

State capture and institutional cascades: a case study of the Department of Water and Sanitation

Abstract

The South African state has been transformed since 1994, but not in the way that many people hoped or expected. In the 1990s and 2000s analyses—and protests-- focused on the incompetency, or ‘lack of capacity’, of the state, its skewed priorities toward elite interests and its failure to deliver services adequately or equitably. Events in the 2010s have shifted our purview to a more insidious reality: the transformation of the state through its capture. The devastating impact of state capture on its institutions is becoming increasingly visible.

This article looks at how the first stage of state capture, or high level capture that corroded the ethos of governing, has cascaded through the Department of Water and Sanitation (DWS) through a second stage of capture. This stage undermines the operation of the DWS and its management and protection of water resources and provision of water services.

Through an analysis of primary data including Parliamentary reports and information from access to information (PAIA) requests, three features of state capture in DWS are examined: securing control over the public service and weakening of controls, centralising control over institutions, and ‘shaking down’ regulation. Its aim is not to identify individuals involved and how they benefit, but to examine how these features have exacerbated the dysfunctionality of DWS that began in the 2000s. Finally it concludes by considering opportunities for systemic reform.

Introduction

The South African state has been transformed since 1994, but not in the way that many people hoped or expected. In the 1990s and 2000s analyses focused on the incompetency, or ‘lack of capacity’, of the state, its skewed priorities toward elite interests and its failure to deliver services adequately or equitably. Community protests became increasingly widespread, demanding both the delivery of services as required by the Constitution and municipal leadership that can and will do so. Events in the 2010s have shifted our purview to a more insidious reality: the transformation of the state through its capture. The impact of state capture on its institutions is becoming increasingly visible.

The water crises that are building and erupting across the country are arguably physical manifestations of a captured state’s disinterest and inability to deliver. Raw sewerage and industrial effluent continue to be discharged directly into the Vaal River, polluting the water supply of millions of South Africans and resulting in the shocking degradation of aquatic ecosystems (South African Human Rights Commission 2018). Health impacts of the widespread and unregulated pollution of water resources by agricultural, mining and industrial users are widespread; for example, consuming one litre of water daily in the Lower Olifants catchment was found to have a health risk 64 times that considered to be safe for a life-time exposure, with water samples containing levels of mercury and arsenic from 10 to 100 times higher than recommended (Wright et al. 2014). Meanwhile, national government has failed to adequately intervene in response to municipal neglect of water infrastructure. This has resulted in towns and cities across the country running out of water in the face of extended climate-induced drought. Global attention focused on the mismanagement of bulk water supply that brought the City of Cape Town to the brink of Day Zero, when the City threatened taps would be cut off (*TimesLive*, January 30, 2018). Less well recognised is the crisis facing many other areas of the country; currently townships in Makhanda municipality have spent extended

periods (*GroundUp*, February 14, 2019) without any running water or with severely contaminated water (*Infrastructure News*, February 27, 2019).

This article uses the Department of Water and Sanitation (DWS) as a case study to move past generalisations and broader dynamics that emerged with the first stage of capture of national politicians and the state coffers, which affected the overall ethos of how government works. It makes a significant contribution to our understanding of state capture by looking at a 'second stage' of capture: how the impacts of state capture cascade through a government department, and how this devastates institutions of the state and undermines its ability to carry out its responsibility to protect water resources and ensure delivery of water, a key resource on which life depends. In short the second stage of state capture affects the very nature of government departments and the foundation of how things operate.

The focus of the article is not on whether state capture took place at the Ministerial level of DWS, which is presently under investigation. Instead it examines how the features of state capture are evident within DWS and how this has further compromised an institution that was already dysfunctional. This primary focus on institutional processes and the impacts of state capture on institutions, as opposed to a focus on actors involved in state capture, to some degree creates challenges related to defining and classifying actions as indicative of state capture. This is, to a certain extent, a gap which also prevents greater reflection on structure versus agency in institutional processes. On the other hand, there are valid reasons for a focus on mid-level and institutional corruption, rather than top-level capture driven by a small number of political and corporate elites. As an area of limited enquiry, the intention of the article is to explore a new lens of analysis, with which future research can examine, for instance, the manifestations of local state capture within municipalities as Water Services Authorities responsible for service delivery.

Its analysis is based on primary data on the state of DWS, which was gathered by the second author and compiled into a fact-finding report of the South African Water Caucus (SAWC) in 2017. Data includes publicly accessible information including Parliamentary Questions and Answers, Portfolio Committee meeting reports, and information from access to information (PAIA) requests. The process of analysing the large volume of primary data included basic coding, categorising emerging themes, and integrating these themes. It also draws on the direct experience of both authors in a range of civil society engagements in the water sector since 1994.

The article begins by using the emerging literature on state capture to explore its associated impacts on state institutions in general and water governance in particular. It begins by summarising relevant aspects of state capture literature. The second section focuses on indicators of institutional deterioration of this government department that resulted, in large part, from capture. It considers three specific areas: securing control over the public service and weakening of controls, centralising control over institutions, and shaking down regulation (monitoring and compliance). Finally it concludes by considering the relationship between the state and civil society and the scope for civil society to exert pressure for radical change in state institutions.

State capture, dysfunction and corruption

The relationship between state capture and institutional functionality is complex. On the one hand, features of state capture may cascade into institutions that lack capacity and already show signs of dysfunctionality. In this way, it is a natural companion or extension of patronage or more overtly corrupt practices that may already be common (Khan 2005; Kitschelt and Wilkinson 2007). On the other, captor networks may facilitate the deliberate undermining of capacity and the creation of dysfunctionality as a precursor to state capture. However, even

within this complex context, it is possible to identify specific features of state capture. These are discussed below.

First used in a report commissioned by the World Bank to describe a recent and highly pervasive form of corruption, the notion of state capture draws from the idea of regulatory capture, or corrupt relations between state regulators and regulated corporations. It is best described as systemic political corruption, and is characterised as a coordinated attempt by political and private sector interests (including business elites, oligarchs, firms and private institutions) to capture state institutions (Hellman et al 2000; Hall 2000). It tends to be more common in post-conflict or transition democracies and is extremely damaging to institutions and governance both immediately and in the long term (Transparency International 2014; Dassah 2018; Pesic 2007). Whereas most forms of corruption seek to subvert the implementation of rules and laws, state capture seeks to influence and distort the law-making process and shape rules and laws to, in effect, legalise corruption (Hellman et al 2000; Ouzounov 2004; Varraich 2014). Dassah (2018) states it clearly: a legal system is ‘rendered the opposite of what it should be, as it serves illegal interests disguised in legal form’.

The process of capture, rather than being explicit or coercive, is by its nature subtle, informal, gradual and furtive (Hall 2012). Its means are familiar: they include private payments to public individuals (Hellman et al 2000) or illegal contributions to political parties and candidates (Transparency International 2014). However its aim is not simply to target bureaucrats responsible for implementation as a means of gaining contracts through outsourcing and privatisation, but also to purchase political influence in the process of policy and law making (Hall 2012:4; Hall 2000). Instead - or in addition to - direct and immediate personal gain, elites focus on broader systemic change that will promote long-lasting personal gain for themselves and other elites.

The concept of state capture gained prominence in South Africa from 2016 when, in response to a formal complaint, Public Prosecutor Thuli Madonsela began an investigation of the Gupta family's relationships with government officials and released the 'State of Capture' report (2016). The following year a consortium of research organisations released a report entitled 'Betrayal of the Promise: how South Africa is being stolen' (Bhorat et al. 2017). These provide considerable detail on how the captor networks are organised and the modes and methods of capture.

The 'Betrayal of the Promise' (Bhorat et al. 2017) describes 'deliberately organised chaos' which allows an elite to control state systems through the 'systematic siphoning of state assets'. While the report describes a variety of ways in which state capture is achieved, those most applicable to the case of DWS include:

- 'securing control over the public service by weeding out skilled professionals;
- securing access to rent-seeking opportunities by shaking down regulations to their advantage and to the disadvantage of South Africans; and
- securing control over strategic procurement opportunities by intentionally weakening key technical institutions and formal executive processes' (Bhorat et al. 2017: 16)

Yet one of the most important characteristics of state capture has received little attention, namely how its impact spreads over time. State capture is not an event but a process. In other words, this article suggests that if we consider the first stage of state capture as establishing a level of control and access to structures and opportunities, the second stage is deepening and extending the reach of the state capture network. In the first stage, the actions of elites create an opening for selected private (national and multi-national companies), state or non-state and interest groups to be involved in making rules and policy (Hall 2000; Transparency International 2014). As such, state capture is network-based, operating according to informal

rules amongst members on an authority-dominance or reciprocity-loyalty basis (Hall 2012). These networks make use of and modify formal institutions to camouflage and represent their interests. In the second stage of capture, with laws and policies having experienced a degree of capture, people within institutions perpetuate and deepen the capture. At this stage the impacts on the functioning of state institutions become apparent.

Features of state capture within the Department of Water and Sanitation

State capture within DWS is typically associated with Minister Mokonyane. DWS was established in 2014 by President Zuma, through re-incorporating a sanitation function into the department, after his initial changes in 2009 when he removed forestry from the department. President Zuma appointed former Gauteng Premier Nomvula Mokonyane as its Minister. After being heavily implicated in the Zondo commission of inquiry into state capture and under investigation for a range of other financial irregularities, she was replaced by Gugile Nkwinti in 2018. Allegations considered by the Commission relate largely to Bosasa. In a testimony to the Zondo commission it was alleged that Minister Mokonyane was paid R50 000 a month for a number of years on instruction by Gavin Watson, in order ‘to protect the company from law enforcement agencies’ (*The Mercury*, May 30, 2017). Although state capture in DWS has become synonymous with Minister Mokonyane; corruption and mismanagement of the department under previous Minister’s (specifically Minister Molewa and Minister Sonjica) is well documented. It is thus necessary to briefly discuss previous periods of the department, in order to understand certain roots and institutional foundations for state capture.

Minister Asmal was the first Minister of Water Affairs and Forestry following South Africa’s democratic revolution. He oversaw a complete policy overhaul of the water sector, intended to reposition water rights and governance within our Constitutional dispensation. The process was lauded as inclusive, participatory and exhaustive. Ultimately, this process culminated in the

National Water Act, 1998, which placed the ownership of water in the hands of South African citizens. This period, however, was also characterised by the roll-out of massive and capital-intensive infrastructure and engineering projects, in turn handed over to under-capacitated municipalities to operate and maintain. Although this period is not regarded as principally corrupt, it is evident that funds were misspent.

Minister Buyelwa Sonjica was appointed as Minister of Water Affairs and Forestry for two periods (2004-2006 and 2009-2010). Importantly, she managed a process of major institutional change in DWAF, based on rapid transformation objectives. It is argued that this transformation process was mismanaged, resulting in the loss of critical skills in the department and weakening of institutional controls to counter corruption. During this period, corruption, particularly in middle management, becomes more evident. In response, the then DG, Pam Yako, made a notable attempt to combat corruption and clean up the department, including cancelling an IT contract to a large ANC donor. As a result, a network of corrupt officials, consultants and service providers orchestrated a deliberate process, including preparing a dossier against the DG to Minister Sonjica, which in turn resulted in a disciplinary hearing and her suspension. Subsequently, the findings of the hearing was overturned, and although she was acquitted of wrongdoing, she was ‘weeded out’ of the department.

As highlighted above, institutional challenges and dysfunction were evident in DWS under previous Ministers. However, these were exacerbated dramatically during Minister’s Mokonyane’s administration. These challenges are documented, to an extent, by a comprehensive organisational review of DWS commissioned in 2015 (Department of Water and Sanitation 2015a), although it did not engage with dynamics within the Department in any fundamental way. These challenges, however, subsequently intensified; and, as this article demonstrates, by late 2017 DWS was not only dysfunctional but close to a state of institutional collapse.

Accordingly, in general, this article holds the position that state capture in DWS took root in, and as a result of, an already weakened department. The repurposing of DWS for state capture hence overlaid and was enabled by preceding institutional trends such as deskilling and a focus on centralised, large engineering projects susceptible to widespread corruption and rent-seeking. In particular, this article identifies features of state capture within the Ministry and DWS and the ways in which capture cascades into, interacts with and intensifies institutional dysfunction. Three features of state capture are most evident in developments within DWS. These include: securing control over the public service and weakening controls, centralising control over institutions, and shaking down regulation (monitoring and compliance). The relationship and impacts, as illustrated in figure 1, are discussed fully in the following sections.

Figure 1: Features of state capture (Bhorat et al. 2017) and institutional impact in DWS

Feature of state capture	Institutional impact or feature
Securing control over the public service and weakening controls	↓ erosion of human resources, including high staff turnover and vacancy rates
	↓ erosion of financial management, including over-expenditure, accruals, increased debt, overdraft, irregular expenditure and poor revenue collection
	↓ poor contract management
	↓ erosion of procurement and supply chain management
	↓ erosion of financial controls to identify unauthorised, irregular, fruitless and wasteful expenditure
	↑ increased risks of corruption
Centralising control over institutions	↓ reduced public participation
	↓ reduced transparency and accountability
	↑ increased risks of corruption
Shaking down policy and regulation (monitoring and compliance)	↓ reduced policy and legislative coherence, linked with intent to centralise control
	↑ increased corporate non-compliance with regulation
	↓ reduced compliance monitoring and enforcement
	↑ increase in issuing inappropriate licences and authorisations
	↓ erosion of monitoring systems
	↓ erosion of reporting systems
	↑ increased risks of corruption

Securing control over the public service and weakening controls

Two defining features of capture were manifest within DWS between 2014 and 2018: ‘securing control over the public service by weeding out skilled professionals’ and its corresponding implication of weakening procurement processes and financial controls (Bhorat et al 2017). There were unprecedented rates of staff turnover, an alarming number of vacancies, and top

level suspensions, which produced an environment in which staff members were vulnerable to arbitrary decision making. This allowed for the preponderance of DWS' budget to be allocated to infrastructure without corresponding outputs, severe financial mismanagement, with allegations of corruption surrounding the Minister's contracting of the largest infrastructure project, the Lesotho Highlands Water Project (LHWP). These are discussed below.

Vacancies and turnovers included those at the highest levels of decision making. Between 2008 and 2018, there were eight Director Generals (DGs), including four Acting DGs, in DWS; this includes a period of thirty months where the position of DG was vacant. Overall, nearly 900 posts within DWS were vacant as of June 2017, according to a National Treasury report, including 21 vacant positions in the office of the DG (Portfolio Committee on Water and Sanitation 2017a). The fact that this occurred over a ten year period supports an interpretation that Ministers intentionally undermined management and formal oversight of operations.

The suspension of senior management in DWS became commonplace. In May 2017 the DG confirmed that four senior officials - all in key decision making positions - had been suspended. This included the Deputy Director General (DDG) for Water Resource Infrastructure, the Chief Financial Officer (CFO) of the Water Trading Entity, the Chief Director: Sanitation and Bucket Eradication Project and the DDG for Regulation. DWS officials failed to give reasons for these suspensions, stating only that they had to do with 'consequence management' (Portfolio Committee on Water and Sanitation 2017b). Given the overall environment within DWS, it is not plausible that 'consequence' related to a clean-out of the Department. Amongst Portfolio Committee members there were, furthermore, widespread allegations that the rationale for these suspensions related to political allegiances and removing officials that opposed corruption, rather than performance management (Portfolio Committee on Water and Sanitation 2017a),

The high turnover rate of accounting officers - nine different officers between 2009 and 2017- is especially alarming. This led the Office of the Auditor-General of South Africa (AGSA) to express concern about ‘instability’ in the accounting department (Portfolio Committee on Water and Sanitation 2017c). In 2015/16 DWS and Water Trading Entity (WTE)¹ received a qualified audit from AGSA on the basis of ‘unauthorised, irregular and fruitless and wasteful expenditure’ since they lacked adequate controls. In particular, DWS converted indirect grants into direct grants and applied incorrect accounting practices (Portfolio Committee on Water and Sanitation 2017d).

Overspending by DWA was rampant. According to a report by the Deputy Minister in May 2017, DWS’ account was R2.6 billion overdrawn. This debt increased nearly nine-fold in one year, from R454 million in 2016 (Department of Water and Sanitation 2017a).

This clearly related to lucrative, large construction projects to build water infrastructure. Financial mismanagement of infrastructure projects was a particular concern raised in the AGSA report. In the 2016/17 financial year, for instance, DWS overspent on its budget, allocating 99.6 per cent to infrastructure programmes², while under-spending on a number of other programmes. However only 28 per cent of the objectives outlined in the Department’s Strategic Plan were achieved. In 2017 it was reported in a media release that DWS paid service providers R1 billion per month (Department of Water and Sanitation 2017a); a PC: WS member explained: ‘various construction projects engaged in by the DWS are all behind and the costs are escalating. People have been employed by the DWS for the purposes of those construction projects and are being paid monthly, but no work is currently being done’. This level of spending on infrastructure, while not achieving objectives, at best highlights poor budget and programme management and at worst points toward officials’ corrupt workings with private sector companies.

An increasing number of allegations of corruption related to water projects have been levelled at DWS. The Special Investigative Unit (SIU)'s investigations have resulted in 58 referrals to the National Prosecuting Authority (NPA) for prosecution and to DWS for civil action and internal disciplinary proceedings. Nine of these referrals related to former and current DWS officials contravening of the Prevention and Combating of Corrupt Activities Act, 2004 (Portfolio Committee on Water and Sanitation 2017).

In particular, corruption allegations have been raised in relation to large infrastructure projects. Most well-known is the Lesotho Highlands Water Project (LHWP), or 'Watergate'. Its second phase, construction of the Polihali Dam, has been repeatedly postponed due to alleged interference by the Minister and her 'irregular appointment' of LTE Consulting without following a proper tender process (*amaBhungane*, August 05, 2016). The issue has also been subject to a probe by the Public Protector, in 2016, who confirmed referring allegations of irregularities to the AGSA.

Prior to being awarded this tender, LTE Consulting was subject to a probe by the SIU, in connection with R5 billion worth of water and sanitation contracts in one year, allegedly awarded to the company without following regular tender or procurement processes. In the case of the LHWP, consultation costs could amount to as much as R2.6 billion. Mokonyane, LTE and others have been implicated in obtaining large infrastructure projects in Giyani and in the design and construction of Nwamitwa Dam outside Tzaneen without tenders. It has also been alleged that LTE Consulting has contracted and paid stakeholders involved, and donated more than R3.5 million to the ANC (*City Press*, July 10, 2016; *amaBhungane*, August 05, 2016).

Further, media reports highlight a number of irregular hiring and firing practices undertaken by the Minister and DWS, allegedly in order to ensure 'favourable' people are involved with

the LHWP. This included the removal of officials who had denied LTE tender opportunities. For instance, in October 2015 the Minister removed South Africa's chief delegate³ on the LHWP, who had ten years of previous experience in water megaprojects, offering no reasons. She was replaced by the former Gauteng MEC for infrastructure development⁴, who served under Minister Mokonyane during her tenure as Gauteng Premier and worked alongside her in ANC provincial structures. Lesotho's chief delegate⁵ to the Lesotho Highlands Water Commission (LHWC) was also removed in April 2015. The reason for the removal was alleged insubordination⁶. Media reports suggest that the chief delegates of South Africa and Lesotho were removed after meeting with LTE Consulting and refusing to give the company tenders without going through the formal process. According to reports, the Minister along with Lesotho politicians removed and replaced officials seen as obstacles, resulting in the 'hijacking of the bilateral (LHWC)' (*City Press*, July 10, 2016).

Soon after LTE Consulting's involvement in the project, DWS rejected bids from other companies for a number of tenders. Due to repeated postponement the Minister announced that the project is only scheduled for completion in 2025 (rather than 2018). According to the Wits School of Governance, a six-month delay in a project of this magnitude would cost about R500-million. The delay and extension of completion date to 2025 will result in total costs of up to R26 billion. Further, the delay will have significant impacts on water security and access (*amaBhungane*, August 05, 2016).

Corruption related to the LHWP was not isolated to Minister Mokonyane's tenure. During Phase One of the LHWP, in the 1980s and 1990s, massive corruption was uncovered. In 1999, a Lesotho court found the chief executive of the Lesotho Highlands Development Agency (LHDA) guilty of accepting bribes from multinationals to secure tenders in the LHWP. More than 12 multinational firms and consortiums were found to have bribed the CEO of the project (Institute for Security Studies in South Africa 2012). The case drew considerable international

attention. However, it is evident that under Minister Mokonyane's administration, corruption related to the LHWP was aggravated. According to the Executive Manager of the Trans Caledon Tunnel Authority⁷, construction tenders worth between R1 million and R1 billion have been advertised for the second phase of the R25 billion LHWP (*amaBhungane*, August 05, 2016) and according to National Treasury, the main source of the Water Trading Entity debt was money owed to the Trans Caledon Tunnel Authority (Portfolio Committee on Water and Sanitation 2017c).

Centralising control over institutions

Such control over appointments and financial management relate to a second important feature of state capture-- the centralisation of power (Public Protector 2016). Centralisation is not always undesirable. While decentralisation allows for a greater level of participation by a number of groups in an organisation (Van de Ven and Ferry 1980), a level of centralisation can result in improved coordination (Ostrom et al. 1999). However, in the case of state capture, 'greater coordination' is used in repurposing or 'reconfiguring the way in which a given state institution is structured, governed, managed and funded so that it serves a purpose different to its formal mandate' (Bhorat et al. 2017: 5).

The most obvious move toward centralisation was through legislation providing additional powers to the Minister through the draft Water and Sanitation Bill. Following significant concerns raised by the Economic Sectors, Employment and Infrastructure Development cluster⁸, the State Law Advisor refused to certify the Draft Bill on account of it not being aligned with the Constitution and because it 'purports to afford functions to the Minister of Water and Sanitation that are exclusive municipal competences' (Portfolio Committee on Water and Sanitation 2017f).

Another way to centralise power is through intentionally weakening or disrupting institutions and formal executive processes (Bhorat et al. 2017). Notably, in 2017, the Minister spearheaded processes for widespread institutional change and reform of several water institutions including Catchment Management Agencies (CMAs), the Water Tribunal and Water Boards. Although proposals for reform of these water institutions may have preceded Minister Mokonyane's tenure, the specific manner in which it was undertaken under her leadership alludes to a deliberate attempt at destabilisation and centralisation.

First, catchment Management Agencies are an institutional means of decentralising decisions related to the management of water resources to the catchment level. While it has been a stated policy intention of DWS since 1997 (reiterated in 1998 and 2013)⁹, DWS Ministers, particularly Mokonyane, have continued to delay and undermine their establishment over the last decades, with the effect of retaining DWS decision-making powers about the regulation and allocation of water to mines, agriculture, industry and domestic users.

Over the past decades only two CMAs have been established, the Inkomati-Usuthu and Breede-Gouritz. Yet their functioning is severely limited by the failure of the Minister to delegate substantive water management functions to these CMAs, including the 'responsible authority' regulatory responsibilities (DWA, 2011). Then, in 2015, the Minister revoked the few powers that had been delegated to CMAs in 2010 and even earlier that year. One of the established CMAs received a letter from DWS saying that they would be properly consulted and 'workshopped' on the matter; this did not materialise, resulting in the resignation of a senior water resources manager and growing mistrust from stakeholders with whom strong institutional relationships had been established over years. This ongoing uncertainty and lack of delegation of substantive functions has hindered the establishment and effective functioning of CMAs.

Ministers have continued to vacillate about the formation of CMAs (as highlighted in DWS's own 2012 report), and Mokonyane made a clear move to dispense with them. While earlier Ministers may have been reticent and politically strategic about how they should be established, Mokonyane was clearly aiming to maintain centralised control over decision-making. This is evident in the changing number of intended CMAs. Originally 19 CMAs were planned along hydrological lines, and this was decreased to nine in 2013 along political or institutional lines (National Water Resources Strategy 2). Most blatantly, the intention of the Mokonyane to centralise power was exposed when she proposed in December 2017 that only one CMA be established.¹⁰ Ironically the document intended to explain the rationale for re-centralising control and 'consolidating' the nine CMAs, repeatedly highlighted the benefits of decentralised water governance, the value of the existing model of nine CMAs, the institutional problems associated with national DWS and problems with centralisation. One can speculate whether that document was written by bureaucrats frustrated by the one CMA proposal. This proposal was in direct opposition to national water policy that provides for the decentralisation of and public participation in water governance. Instead it would allow for DWS ability to assert influence over only one institution. Not surprisingly, there was virtually no scope for public consultation, further eroding civil society trust in water management institutions and undermining existing relations with government.¹¹

A second example of undermining water institutions relates to the Water Tribunal. Water disputes can be complex, and the resolution of disputes often requires technical and specialist knowledge to be effective. The Water Tribunal was established to be an independent, accessible and cost effective appeal authority for stakeholders, including communities and civil society, to resolve water disputes. As a result of its mismanagement and under-resourcing, it was unable to function as intended and stopped functioning altogether in December 2011. Only after litigation was brought against the Minister, was it reconstituted in 2015. The prolonged period

of inactivity resulted in a sizeable backlog. Then, in 2017, in response to a question posed in Parliament, the Minister announced that the Water Tribunal will be ‘discontinued’, arguing that the Water Tribunal has not been an ‘efficient, cost effective and speedy’ appeal mechanism.

Another powerful example of Mokonyane’s attempts to assert and centralise control over water institutions was through her destabilisation of water boards. Her destabilisation is alleged to be an attempt to get rid of leadership as a means of gaining influence over tenders. During her period as Minister, two inter-related changes occurred. First, she meddled with water boards, getting rid of CEOs, appointing her own leadership, and, through a merger, increasing the reach of Umgeni Water. She also attempted to disband the entire Overberg Water Board. (*City Press*, February 28, 2018) Second, while Treasury objected and the High Court held these actions to be unlawful (*Eyewitness News*, December 12, 2016), this destabilisation and meddling resulted in financial mismanagement, namely ‘poor budget management processes, supply chain management, irregular expenditure and poor management’. This was evident in only 33 per cent of water boards receiving unqualified audits in 2015/16 financial year, according to the AGSA report (Portfolio Committee on Water and Sanitation 2017d).

Through the control and destabilisation of CMAs, the Water Tribunal and water boards, Mokonyane centralised power so that she could assert influence or control key decisions about operations and their financing. While she was asserting this control, she was also ensuring that the regulation of her Department and its operations was weakened or did not take place.

Shaking down policy and regulation (monitoring and compliance)

Another key feature of state capture is ‘securing access to rent-seeking opportunities ‘by shaking down’ policy, regulations and law-making (Bhorat et al 2017, Dassah 2018). Instead of ensuring proper implementation of the National Water Act and the National Water Resource Strategy , during the same period that DWS exerted control through staffing and centralisation

described above, the Minister announced a range of sweeping legal and policy reform processes, proposing, inter-alia: the development of a Water and Sanitation Master Plan, Water and Sanitation Bill, an updated National Water Resources Strategy, new norms and standards for water and sanitation services, the above-mentioned proposal to establish a single CMA, establishment of a National Water Resource Management Agency, and an Economic Regulator for the water sector. Without overall policy direction and alignment of proposed policy and legislative changes, all of these processes together created significant policy and legislative uncertainty in the water sector. The lack of alignment between the proposed Bill and the Master Plan, issues of overlapping mandates, lack of public participation and general incoherence and uncertainty in the legal and policy environment related to water were raised by civil society actors and members of the PC: WS (Portfolio Committee on Water and Sanitation 2017d). This furthermore, in some way, can be seen as an intention by the Minister to distort the law-making process and shape rules to legitimise corruption (Hellman et al. 2000).

While these sweeping policy and legal reform processes created confusion in the sector, DWS, through neglect, undermined previously functional monitoring systems. The Blue Drop and Green Drop reports are arguably the only comprehensive assessments available to the public and water service authorities on whether water and wastewater treatment plants are complying with quality standards. Yet neither report has been published since 2013,¹² with considerable implications for water safety and quality. What information has been released shows that DWS is not releasing data because they show the dire state of South Africa's water, and DWS' clear failure to fulfil its legal obligations.

The preliminary findings of the Blue Drop 2014/2015 assessment, which was not published but presented to PC: WS, highlights worrying trends. Over a two year period the number of municipalities awarded blue drop status more than halved (98 in 2012 to 44 in 2014). DWS pointed to insufficiently skilled process controllers managing water treatment plants and a lack

of investment in infrastructure, as well as problems with monitoring and data management (Department of Water and Sanitation 2017b).

The initial findings of the Green Drop 2014/15 assessment indicates a rapid decline in water infrastructure and a rise in the critical risk categorisation. Of the 824 wastewater treatment works assessed, 212 plants fell within the critical risk category and 259 in the high risk category (Portfolio Committee on Water and Sanitation 2017g). These pose serious risks of completely untreated sewage entering rivers, streams and dams. Approximately 60 per cent of the wastewater treatment systems in North West Province are considered at high and critical risk (Portfolio Committee on Water and Sanitation 2017g).

The non-release of the 2013 Green Drop report, and the ongoing 'review' of the 2014 Green Drop assessment, was blamed on financial and capacity constraints as well as laboratories withholding data due to non-payment by DWS. DWS refusal to release the reports contributed to regressions in performance and mistrust between DWS and Water Service Authorities (Portfolio Committee on Water and Sanitation 2017g). Initial findings mirror those raised in the blue drop report, with the addition of poor maintenance of sewer pump stations and the lack of inflow-monitoring metering possibly resulting in WWTW's becoming overwhelmed (Department of Water and Sanitation 2017b). Without these reports it is difficult to improve management, operations and risk mitigation or to plan remedial action and refurbishment of plants.

Interference with monitoring is not only evident in the non-release of these reports. The ability to conduct monitoring and oversight in the future is also constrained by the dramatic decline in the sampling of water quality. Only a few variables are tested¹³, and in-flow and/or effluent quality monitoring are also lacking. Moreover changes in service providers have had serious

repercussions; for example, there was no regular monitoring of the Upper Vaal for nearly three years and no data on flows in the Olifants during the worst drought in on record.¹⁴

Institutional mismanagement has had a direct impact on compliance monitoring and enforcement (CME). While the Blue Scorpions are expected to serve as a backbone of CME, they receive insufficient training and have many unfilled vacancies. DWS has only 35 compliance and enforcement officials for the whole country, and has never published a specific water compliance and enforcement report. In some provinces there are no Blue Scorpions to monitor rivers (Department of Environmental Affairs 2017).

Yet even when offenders are identified, DWS has failed to undertake meaningful enforcement (2016/17 National Environmental Compliance and Enforcement report). In 2016/2017, 76 facilities (of the 321 inspected) were found to require enforcement action, yet DWS has zero convictions for criminal offences. Pre-directives seldom result in directives being issued; even if they are issued, compliance is seldom enforced (Department of Environmental Affairs 2017).

This is particularly the case with mines. No mine completely complied with its water use license (WUL) in 2016/7. Of the 111 mines monitored, 55 were significantly non-compliant; of these, 25 were referred for enforcement action and the others were requested to provide action plans to address non-compliance.¹⁵

At the same, DWS has issued many WULs, including for mining in protected environments. Rather than refuse WUL applications, these are issued with stringent conditions. Mining companies that cannot or are unwilling to comply with these conditions request an amendment. As a result, prospecting or mining goes ahead in highly sensitive environments. Since January 2008 DWS has only suspended one WUL.¹⁶

Publishing CME data and statistics deters other offenders and builds transparency and accountability. In 2015 DWS committed publically to publish such an annual report (Department of Water and Sanitation 2015b), but it has not done so. The failure of DWS to make CME data publicly available has made it easy for companies with extremely detrimental impacts on the environment to hide the status of their often dismal environmental compliance. These impacts have devastating consequences for local communities living around mines and industrial facilities.

Civil society response to state capture in DWS and opportunities for reform

It is important to understand the second phase of capture that is discussed above, and then to consider the ways in which civil society is responding and the possible implications of such a response. It is plausible that the captured system may be extended and reinforced, whether or not there are attempts at reform. However it is also possible that social forces may align to hold DWS accountable and, under new Ministerial leadership, to undertake changes to the systemic problems that have been created (*Engineering News*, June 6, 2018). This would require a deeper challenge of existing systems.

Civil society organisations (CSOs) appear keen to play a role in holding DWS accountable, but how effective they are in doing so depends on their approach to government. Clearly those portrayed as supplementing or collaborating with government are not positioned to do so. Better positioned are those which aim to complement or reform it, or oppose it.¹⁷ Historically South African CSOs have positioned themselves ideologically as technical or social change organisations (Galvin 2005; Galvin 2010). CSOs on the ‘technical’ side of the continuum undertook public tasks delegated by the state (Hall 1987; Colston 1998; Ryan et al. 2006; Ayres, 2013), particularly with the influence of neo-liberalism in the 1990s (Princen et al. 1995: 54). One example was CSO implementation as part of DWS’ Masibambane programme. On

the ‘social change’ side of the continuum, CSOs mobilised in the streets and in the courts against government, such the Anti Privatisation Forum in *Mazibuko vs the City of Johannesburg*. Between these extremes, still other CSOs have engaged with government, monitoring its delivery and using this to critique and challenge its policies. Arguably this has influenced officials to change their approach (Galvin 2016). This approach has been taken by the South African Water Caucus (SAWC), which was initiated in 2002 and now has over 20 CSO members across the country.¹⁸ SAWC has spent many years building relationships with DWS officials and regional managers. However the institutional decline in DWS over the last decade inevitably led CSOs toward greater confrontation with government, and toward the social change side of the continuum. Social change CSOs, together with communities across the country, scaled up their protest and the SAWC was increasingly vocal around DWS dysfunctionality. Clearly there is latitude for CSOs to shift the way in which they engage with government, depending on their strategic calculations within the changing context of governance (Najam 2000; Bebbington and Farrington 1993).

Perhaps most interestingly, during this time state institutions including as PC:WS, SCOPA and the Special Investigative Unit, AGSA and National Treasury, placed the Minister and DWS under greater scrutiny through enquiries and investigations to hold them to account and provide checks and balances to power and corruption. Their goals and even preference for strategies became far more akin to the confrontational ones of CSOs. This opened up opportunities for new cooperative relations between state institutions and CSOs. Thus, it can be argued that DWS dysfunctionality degraded its relationship with CSOs but new relationships with other state institutions created opportunities for CSOs to play a more effective role in monitoring and holding DWS accountable (Sanyal 1994; Ryan et al. 2006; Commuri 1995).

In terms of substance, SAWC’s position is to challenge each aspect of DWS dysfunctionality and state capture. Most importantly this includes calling on DWS to hasten the establishment

of CMAs to decentralise water governance; prioritise and allocate appropriate resources, including funding, staff and training for compliance and enforcement capacity; recommit to the Blue Drop-Green Drop reporting system and undertaking effective remedial action; and urgently address wastewater treatment works at ‘critical risk’ with adequate resources and skills. In terms of process SAWC also advocates opening up of policymaking processes, access and transparency in decision-making, public participation and consultative processes to enhance accountability, and the strengthening of oversight, regulation, monitoring and enforcement mechanisms (Martin and Solomon 2017).

Although there are signs of scope for reform, it is important to distinguish between reforms that challenge the systemic problems and those which clearly do not. Since his appointment in 2018, the new Minister and DWS have made public commitments and taken various actions intended to improve governance, contract and financial management, accountability, enforcement, institutional reform and proper service delivery (*Business Day*, May 23, 2018; *Infrastructure News*, May 29, 2018). In his 2018/19 budget speech he considered concerns raised by critical state institutions and civil society, and committed to ensuring proper expenditure of funds and taking disciplinary measures and engaging law enforcement state agencies where necessary. Further, announcements by the Minister and DWS suggest a renewed commitment to the previous policy goals and strategies. In particular the Minister stated his commitment to ‘hasten the establishment of Catchment Management Agencies in the remaining Seven Regions’ and to enforce the ‘polluter pays principle’, including community engagement and participation (*Engineering News*, June 6, 2018). However, even taking these commitments at face value, the space to make systemic changes within DWS are severely circumscribed, even by a new Minister.

It would be naïve to suggest that efforts of civil society with the above state institutions could alone achieve the necessary systemic changes, even with the support of the Minister. While it

is not in the scope of this article, the barriers to making systemic changes needs exploration. In *How to Steal a City*, Olver (2017) shows how the way in which the ANC functions in terms of fundraising, elections, and caucuses results in corruption. The scope for accountability is limited by the present electoral system, party over constituency, and the power of the executive branch within the legislative and judicial branches.

Conclusion

The second stage of state capture in DWS has considerable implications for its ability to operate effectively. It has contributed significantly to gross environmental injustice through water and environmental resource degradation and corresponding violations of environmental and water rights as well as a failure to ensure adequate bulk infrastructure.

The transformation needed in the 2020s is to address the havoc wrought by state capture. This means reviewing the ‘rules of the game’ and turning around governance and policy landscapes. In government departments such as DWS this means filling vacancies, including high levels ones, with competent professionals and strengthening financial management; reversing centralisation of decisions, through the decentralising water resource management through CMAs; and strengthening systems that provide feedback and checks and balances, such as monitoring and reporting systems, CME and reviewing of WUL applications.

How the required systemic change can be achieved, and the obstacles to such attempts, will depend on the power of forces demanding change. Having state institutions that are willing and able to place government departments such as DWS under greater scrutiny through enquiries and investigations is critical to doing so. Together with progressive CSOs, mobilised community members, and a critical press, it may be possible. Not only is this a turning point in testing the power of South Africa’s democracy to curtail capitalist greed, but it is also critical

to achieve its original vision of transformation—a system that meets the socio-economic needs of its people.

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End notes:

- ¹ The National Water Act makes provision for cost recovery on services rendered by DWS to water users. With this as a rationale, DWS created the Water Trading Entity (WTE). The WTE sits within DWS administration with limited separation of functions from DWS's Main Exchequer Account. The DG is accountable for the functioning of the WTE and acts as the accounting officer of the WTE. The funding of its activities comes from the DWS equitable share as a transfer and through revenue collection from the various water schemes operated throughout the country.
- ² National Assembly, Question No. 1601. Date of publication in internal question paper: 9 June 2017 (Internal Question Paper No. 21)
- ³ Dr Zodwa Dlamini
- ⁴ Bheki Nkosi
- ⁵ Charles Putsoane
- ⁶ The Lesotho Highlands Development Authority is currently operating without a board of directors following a series of resignations and dismissals.
- ⁷ Trans Caledon Authority manages the project for SA and the Lesotho Highlands Development Authority manages it for Lesotho.
- ⁸ National Assembly, Question No. 2303. Date of publication in internal question paper: 14 August 2017 (Internal Question Paper No. 26)
- ⁹ The establishment of CMAs has been official policy since the White Paper on a National Water Policy for South Africa, 1997 (National Water Policy), and reiterated in the National Water Act, 1998 and the National Water Resource Strategy, 2013 (NWRS2).
- ¹⁰ On 15 December 2017 the Minister published a 'Proposal for the Establishment of the Single Catchment Management Agency' along with a 'Business Case'.

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- ¹¹ Civil society members became aware of the intention of the Minister to commence the process of consolidating the nine CMAs prior to the publication of the proposal. Further, there was lack of coordination related to *inter alia* the Proposal for Establishing a Single CMA and the Draft Master Plan which states '*[t]he plan is to establish one CMA structure in SA under the Schedule 3a of the PFMA, to manage water resources in the country*'¹¹ The Draft Master Plan was published for comment before the 'Proposal for the Establishment of a Single CMA' which created the impression that the consolidation of CMAs was a *fait accompli* regardless of the outcomes of public participation.
- ¹² The Blue Drop and Green Drop certification programme was initiated in 2008. Since its inception, Blue Drop assessments were done in 2009, 2010, 2011 and 2012. The first Green Drop report was published in 2012. DWS did not finalise the 2014/2015 Blue Drop progress report, citing financial and capacity constraints. It did a partial assessment in 2017 (Portfolio Committee on Water and Sanitation 2017g).
- ¹³ Acid mine water contains a broad spectrum of metals in toxic concentrations as well as uranium, but testing is limited to total dissolved solids, pH, electrical conductivity, manganese, sulfate, and iron. Sampling is only done once a month, with no allowance for *inter alia* diurnal fluctuations, pollution incidences and rainfall events.
- ¹⁴ A change in service contractor between ERWAT and CSIR meant that water quality in the Upper Vaal was not monitored for two years and nine month, except for some ad hoc monitoring. Issues related to switching to another service provider also resulted in a lack of data on available flows in the Olifants for three months during the worst drought on record.
- ¹⁵ National Assembly, Question No. 2600. Date of publication in internal question paper: 1 September 2017 (Internal Question Paper No. 31)

¹⁶ WUL denied for agricultural water use (irrigation) for Aganang Beef. National Assembly, Question No. 1054. Date of publication in internal question paper: 5 May 2017 (Internal Question Paper No. 15).

¹⁷ Typologies of many authors portrayed CSOs in similar categories. See Coston 1998; Fisher 1995; Waddell 1998; Young 1999, Clark 1991; Najam 2000; Salamon 1987; Brown and Lyons 1995.

¹⁸ <http://www.emg.org.za/programmes/climate-change/35-uncategorised/43-sa-water-caucus>