

REFORMING PUBLIC ADMINISTRATION IN SOUTH AFRICA: A PATH TO PROFESSIONALISATION

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CHAPTER 1

RYAN BRUNETTE

APPOINTMENT AND REMOVAL IN THE PUBLIC SERVICE AND IN MUNICIPALITIES

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Reforming Public Administration in South Africa

A PATH TO PROFESSIONALISATION

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About PARI

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

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Preface

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

This book had its origins in the research, writing, dissemination, and advocacy efforts surrounding three policy position papers produced by PARI. These three papers treated distinct parts of the South African public administration: high-level appointments within the criminal justice sector¹, public procurement², and the system of recruitment and appointment of public servants³. Versions of these papers were presented and discussed at several advocacy forums including a conference jointly hosted by PARI and the Ahmed Kathrada Foundation in 2019, workshops with civil society in the same year, and various public ‘webinars’ over the last 18 months.

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

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

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

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

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

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

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

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

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

MBONGISENI BUTHELEZI *and* JONATHAN KLAAREN
Johannesburg, September 2021

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

Introduction

Conceiving (of) State Reform in South Africa

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appointment and Removal in the Public Service and in Municipalities

RYAN BRUNETTE

INTRODUCTION

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

The proposed reforms developed here are central to this task. They are properly understood as foundational to the practice and study of modern, especially democratic, public administration. They were a pivotal consideration in many of its first acts¹ and in the founding texts of its academic study.² It has long been recognised that where politicians exercise unconstrained power over appointment and removal in the public administration, they can and will be tempted to use this power to give positions to supporters, to place them across administrative checks and balances, and engage in corruption. In the 1850s, for instance, Britain began its final push towards a non-partisan and professional civil service. It established an independent commission responsible for appointments and discipline, then expanded the authority of this body to cover most administrative posts by the 1870s. The

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

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

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

These experiences have been replicated widely. Countries that established appropriately insulated processes of appointment and removal early on in their political development,⁴ such as Germany, Sweden,⁵ Japan,⁶ Malaysia,⁷ and Botswana,⁸ experienced significant and consequential episodes of relatively clean and capable government after the arrival of mass, democratic politics. Others, like the early if limited democracies of the United Kingdom⁹ and the United States,¹⁰ dramatically reduced incidences of corruption and patronage when political and administrative

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

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

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

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

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

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

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

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

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

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

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

¹² National Planning Commission. “National Development Plan: Vision for 2030,” November 11, 2011. <http://www.nstf.org.za/wp-content/uploads/2018/04/All-The-NDP.pdf>.

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

¹⁴ Available at <https://www.dpsa.gov.za/dpsa2g/documents/acts®ulations/pama/Notice%20for%20comments%20to%20the%20Public%20Administration%20Management%20Amendment%20Bill.pdf>

1. BACKGROUND TO THE PUBLIC PERSONNEL SYSTEM IN SOUTH AFRICA

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

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

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

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

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

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

2. THE LEGAL FRAMEWORK GOVERNING APPOINTMENT AND REMOVAL

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

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

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

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

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

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

The second limitation is a focus on the public service and on municipalities. The public service includes departments, government components and service delivery units in the national and provincial spheres.²⁰ Municipalities include both municipal administrations and municipal entities.²¹ These categories do not cover all of the organs of state established in terms of the Constitution and other laws. They do not include the so-called Chapter 9 Institutions,²² the security services²³ and the state-owned public entities.²⁴ The functions of these latter institutions, in theory and to a significant extent in fact, are such as to justify operation outside of the Public Service Act and related legislation. Their reform, therefore, will be subject to somewhat different particulars and processes to those elaborated here. It should be stressed, however, and at the outset, that international experience suggests that the reforms considered in this chapter for the public service and the municipalities, by constraining some patronage opportunities, will redirect political energies into a search for other patronage opportunities. Government agencies outside the public

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

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

²¹ As defined in the Municipal Systems Act.

²² Established in terms of Chapter 9 of the Constitution.

²³ Established in terms of Chapter 11 of the Constitution.

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

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

2.1 The public service

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

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

2.1.1 *The Public Service Commission*

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

²⁵ Section 3(1) of the Public Service Act, 103 of 1994.

²⁶ Section 1 of the Public Service Act, 103 of 1994.

²⁷ Section 7(3) of the Public Service Act, 103 of 1994.

²⁸ Section 196(1) of the Constitution.

²⁹ Section 196(2) of the Constitution.

³⁰ Section 196(7) of the Constitution.

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

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

The Commission must exercise oversight over the public administration in a way that encourages effectiveness, efficiency and a high standard of professional ethics.³⁹ It is required to promote the basic values and principles governing public administration as set out in section 195 of the Constitution. The Commission has broad powers to investigate, monitor and evaluate the public service. It receives and investigates complaints from employees, acts as a grievance body and offers appropriate remedies. It can propose measures to improve performance. It can give direction to the effect that recruitment, transfers, promotions and removals comply with the values and principles of section 195.⁴⁰ The Public Service Commission Act gives the power to summons, secure records and administer oaths to the Commission

³¹ Section 196(8) of the Constitution.

³² Section 196(10) of the Constitution.

³³ Section 6(2) of the Public Service Commission Act, 46 of 1997.

³⁴ Section 5 of the Public Service Commission Act, 46 of 1997.

³⁵ Section 6 of the Public Service Commission Act, 46 of 1997.

³⁶ Section 11 of the Constitution.

³⁷ Section 196(3) of the Constitution.

³⁸ Section 12 of the Public Service Commission Act, 46 of 1997.

³⁹ Section 196(2) of the Constitution.

⁴⁰ Section 196(4) of the Constitution.

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

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

2.1.2 Requirements and qualifications for appointment to the Public Service

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

⁴¹ Section 10 of the Public Service Commission Act, 46 of 1997.

⁴² Section 11 of the Public Service Commission Act, 46 of 1997.

⁴³ Rules of the Public Service Commission: Managing Conflicts of Interest Identified through the Financial Disclosure Framework for Senior Managers. GN 865 in GG 32298 of 12 June 2009.

⁴⁴ It does so at subsec 196(13).

⁴⁵ Sections 11(b) and 13 of the Public Service Commission Act 46 of 1997, along with the Governance Rules of the Public Service Commission. GN 263 in GG 38620 of 30 March 2015.

⁴⁶ Section 1 of the Public Service Act, 103 of 1994.

⁴⁷ Public Service Regulation 67(2)(c).

⁴⁸ Section 12(1) of the Public Service Act, 103 of 1994.

⁴⁹ Department of Public Service and Administration. (2013). 'Executive Protocol: Principles and Procedures for the Employment of Heads and Deputy Directors-General Nationally'; Mbeki, T. (1999). 'Delegation of Power Entrusted to the President: Head of National Departments'. Annexure A in Department of Public Service and Administration. (2003). Senior Management Service Handbook. Accessed on 18 June 2021 at <http://www.dpsa.gov.za/dpsa2g/documents/sms/publications/smsb2003.pdf>.

⁵⁰ Public Service Regulation 67(g), 2016.

⁵¹ Sections 1 and 9 of the Public Service Act, 103 of 1994.

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

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

⁵² Section 10 of the Public Service Act, 103 of 1994.

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

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

⁵⁵ Employment Equity Act, 55 of 1998.

⁵⁶ Public Service Regulation 60, 2016.

⁵⁷ Public Service Regulation 61, 2016.

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

2.1.3 Powers and procedures of appointment

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

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

⁵⁹ Section 31 of the Public Service Act, 103 of 1994.

⁶⁰ Public Service Regulation 63, 2016.

⁶¹ Public Service Regulation 65, 2016.

⁶² Section 11 of the Public Service Act, 103 of 1994.

⁶³ Public Service Regulation 67(1), 2016.

⁶⁴ Public Service Regulation 67(2)(b), 2016.

⁶⁵ Public Service Regulation 67(2)(a), 2016.

⁶⁶ Public Service Regulation 67(2)(f), 2016.

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

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

⁶⁷ Public Service Regulation 67(2)(d), 2016.

⁶⁸ Public Service Regulation 67(2)(e), 2016.

⁶⁹ Public Service Regulation 67(3), 2016.

⁷⁰ Public Service Regulation 67(5), 2016.

⁷¹ Public Service Regulation 67(7), 2016.

⁷² Section 12 of the Public Service Act, 103 of 1994.

⁷³ Mbeki, T. (1999). 'Delegation of Power Entrusted to the President: Head of National Departments'. Annexure A in Department of Public Service and Administration. (2003). Senior Management Service Handbook. Accessed on 18 June 2021 at <http://www.dpsa.gov.za/dpsa2g/documents/sms/publications/smsb2003.pdf>; Mchunu, S. (2020). 'Application of the Public Service Regulations, 2016 with Respect to the Filling of Head of Department and Deputy Director-General Posts'. Accessed on 18 June 2021 at http://www.dpsa.gov.za/dpsa2g/documents/ep/2020/ep_17_11_2020.pdf.

⁷⁴ Department of Public Service and Administration. (2013). 'Executive Protocol: Principles and Procedures for the Employment of Heads and Deputy Directors-General Nationally'.

⁷⁵ Section 9 of the Public Service Act, 103 of 1994.

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

2.1.4 Discipline and dismissal

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

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

⁷⁶ Department of Public Service and Administration. (2013). 'Executive Protocol: Principles and Procedures for the Employment of Heads and Deputy Directors-General Nationally'.

⁷⁷ Section 9 of the Public Service Act, 103 of 1994.

⁷⁸ Section 12(2) of the Public Service Act, 103 of 1994; Public Service Regulation 68, 2016.

⁷⁹ Public Service Regulations 11–15, 2016.

⁸⁰ Breytenbach, J. (2003). 'Code of Conduct for Supply Chain Management Practitioners'. Practice Note 4 of 2003. Accessed on 18 June 2021 at <http://www.treasury.gov.za/divisions/ocpo/sc/PracticeNotes/SCM-PracNote%2003%204.pdf>.

⁸¹ Section 16A of the Public Service Act and Public Service Regulation 13(e), 2016.

⁸² Section 38 of the Public Finance Management Act, 1 of 1999.

⁸³ Section 16A of the Public Service Act, 103 of 1994.

⁸⁴ Section 16B(1)(a) of the Public Service Act, 103 of 1994.

⁸⁵ Section 16B(1)(b) of the Public Service Act, 103 of 1994.

⁸⁶ Department of Public Service and Administration. (2015). 'Labour Relations Sanctioning Guidelines for the Public Service'. Accessed on 18 June 2021 at http://www.dpsa.gov.za/dpsa2g/documents/nlr/2015/21_1_r_4_12_2015%20Annexure%20A.pdf.

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

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

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

2.1.5 Analytical summary: the public service

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2 The municipalities

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

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

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

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

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

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

The Municipal Systems Act enables, in defined circumstances, the establishment and acquisition of municipal entities, including private companies and service utilities.¹⁰¹ Private companies must be acquired and founded under company law¹⁰² and service utilities must be established through municipal by-laws.¹⁰³ Multiple municipalities can agree to establish jointly held companies¹⁰⁴ and service utilities.¹⁰⁵ In all cases, municipal entities are to be governed by boards. Chief executive officers, accountable to these boards, are responsible for administration.¹⁰⁶

2.2.1 *Qualifications for office in municipal administrations and entities*

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

⁹⁷ Section 7 of the Municipal Structures Act, 32 of 2000.

⁹⁸ KwaZulu-Natal Determination of Types of Municipality Act, 7 of 2000.

⁹⁹ Section 55 of the Municipal Systems Act, 32 of 2000.

¹⁰⁰ Section 53 of the Municipal Systems Act, 32 of 2000.

¹⁰¹ Chapter 8A of the Municipal Systems Act, 32 of 2000.

¹⁰² Section 86C(1) of the Municipal Systems Act, 32 of 2000.

¹⁰³ Section 86H of the Municipal Systems Act, 32 of 2000.

¹⁰⁴ Section 86F of the Municipal Systems Act, 32 of 2000.

¹⁰⁵ Section 87 of the Municipal Systems Act, 32 of 2000.

¹⁰⁶ Section 93J of the Municipal Systems Act, 32 of 2000.

¹⁰⁷ Sections 54A and 56 of the Municipal Systems Act, 32 of 2000, implemented by Regulation 8 and 9 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.

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

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

The competency, qualification and experience standards for managers directly accountable to municipal managers are differentiated between officials responsible for development and town planning, public works, finance, community services, corporates services, and other areas.¹¹¹ Otherwise, at lower levels, qualifications are defined by the municipalities themselves and by other applicable legislation. Most important are the National Treasury regulations under the Municipal Finance Management Act, 56 of 2003.¹¹² These extend beyond both senior management and specifically financial competencies, toward supply chain management officers and officials in municipal entities. Disqualifications such as a criminal record and previous removal are required to be screened. The regulations establish periods—ten years in cases of financial misconduct, five years in cases involving dishonesty or negligence, and so on—over which someone dismissed from a municipality may not be appointed to a municipality.¹¹³

2.2.2 Powers and procedures of appointment and termination

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

¹⁰⁸Section 93E(1) of the Municipal Systems Act, 32 of 2000.

¹⁰⁹Section 93F of the Municipal Systems Act, 32 of 2000.

¹¹⁰Section 93E(2) of the Municipal Systems Act, 32 of 2000.

¹¹¹Regulation 8 and 9 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.

¹¹²Municipal Regulations on Minimum Competency Levels, 2007.

¹¹³Section 57A of the Municipal Systems Act, 32 of 2000; Schedule 2 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.

¹¹⁴Section 56(1)(a)(ii) of the Municipal Systems Act, 32 of 2000.

¹¹⁵Section 54A(2A) and 56(c) of the Municipal Systems Act, 32 of 2000.

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

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

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

¹¹⁶Regulation 7 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.

¹¹⁷Regulation 10 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.

¹¹⁸Regulation 12 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.

¹¹⁹Regulation 13 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.

¹²⁰Section 54A of the Municipal Systems Act, 32 of 2000.

¹²¹Section 56 of the Municipal Systems Act, 32 of 2000.

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

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

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

2.2.3 Analytical Summary: the municipalities

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

¹²² Regulation 17 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014.

¹²³ Section 55 of the Municipal Systems Act, 32 of 2000.

¹²⁴ eThekweni Metropolitan Municipality, for instance, retained features of a closed career system below the highest positions.

¹²⁵ Section 57(6) of the Municipal Systems Act, 32 of 2000.

¹²⁶ Section 93E of the Municipal Systems Act, 32 of 2000.

¹²⁷ Section 93J of the Municipal Systems Act, 32 of 2000.

¹²⁸ Section 93J of the Municipal Systems Act, 31 of 2000.

¹²⁹ Schedule 2 of the Municipal Systems Act, 31 of 2000.

¹³⁰ Chapter 6 of the Regulations on Appointment and Conditions of Employment of Senior Managers, 2014; Disciplinary Regulations for Senior Managers, 2011.

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

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

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

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

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

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

3. REFORM PRINCIPLES AND PROPOSALS

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

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

3.1 Principles of reform

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

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

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

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

3.2 The reform of appointment and removal processes

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

PROCESS PLANNING

Process plans set—within broad legislative parameters as well as principles of competitiveness and non-partisanship—qualifications, job and person specifications, types of tests and scoring, and categories of subject matter experts needed on the selection committee.

PROCESS ADMINISTRATION

Process administrators design and conduct relevant tests, long-list on the basis of compliance and minimum thresholds, and establish a selection committee that includes relevant subject matter experts.

SHORT LISTING

The selection committee scores and generates a short list.

APPOINTMENT

Appointment must be made from the short list.

3.2.1 *The reform of the public service*

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

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

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

¹³²See chapter 13.

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

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

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

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

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

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

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

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

3.2.2 The reform of municipalities

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

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

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

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

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

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

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

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

3.3 A statutory mechanism for incrementalism

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

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

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

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

CONCLUSION

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

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

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

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

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

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

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

“This is a highly impressive, timely, and relevant collection of reviews and proposals.

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

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

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

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

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

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

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