4) which noted four major differences. In a developmental state:

1. Appointments are not made on the basis of political or other primordial considerations.
2. Top managers are technocrats appointed from within the public service.
3. Educational qualification is a crucial factor for entrance into the bureaucracy.
4. Merit is achieved through open, transparent and competitive examinations.

In South Africa the responsibility for recruitment, in particular in the appointment of senior public servants, was taken away from statutory bodies (such as the Public Service Commission – who are meant to “protect and advance the principle of merit”) and handed over to ministers and their provincial government equivalents (Chipkin 2016: 8). Since 1999 directors-general have been appointed by the president (with Ministers exercising huge influence) a procedure ensuring that they are appointed largely on the basis of political affiliation – that is, on the strength of friendships and networks of the anti-Apartheid struggle – and brought in on the basis of trust (Miller 2005: 85–6, 103, 117 in Cameron 2010). In recent years “it even became popular to deride ‘technocrats’ in the civil service as if it were somehow wrong to possess a high level of technical skill when what was needed was political loyalty to the ruling party” (Jonas 2019: 175). A key issue in public reform going forward is about how to balance the power of the Minister in this regard by requiring more rigorous recruitment, minimum competencies and qualifications as well as the inclusion of senior public servants and the PSC in processes of recruiting and disciplining senior public servants (Schmidt 2020).

Thus, the situation arises in South Africa that “political discretion, not simply in the recruitment process but in the very design of posts, coupled with the absence of an entrance exam or career advancement on the basis of subject-related tests means that the public service after 1994 has been organized with a view to reduce as much as possible its administrative autonomy” (Chipkin 2016: 9). There is very weak scrutiny of the competence of senior public servants as a general rule. Performance management as has been applied, has rarely been an evidence-based independent process geared to improving performance and weeding out incompetent DGs and Deputy DGs. On the contrary, these processes together with “non-compliance” with non-substantive requirements of other legislation such as the Public Finance Management Act (PFMA), are more typically used to remove competent top officials where they have frustrated ministerial actions that are contrary to policy or law (Schmidt 2020).

The political-administrative interface is complex and critical and in South Africa needs to be understood more clearly and managed in a way that can improve integrity and accountability within the public service. Political leadership needs to understand how administration works but senior managers conversely need to understand the dynamics of politics. Some research has been done in this regard at city level (Schmidt 2017).

V: “Radical economic transformation” and the capture of the state

Under the Zuma administration, the resources and institutions of the state would be repurposed or “captured” as part of a political project to supposedly achieve the social and economic promises of the developmental state. In practice it would be loyalists and friends of the president (such as the infamous Gupta family) who would capture the resources of the state – in most cases for personal benefit – under the guise of “radical economic transformation”. Any individual or agency trying to stop this project would be labelled “counter-revolutionary”.

The reality is that this was not a new strategy: the Afrikaner nationalists in the 1930s had used the parastatals (now called state-owned enterprises) as well as the public service to empower poor white Afrikaners. The strategy of economic transformation using state resources was compelling to the Zuma faction, as Chipkin (2018) explains:

“The idea of using the government’s procurement budget to realise social and economic outcomes was not a new one. It was the backbone of South Africa’s “developmental state” in the 1930s and a key plank in the Apartheid platform, especially in cultivating a national class of Afrikaner capitalists. From about 2011, sections of the ANC and ministers and officials in the Department of Trade and Industry, supported by elements of organised black business, started referring to “radical economic transformation”. This was the name for an

ambitious project to leverage the procurement budgets of state-owned enterprises (SOEs) to displace established white firms and to create new, black-owned and controlled industrial enterprises... Here was a vision of economic transformation that was not contingent on the reform of “white businesses” and did not depend on the goodwill of whites to invest in the economy, employ black people, and treat them as equals. (Chipkin 2018: 104)”

When the protagonists of black economic empowerment insisted that 30 per cent of government contracts, especially those of SOEs be set aside for black companies, irrespective of their experience, capacity or price at which they offered to provide services or goods, the National Treasury pushed back insisting government entities proceed in a way that was “fair, equitable, transparent, competitive and cost-effective” (Chipkin 2018: 105). This explains the targeting of former finance minister Pravin Gordhan and the National Treasury.

The stage had been set for factional politics and a contest of power: within the ANC those committed to constitutionalism imperatives and the rule of law versus proponents of “radical economic transformation”, led by the Zuma faction; the latter would proceed, largely unhindered, to capture the state and repurpose its institutions (including criminal justice agencies).

An internal organisational renewal document released by the ANC in 2012 noted how within the party there had been a “silent retreat from the mass line to palace politics of factionalism and perpetual in-fighting” (ANC 2012: 9). This “new type of cadre”, self-interested and prone to pursue their self-interest through divisive alliances, benefits from government and party interventions, was seen to “misuse” public resources, i.e. be corrupt. Here “ill-disciplined members of the ANC acting in ways contrary to what is expected of them, either by the standards of the ANC as a political organisation or by the standards of the public service”, are corrupt (Chipkin 2016).

Chipkin’s analysis (2016) of the politics within the ANC is salient here:

“There is growing contestation about who has legitimate authority in the organization and where, moreover, power lies... There are accusations, moreover, that President Jacob Zuma, has allowed his family and their business associates (the Gupta family) to “capture” key institutions... What all these intrigues have in common is that they centre on reducing the autonomy of state institutions and/or displacing those who currently control them in favour of a new configuration of forces. The politics of purge and displacement has wracked the law and order departments (the police, the directorate for specialized crimes (the “Hawks”), the National Prosecutions Authority (NPA), the South African Revenue Services (SARS) and some of the state-owned enterprises, most recently Denel, a state arms company). (Chipkin 2016: 18)”

As the Zuma administration radicalised and resorted to increasingly illegal means to pursue “radical economic transformation”, it was driven to “capture” and weaken key institutions. It had to manage increasingly complex relations, many of which involved people engaged in unlawful activities, and so the Zuma administration moved to establish control over key institutions, especially those involved in criminal investigation and prosecution: the SARS, the Hawks (high priority crimes unit of the South African Police Service (SAPS)), and the National Prosecuting Agency (NPA). It had been necessary to shut down certain investigations and immunise or protect key people from prosecution. In this sense, Chipkin (2018: 106) notes “the political project of the Zuma administration came at a very heavy price for the capability, integrity and stability of the South African state”.

VI: Speaking out and “connecting the dots”

In May 2016, 27 former directors-general in the South African civil service felt compelled to issue a statement voicing their concerns about corruption and state capture, specifically mentioning the

Guptas who were said to be influencing cabinet appointments. This unprecedented initiative by senior civil servants to speak out was extraordinary. They described their action as “not a party-political initiative” but rather “driven by our shared commitment to our constitutional democracy”. As former directors-general they brought “a collective commitment to serve and dismantle the apartheid state machinery and replaced it with democratic institutions that were informed by democratic values, social justice, fundamental human rights and a deep desire to improve the lives of all South Africans”. They noted that the post-1994 state was built through the sweat and blood of thousands of South Africans, and many paid the ultimate price. “Remaining silent amounts to betrayal of the trust bestowed upon all South Africans by the millions who fought for democracy and the demise of apartheid.”

In their statement the directors-general called for an Independent Public Inquiry in terms of Section 4(1) (a) of the Promotion of Administrative Justice Act. It was eventually the Zondo Commission into State Capture that would bring home the reality to South Africans of the magnitude of state capture and corruption during the past decade.

In a week of high drama, on 30 March 2017 President Zuma fired finance minister Pravin Gordhan and deputy minister Mcebisi Jonas, who had been recalled at short notice earlier in the week from an investment roadshow in the United Kingdom – referencing an intelligence report accusing Gordhan of conspiring with foreign forces against him. Zuma’s manipulation of state intelligence agencies is well known. One of his first appointments as president in 2009 was to appoint Richard Mdluli as head of SAPS crime intelligence, who would later be declared unfit and improper to hold office.

On 1 April 2017, following the death on 28 March of struggle stalwart Ahmed Kathrada, fired finance minister Pravin Gordhan, at the first of four memorial services for Kathrada, called for mass mobilisation against state capture. Specifically, he asked South Africans to “connect the dots” to determine how and to whom money flowed from Treasury to various projects.

In May 2017, an influential report, *Betrayal of the Promise*, written by leading academics “connected the dots”. The report convincingly shows how as a political project of the Zuma faction, the state was being repurposed under the guise of radical economic transformation to corruptly benefit the former president and his faction of the ANC. Anyone who opposed this often blatant stealing and tried to uphold the integrity of the procurement process, referencing the rule of law and constitutionalism (for example National Treasury and long-serving minister, Pravin Gordhan) would be targeted (Bhorat et al. 2017).

VII: The Zondo Commission

In one of his last acts as president of the Republic of South Africa, on 9 January 2018, President Zuma announced a full Judicial Commission of Inquiry headed by Honourable Mr Justice Raymond Zondo, deputy chief justice of the Republic of South Africa, to inquire into allegations of state capture, corruption and fraud in the public sector including organs of state.

The Zondo Commission’s establishment flowed from the recommendations in the 355 page report, “State of Capture” (whose release Zuma tried unsuccessfully to block), by former and widely respected public protector, Advocate Thuli Madonsela. The report’s full name gives an indication of the ambit of her investigation: *Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relations and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family’s businesses.*

One can well ask why, with the range of existing anti-corruption agencies in South Africa, a separate Commission of Inquiry into state capture had to be appointed? The answer lies in the conscious decimation and manipulation during the Zuma regime of the capacity and independence of the country's criminal justice agencies to fight corruption.

Indeed, in one of his first presidential moves, Jacob Zuma would disband the highly effective Directorate of Special Operations, known as the Scorpions. Ten years earlier, in 1999, then president Thabo Mbeki had announced the formation of the Scorpions as a specialised unit which would prosecute high-profile corruption cases. Former president Zuma's erstwhile business partner Schabir Shaik would be successfully prosecuted for corruption in the arms deal, receiving a 15 year sentence. Interestingly, President Mbeki would himself be recalled from office by the ANC and accused of allegedly manipulating criminal justice agencies, in this case the Scorpions, to target his political opponents. But that is another story.

Several cautions can be raised against commissions which according to Le Roux and Davis in their important book *Lawfare: Judging Politics in South Africa* (2019) have several undesirable features in common. These include "huge budgets, lengthy processes, armies of lawyers – often side-lining the very people with the story to tell – and the production of voluminous reports containing recommendations for policy reforms and even criminal prosecutions". Their concern is that then nothing happens.

"No prosecutions. No policy reforms. No consequences. Moreover for so long as a commission is active, law-enforcement agencies, politicians, and those implicated point to the ongoing process, the daily media reports, the theatre of accountability, as the reason why they are not doing more to redress or address whatever it is that occurred. So we need to be supportive but also sceptical of commissions as they often seem to decommission inquiry. (Le Roux and Davis 2019: 295–6)." Commissions of inquiry should thus supplement and not be a substitute for effective law enforcement (Le Roux and Davis 2019). Hence the importance of the urgent reconstruction of the NPA. It is to this that we now turn.

VIII: The National Prosecuting Authority and the rule of law

The focus on the NPA is fundamentally important because it is tasked with upholding the rule of law. Judge Dunstan Mlambo summed this up at the May 2019 strategy meeting with the NPA leadership: "South Africa's rampant lawlessness and corruption is the reason the NPA matters. The NPA is integral to upholding the rule of law, and the judiciary is ready to co-operate. At the centre of any functioning constitutional democracy is a well-functioning criminal justice system, and the office of the NDPP is at the core of delivering criminal justice" (NPA 2019).

It is clear that during the Zuma years there was a conscious effort to control key institutions of criminal justice, such as the Hawks and the SAPS, but our focus is on the NPA which as a "single national prosecuting authority" has "the power to institute criminal proceedings" and exercise its functions "without fear, favour of prejudice". It is these formidable powers that were abused by the politicisation of the NPA through the appointment of individuals with questionable integrity and ambivalent commitment to the independence of the office. Appointments to the leadership of key institutions of criminal justice would from 1997 also have factored in the ANC's policy of cadre deployment based on political loyalty.

Under the constitution, the president currently has a presidential prerogative to make these key appointments. Several submissions by leading civil society organisations and think tanks in recent months to the Zondo Commission concern the manipulation of the criminal justice agencies and focus in particular on the appointment and dismissal procedures of the top leadership (Corruption Watch and Institute for Security Studies 2019). As these submissions point out, the executive has

considerable powers in relation to the appointment of senior leaders. Implicit in the constitution, however, is the assumption that the executive will exercise these powers in good faith in order to appoint people who are likely to discharge their responsibilities effectively in line with the constitution. However, notably during the Zuma era, a number of senior appointments were made that were apparently intended to ensure that the powers of these agencies were exercised in a selective manner favourable to the executive (Corruption Watch and Institute for Security Studies 2019).

This “Achilles heel” to make top appointments was exploited by the former president who had a particular interest in controlling these agencies: for one, he himself is facing corruption charges. An aggressive “Stalingrad” legal strategy, that is still ongoing, has managed to delay his “day in court” since the charges were first raised in respect to the arms deal (see Camerer 2009, 2011). In April 2020, Zuma’s legal team approached the apex Constitutional Court, following a March dismissal of his bid for a permanent stay of prosecution by the Supreme Court of Appeal. The SCA had dismissed it without even hearing argument on the case on the basis that Zuma’s appeal bid had no reasonable prospect of success. The NPA slammed the last-ditch attempt to permanently stop his corruption trial as “hopeless” saying that the application’s “real purpose and effect” was to delay the case against him and that “the State is ready to proceed.” Zuma subsequently withdrew his leave to appeal with the Constitutional Court. The trial of the former president is now scheduled to begin on 23 June 2020, Covid-19 and his health permitting.

It can be argued that the prosecution service failed to halt state capture because of the appointment and elevation of a host of compromised individuals to its leadership structures. As a consequence, those involved in state capture were never prosecuted or properly investigated and a range of others, some of whom were fighting state capture, became its targets instead (Jonas 2019: 119).

In 2014, former prosecutor and criminal justice expert Martin Schonteich noted how the NPA’s fate as an institution that exercises its functions without fear, favour or prejudice, as mandated by the constitution, “hangs in the balance”. With the appointment of its 6th head or acting head by late 2013, “the NPA has been burdened with inconsistent – and at times poor and unsuitable – leadership. Relatedly, political interference and the politicisation of the NPA has seriously undermined a once promising institution, negatively affecting staff morale and sapping public confidence” (2014:5). By 2018, things had only got worse.ⁱ

IX: A new dawn

Early on in his presidency, Cyril Ramaphosa had the opportunity to signal a “new dawn” characterised by a commitment to uphold constitutionalism and the rule of law. In 2018 he appointed the Mokgoro Commission of Enquiry to look into the fitness to hold office of two senior NPA prosecutors, Advocates Nomgcobo Jiba and Lawrence Mwrebi.

The case of the former acting NDPP, Nomgcobo Jiba, is a case in point. Described by Renwick (2018) as a “Zuma ultra-loyalist” for whom Zuma had reportedly expunged the criminal record of her husband (for embezzling a trust fund), she pursued a vendetta against senior prosecutors Gerrie Nel and Glynnis Breytenbach and also refused to continue investigations against the senior intelligence officer closest to the president, Richard Mdluli, who had been arrested on charges of corruption, intimidation and suspicion of connection with the murder of the husband of his girlfriend.

Ramaphosa eventually fired Advocates Jiba and Mwrebi in April 2019 following the Mokgoro Inquiry that found neither of them “fit and proper” to hold their respective offices. The decision to dismiss them was upheld by parliament’s Justice Committee in late November 2019, bringing to an end the public service careers of these senior prosecutors who had failed to uphold their professional code and brought untold damage to the NPA.

Addressing the important role of the independence of the NPA in the context of South Africa, the Mokgoro report notes:

“In the face of South Africa’s painful history and its struggling inequality, it is the rule of law that holds every individual to the same standard and, in so doing, recognises the inherent dignity within every individual. Whether one wields power or is of the most vulnerable, the rule of law guarantees equal treatment. Without it, the vision of a constitutional democracy is dead in the water. Appreciating that the NPA plays a critical role in upholding the rule of law, it is crucial that it is seen to be free from all external pressures which might threaten prosecutorial independence. (2019: 137)”.

Section 179 (4) of the constitution says that “National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice”. In line with the constitution, Section 32 (1) (a) of the NPA Act (32 of 1998) requires members of the prosecuting authority to carry out their duties without fear, favour or prejudice, and subject only to the constitution and the law. The Constitutional Court has also stated that section 179(4) of the constitution “requires there be national legislation which guarantees the independence of the prosecuting authority”. The independence of the NPA and Hawks is therefore either explicitly or implicitly protected by the constitution. Whilst these agencies form part of the executive arm of government, the constitution (explicitly or by implication) upholds their right to operate independently. Implicitly, the purpose of securing independence for these agencies is to protect them from “undue influence” in order to uphold the principles of law and equality before the law that are fundamental to the constitution (Corruption Watch and Institute for Security Studies 2019: 19).

Operational independence from political interference is a key theme highlighted by two ANC veterans and former NDPPs, Adv Bulelani Ngcuka and Adv Vusi Pikoli. Both regarded as men of integrity who upheld the independence of their office at great personal cost, they were invited to attend the NPA strategy meeting in May 2019. Ngcuka, who was once accused by his detractors of being an Apartheid-era spy, noted how independence “is the most important issue for the new NDPP and the NPA as a whole” (NPA 2019:5). For Pikoli, independence is about “doing your job and doing it in the right way with integrity, irrespective of external pressure”. Pikoli was suspended by President Thabo Mbeki when he tried to pursue charges of corruption against the former head of police, and former ANC youth league president, Jackie Selebi, who was eventually convicted of corruption (for a full exposition of his time in office, see Pikoli’s memoir written with Wiener: 2013).

They also highlighted the Code of Conduct that prosecutors are required to uphold to ensure that there is public confidence in the integrity of the criminal justice process and that the NPA maintains its legitimacy. The code holds individuals within the NPA to a high standard – to uphold justice, human dignity and fundamental rights, prosecutors are personally accountable for their cases, may not mislead the court or suppress evidence and should assist the court in arriving at a just verdict – refraining from violating the decorum of the court (2019: 137). Where officials are mired in controversy and consistently taken on review for irrational decision making, and found wanting by the courts, it damages the public confidence. “The NPA must instil a strong sense of constitutional values and belief in the rule of law. When these values are internalised and fought for vociferously from within the NPA, only then will the institution enjoy the confidence of the citizenry and become the prosecuting authority that South Africans deserve” (2019: 138).

The instability, compliance and questionable integrity of several of the NDPPs (prior to Batohi’s appointment) has undoubtedly aided the dysfunctionality of this critical criminal justice agency and served former president Zuma and others to evade corruption charges. With the public enquiry and resultant dismissal of senior NPA advocates under the Zuma administration, and a new leadership team at the helm, the stage is potentially set to revitalise the NPA to use, and not abuse, its powers to bring criminals to book.

X: New leadership and challenges for the NPA

Whilst he had a presidential prerogative to act unilaterally in appointing the NDPP without consultation – as had been done during the Zuma years where there had been six acting NDPPs of varying integrity – President Ramaphosa followed a different, consultative process. On 10 October 2018 he announced he would appoint a panel to advise him on the appointment of the new NDPP. This was unprecedented.

Following public interviews with shortlisted candidates, the panel recommended five candidates for the president's consideration. He appointed advocate Shamila Batohi who, before she returned to South Africa, had been a senior legal advisor to the prosecutor at the International Criminal Court in the Hague and had previously served as director of public prosecutions for KwaZulu-Natal from 2000 to 2009. She described her new position as walking into a "shark's cage".

In looking at how to avoid manipulation of the criminal justice system both the appointment and dismissal processes of its leadership are key (Corruption Watch and Institute for Security Studies 2019; PARI 2019; Dullah Omar Institute 2019; Helen Suzman Foundation 2019). Institutionalising mechanisms, such as advisory panels that include professional peers, to ensure that the most suitable candidates are appointed to leadership roles in the criminal justice and other key government agencies, is recommended. President Ramaphosa set in motion a progressive precedent in this regard through the panel appointment process he implemented for the NPA and SARS appointments (Jonas 2019: 179).

On her first day in office Advocate Batohi initiated a comprehensive and confidential staff survey of the 4,000 employees of the NPA. The results of the survey give her a further mandate to take strong leadership action. Low staff morale is evident with many vacancies creating increasing pressure and workload on remaining staff. Budgetary resources are stretched and many competent prosecutors have left. A key gripe is the lack of career pathing and opportunities for training and staff development. Whereas the NPA had in the past been an employer of choice, this was no longer the case.

Beyond the internal organisational challenges, there is growing external pressure for action by the NPA against alleged perpetrators of state capture. Daily televised revelations of the scale of corruption at the Zondo Commission are creating further impatience at the perceived impotence of the NPA to act "without fear or favour".

Section 7 of the NPA Act (32 of 1998) provides for the president, by proclamation, to establish investigating directorates in the office of the national director. A new Investigative Directorate on Corruption, led by Advocate Hermione Cronje, a career prosecutor with over 20 years of experience, has been established and is poised to take up complex cases for criminal prosecution from the Zondo Commission. "Case selection criteria will ensure we address those who planned, orchestrated or instigated the corruption of the system and those who ultimately derived the benefit of the looting of state coffers, not only the foot soldiers" (NPA 2019).

Finance minister Tito Mboweni recently announced an additional R1.3 billion in support for the NPA which will allow many of the acting positions to be formalised and support the recent secondment to the new Investigative Directorate of senior advocates with the requisite skills in dealing with complex commercial crime cases. Until high-profile politicians and public servants who have corrupted are prosecuted and jailed, there will be no faith in either the civil service or criminal justice system and this cleaning up can only occur if a powerful and institutionally independent prosecution service is given the resources to prosecute all instances from the very highest to the lowest (Jonas 2019: 175).

Civil society has promised its support, advocating for an ethical and efficient constitutional democracy, calling for those implicated in state capture to be accountable and dedicating themselves to rebuilding the state and institutions decimated by years of capture and poor governance. A recent conference, “Civil Society – Defeating State Capture and Rebuilding the State” – committed delegates to helping “strengthen, resource and guarantee the independence of the criminal justice system and put in place checks and balances to remove opportunities for corruption”. The conference outcomes also called for the Zondo Commission to issue an interim report and on the NPA to prosecute cases where sufficient evidence exists.

XI: In Conclusion

In his frank and thoughtful book, *After Dawn*, fired deputy finance minister and state capture whistleblower Mcebisi Jonas notes how 25 years into South Africa’s democracy it is time to revisit merit as key for public servant appointees. Whereas the decision to appoint unqualified people to positions of responsibility in the civil service was initially justified as a mechanism to make the service – which was dominated by whites – more representative of the general population, this imperative no longer exists. “Twenty five years into democracy it is possible to have a representative civil service that is peopled by qualified, skilled and experienced people who can raise productivity and bring professionalism to bear. A further result of our politicised civil service is that it fell victim to manipulation by patronage networks... Some say as much as a third of public procurement has been siphoned off by the corrupt” (Jonas 2019: 175).

The solution is clear: depoliticise appointments and base them on merit so that top skills can be attracted. Senior ANC leader and former interim president Kgalema Motlanthe has also advocated for a meritocratic public service where appointments are based on a rigorous recruitment, interviewing and selection process underlined by ethics, morality and state building, wholly contrary to the existing practice where appointments are made by political grandees and are based more on extending political influence than getting the job done (Jonas 2019: 175).

With the precedent set of a transparent appointment process, visible, competent and ethical leadership at the top of the NPA, it seems as if the tide could be turning. Articulating explicit professional values and a commitment to a truly independent prosecutorial service is led by Adv Batohi: “Through its ethical conduct, empathy to clients and exemplary legal adeptness, we will convey our professionalism. There is a need for the highest standard of integrity, and those whose conduct falls short will not be tolerated in the NPA” (NPA 2019).

During his tenure President Jacob Zuma intentionally crippled agencies with the power to investigate and prosecute the crime of corruption. Primarily this was enabled by his grip on the ANC which seemed to lose its moral compass under his leadership, and his presidential prerogative to make key appointments to the leadership of criminal justice agencies, such as the NPA. Individuals with a questionable commitment to prosecutorial independence and upholding the constitution were put in place. Thankfully those days are over. President Zuma will himself hope to benefit from an independent prosecution service which can be trusted to do its job without fear or favour, when he eventually has his day in court.

References

- African National Congress (ANC) (1997). Report by the President of the ANC, Nelson Mandela to the 50th National Conference of the African National Congress, Mafikeng, 16 December. www.sahistory.org.za/archive/report-president-ancnelson-mandela-50th-national-conference-african-national-congressmafik#sthash.GSJKjmXg.dpuf, accessed 30 May 2016.
- African National Congress (ANC) (1998). The state, property relations and social transformation, *Umrabulo*, 5 (Third Quarter).
- African National Congress (ANC) (2012). Organisational renewal: Building the ANC as a movement for transformation and a strategic centre of power, a discussion document towards the National Policy Conference, 10 April.
- Bhorat, H., M. Buthelezi, I. Chipkin, S. Duma, L. Mondi, C. Peter, M. Qobo, M. Swilling and H. J. S. C. R. P. Friedenstein (2017). *Betrayal of the promise: How South Africa is being stolen*. Public Affairs Institute, 1–72.
- BizNews (2016). Full statement: 27 former DGs call for “state capture” inquiry. Silence betrays trust, 16 May. www.fin24.com/BizNews/full-statement-27-former-dgs-call-for-state-capture-inquiry-silence-betrays-trust-20160516 (accessed 8 April 2020).
- Butler, A. (2008). Consolidation first: Institutional reform priorities in the creation of a developmental state in South Africa. In: Turok, B. (ed.), *Wealth Does Not Trickle Down: The Case for a Developmental State in South Africa*. Cape Town: New Agenda, 183–201.
- Camerer, M. (2011). Anticorruption reforms in democratic South Africa, pp269-293 in Shapiro, I and Tebeau, K. *After Apartheid: Reinventing South Africa?* Charlottesville, VA: University of Virginia.
- Camerer, M. (2009). Corruption and reform in democratic South Africa. Unpublished PhD thesis. University of Witwatersrand.
- Cameron, R. (2010). Redefining political-administrative relationships in South Africa. *International Review of Administrative Sciences*, 76(4): 676–701.
- Cameron, R. and Thornhill, C. (2009). Public service reform in South Africa: 1999–2009. *Journal of Public Administration*, 44 (special issue 1): 897–909.
- Chipkin, I. (2016). The state, capture and revolution in contemporary South Africa. PARI Working Paper, Johannesburg: University of Witwatersrand.
- Chipkin, I. (2018). The end of tyranny: How civil society in South Africa fought back. In: Rodriguez-
- Garavito, C. and Gomez, K. (eds), *Rising to the New Populist Challenge: A New Playbook for Human Rights Actors*. Bogota: Dejusticia, 101–11.
- Constitution of the Republic of South Africa Act (Act 108 of 1996).
- Corruption Watch and the Institute for Security Studies (2019). 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.

- Dullah Omar Institute (2019). Submission to the Zondo Commission of Inquiry into State Capture: Recommendations concerning the National Prosecuting Authority of South Africa, June.
- Fraser-Moleketi, G. J. (2006). Public service reform in South Africa: An overview of selected case studies from 1994–2004. Unpublished manuscript Admin. in Public Administration thesis. University of Pretoria.
- Helen Suzman Foundation (2019). *Delivery of Justice: Independence and Accountability. The Criminal Justice System: Radical Reform Required to Purge Political Interference*. See <https://hsf.org.za/publications/special-publications/the-criminal-justice-system-radical-reform-required-to-purge-political-interference.pdf> accessed 27 May 2020.
- Jonas, M. (2019). *After Dawn: Hope after State Capture*. Johannesburg: Picador.
- Le Roux, M. and Davis, D. (2019). *Lawfare: Judging Politics in South Africa*. Jonathan Ball Publishers. Johannesburg & Cape Town.
- Levin, R. (2007). Building a capable development state in South Africa. Paper presented at the 7th Africa Governance Forum, Ouagadougou, Burkina Faso, 24–26 October.
- Madonsela, T. N. (2016). State of Capture: Report on an Investigation Into Alleged Improper and Unethical Conduct by the President and Other State Functionaries Relating to Alleged Improper Relationships and Involvement of the Gupta Family in the Removal and Appointment of Ministers and Directors of State-Owned Enterprises Resulting in Improper and Possibly Corrupt Award of State Contracts and Benefits to the Gupta Family's Businesses, Office of the Public Protector.
- Maughan, K. 8 April 2020, "NPA wants Constitutional Court to dismiss Jacob Zuma's 'hopeless' appeal. Times Live. <https://www.timeslive.co.za/news/south-africa/2020-04-09-npa-wants-constitutional-court-to-dismiss-jacob-zumas-hopeless-appeal/>
- Miller, K. (2005). *Public Sector Reform Governance in South Africa*. Aldershot: Ashgate.
- Mokgoro, Y. (2019). Enquiry in terms of Section 12(6) of the National Prosecuting Authority Act 32 of 1998.
- Naidoo, V., 2013. Cadre deployment versus merit? Reviewing politicization in the public service. *New South African review 3: The second phase—Tragedy or farce*, pp.261-77.
- National Planning Commission (2012). National development plan 2030: Our future-make it work.
- National Prosecuting Authority (NPA) (2019). South Africa: Strategic Planning Conference May, Summary Report.
- PARI (2019). Position Paper on Appointments and Removals in Key Criminal Justice System Institutions. Draft for Comment, 18 October. <https://pari.org.za/position-papers-on-proposals-for-state-reform/> (accessed 4 November 2019).
- Picard, L. A. (2005). *The State of the State: Institutional Transformation, Capacity and Political Change in South Africa*. Johannesburg: Witwatersrand University Press.
- Public Service Commission (PSC) (2014). *Building a Capable, Career-Oriented and Professional Public Service to Underpin a Capable and Developmental State in South Africa: A Discussion Document*. Pretoria: PSC.

Ramaphosa, C. (2019). Opening of Parliament Speech, National Assembly, Cape Town.

Renwick, R. (2018). *How to Steal a Country: State Capture and Hopes for the Future of South Africa*. Jacana, 20 June.

Schmidt, D. (2017). Practice Note: Integrity and social accountability in prioritization and performance: Navigating the political-administrative interface. InTAcT.

Schmidt, D. 2020. Email correspondence with the author.

Schonteich, M. (2014). A story of trials and tribulations: The National Prosecuting Authority, 1998–2014. *South Africa Crime Quarterly*, 50.

Southall, R. (2006). Introduction: Can South Africa be a developmental state? In: Buhlungu, S., Daniel, J. and Lutchman, J. (eds), *State of the Nation: South Africa 2005–2006*. Cape Town: HSRC Press, xvii–xlv.

Wiener, M. (2013). *My Second Initiation: The Memoir of Vusi Pikoli*. Johannesburg: Picador.

i Timeline of NDPP appointments: 1 April 2001–31 August 2004: Bulelani Ngcuka; August 2004–January 2005: Silas Ramaite (acting); 1 February 2005–17 February 2009: Vusi Pikoli (suspended and then removed/retired); 1 May 2009–31 October 2009: Mokotedi Mpshe (acting); 1 December 2009–1 October 2013: Menzi Simelane (December 2011 suspended after the SCA, 8 May 2012 removed pursuant to CC judgment – not “fit and proper” for the office); 20 December 2011–30 September 2013: Nomgcobo Jiba (acting) including her maternity leave, early January–17 May 2013; 1 October 2013–31 May 2015: Mxolisi Nxasana “reached a settlement” after the president cancelled inquiry into whether he was “fit and proper”; 18 June 2015–13 August 2018: Shaun Abrahams (found to be irregularly appointed); 1 August 2018–31 January 2019: Silas Ramaite (acting); 1 February 2019–present: Shamila Batoyi.