A CRITIQUE OF SOUTH AFRICAN ANTI-CORRUPTION STRATEGIES AND STRUCTURES: A COMPARATIVE ANALYSIS

by

BERNARD KHOTSO LEKUBU

Submitted in accordance with the requirements for
the degree

of

DOCTOR OF LITERATURE AND PHILOSOPHY

in the subject

Criminal Justice

at the

UNIVERSITY OF SOUTH AFRICA

Promoter

Prof. Dr Omphemetse S. Sibanda

PRETORIA

FEBRUARY 2019

DEDICATION

This thesis is dedicated to my mentor, brother, father, friend and confidant, Professor Moses Montesh, who sadly passed away on the 3rd of February 2016 before he could witness the final outcome of my work. Prof, I know for a fact that you are exceptionally proud of me wherever you are. You have always insisted that I put my all in everything else and today I am proud to say, your lessons have made me who I am today. *May his departed soul rest in eternal perfect peace*. I will forever carry you in my spirit and pray for your family more than I pray for myself, especially your little princess (Michelle).

ACKNOWLEDGEMENTS

First and foremost, I would like to thank the Almighty God for the gift of wisdom bestowed upon me, the time, energy, strength and most importantly all the blessings. The cost of educating oneself can be quite pernicious and even inscrutable at times when family and friends cannot comprehend your plans and goals in life. I must also submit that this has been the longest thorny road to walk on. People will try anything and everything to block, distract and derail you, but "I pray a living God".

Secondly, I would like to take this opportunity to convey my sincere and profound gratitude to my family, my mother Agnes Gosalamang Lekubu, my brothers William, Levy, Lebogang, Kopano, a special one to my twin sister (Lorato), all her kids, and furthermore, a very very special one to all my wonderful and lovely kids. To all my friends that have always supported me (Mr Vusi Mathete and Mr Mpole Makoko), I salute you. Thank you so much for being patient with me even at times when you needed me the most; I had a plan and I wanted to execute it. Thirdly, it would be remiss of me not to acknowledge a friend, a brother-from-another-mother, one of the four musketeers, Professor Vinesh Basdeo. Prof., thank you so much for all your support, guidance and your valuable assistance in this work. From the beginning of this project, you have always been there. In the midst of everything else, we lost a friend, a brother, a mentor, one of the musketeers and most importantly a disciplinarian: Professor Moses Montesh – *May his departed soul rest in eternal perfect peace.*

My sincere gratitude and appreciation goes out to the 03h00 am squad initiator, Prof. Mamokgethi Phakeng (Mkhaya). Prof., thank you so much for all your words of encouragement, your unwavering support during your stay at Unisa and afterwards. You used to say to most, if not all of us "*Ulala kanjani ungana PhD*" and trust me; these words gave me sleepless nights. I have made it. Thank you ever so much for everything you have ever done for me. I salute you.

May I also take this opportunity to acknowledge and thank Prof. Rushiella Songca. Prof., thank you so much for all the wise words of encouragement, the support and time off work to complete this project. You have always said to me "Benni, keep your eye on the ball, this one is for you to take." I held on to those words; from the bottom of my heart, I wish and want to thank you most sincerely.

I would also like to express my sincere gratitude to the College of Law CRIC members. Thank you so much for all the support (in pecuniary form as well) and for allowing me the time and space to finalise my studies. Prof. Puseletso Letete: "*O bosso wena*" thank you so much.

Now for the man of the moment, Prof. Omphemetse S. Sibanda, my mentor, brother, friend and most importantly, my promoter, my "*yonke'into*". Prof., no words, actions or expressions can ever be enough to say "Thank You" to you. When I was in limbo with my studies, you came like a God-sent angel and rescued me. Words can never be enough to express how I feel. It has been an intricate, thorny and challenging experience, yet exhilarating on the other hand but we came out victorious amid all the challenges. I will forever be indebted to your wisdom and the sacrifices you have made for me to see me through, like the family quality time I took away from you, simply because I also wanted to be counted amongst the best. "You are a star". May the Almighty God continue to bless you in abundance and fulfil your dreams and wishes. My sincere gratitude as well goes out to your wife and children, for lending me a piece of you when you could have had quality time with them. Even when Orlando Pirates beat Kaizer Chiefs 3–1 at the peak of this work, it was a bitter pill to swallow but we soldiered on. We had a goal and a plan and we finally achieved it.

"If you can't fly, then run; if you can't run, then walk; if you can't walk, then crawl, but whatever you do, you have to keep moving forward."

Martin Luther King Jr.

ABSTRACT

The ill-effects of corruption on the society, polity and economy of a country are far reaching. They have a corrosive effect on the rule of law, on governance and on the welfare of the society. The Constitution of the Republic of South Africa of 1996, which is the supreme law of the country, places as an expectation and obligation on the government accountability of state, and a government free of corruption and the malignancy of economic nepotism. South Africa's anti-corruption framework is designed as a control-based approach that is multi-faceted and executed through legislation, supporting regulations, audit trails, anti-corruption structures, law enforcement, and public vigilance and reporting structures, amongst others. Be that as it may, South Africa is battling the scourge of corruption and other self-serving behaviours, often amongst the upper echelons of governing power, as demonstrated by the State capture. Some of the acts of corruption stems from the very same institutions that are meant to be the upper guardians of law and order. Numerous corrupt practices occur almost daily, including but not limited to fraud, bribery, extortion, nepotism, conflict of interest, cronyism, favouritism, theft, fronting, embezzlement, influence-peddling, insider trading/abuse of privileged information, bid-rigging and kickbacks and money laundering. The list is not exhaustive. Based on the findings of this study, numerous recommendations and /or suggestions are made. The value of the study lies in the contribution it makes in South Africa's fight against corruption to become comparable to countries whose corruption perception index is all time favourable, such as Botswana, Seychelles, Hong Kong and Singapore.

DECLARATION OF ORIGINALITY

I, Bernard Khotso Lekubu (student number 3187-9373), hereby declare that this thesis titled **A CRITIQUE OF SOUTH AFRICAN ANTI-CORRUPTION STRATEGIES AND STRUCTURES: A COMPARATIVE ANALYSIS** has not previously been submitted by me for a degree at any other university; that this is my own work in design and execution and that all material from published sources contained herein have been duly acknowledged.

_____

BK LEKUBU

FEBRUARY 2019

PRETORIA

LIST OF ACRONYMS

ANC	African National Congress
ACA	Anti-Corruption Agency
AFU	Asset Forfeiture Unit
AGSA	Auditor-General of South Africa
AU	African Union
AUCPCC	African Union Convention on Preventing and Combatting Corruption
BEE	Black Economic Empowerment
CAACC	Commonwealth Africa Anti-Corruption Centre
CECA	Corruption and Economic Crime Act
CPIB	Corrupt Practices Investigation Bureau
CLEAS	Comprehensive Law Enforcement Accountability System
DPCI	Directorate for Priority Crime Investigation
DPSA	Department of Public Service and Administration
DCEC	Directorate on Corruption and Economic Crime
GPAD	Governance and Public Administration Division
IACC	International Anti-Corruption Court
IACCC	International Anti-Corruption Cooperation Centre

ICAC	Independent Commission against Corruption
ICC	International Criminal Court
ICD	Independent Complaints Directorate
ICOB	Independent Civilian Body
IPID	Independent Police Investigation Directorate
LEID	Local Government Ethics and Integrity Directorate
MACC	Minimum Anti-Corruption Capacity
MFMA	Municipal Financial Management Act
MP	Member of Parliament
NA	National Assembly
NCOP	National Council of Provinces
NDP	National Development Plan
NDPP	National Directorate of Public Prosecutions
NEC	National Executive Committee
NEID	National Ethics and Integrity Directorate
NPA	National Prosecuting Authority
NPC	National Planning Commission
OECD	Organisation of Economic Co-operation and Development
OUTA	Organisation Undoing Tax Abuse

PCCA	Prevention and Combating of Corrupt Activities Act, No.12 of 2004
PCO	Prevention of Corruption Ordinance
PEID	Provincial Government and Integrity Directorate
PFMA	Public Financial Management Act
POBO	Prevention of Bribery Ordinance
PSC	Public Service Commission
PP	Public Protector
RHKPF	Royal Hong Kong Police Force
SACU	Special Anti-Corruption Unit
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SALGA	South African Local Government Association
SAPS	South African Police Service
SARS	South African Revenue Services
SCA	Supreme Court of Appeal
SIU	Special Investigating Unit
SOEs	State-Owned Enterprises
SASSA	South African Social Security Agency
UNCAC	United Nations Convention Against Corruption
UNDP	United Nations Development Program

LIST OF FIGURES

LIST OF TABLES

KEYWORDS

Accountability

Anti-corruption commission

Bribery

Corruption

Constitution

Ethical leadership

Good governance

Oversight

State capture

Poverty

LIST OF APENDICES

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION AND RESEARCH PROBLEM

1.1 INTRODUCTION

> [C]orruption is a serious criminal offence, which threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society (Liberati, 2000).

On the 25th of February 2013 the heads of Anti-Corruption Agencies of the 19 Commonwealth African Countries, namely: Botswana, Cameroon, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda and Zambia, met in Gaborone (Botswana) to launch an anti-corruption partnership Commonwealth Africa Anti -Corruption Centre (CAACC). Currently, South Africa is represented at the CAACC by the Special Investigation Unit (SIU). The creation of CAACC, in my view, was by great measure an indication of the awareness and acknowledgement by the CAACC that a concerted effort is needed to fight corruption. It was noted by Dr Roger Koranteng, the commonwealth governance advisor, at the CAACC regional conference held from 25th -29th May, 2015 at Bahari beach hotel, Daresalaam Tanzania, under the theme “engaging the civil society as partners in the fight against corruption” that the lack of political will is one of the main impediments to fighting corruption in Africa and the institution to fight corruption.

The 2013 National Development Plan 2030 (NDP) has as its vision a state free of corruption and corrupt activities (see Pillay, 2016:124). This vision appears to be fast becoming just a pipe-dream. Like in many countries that have transition from undemocratic to democratic government South Africa has not been saved from state capture and the rise of corruption and corrupt activities. There is a non-abating prevalence and evidence of the scourge of corruption and other self-serving behaviours, often amongst the upper echelons of governing power. The government, citizens and law enforcement agencies are calling for immediate measures to be taken to combat corruption or to at-least address factors that make corruption so rampant in the country. Undoubtedly, the effectiveness of the anti-corruption agencies in South Africa plays a great role in the realisation of the prescripts of the NDP regarding corruption prevention.

Corruption is a prevalent and continuing problem throughout the world. Its corrosive impacts are beyond any measure. The ill-effects of corruption on the society, polity and economy of a country are far reaching. Corruption is the epicentre of many political, economic and social ills in many countries. It is omnipresent in different forms and proportions, with devastating effects on the lives of common citizens and the whole of society (Sibanda, 2015:1). Its corrosive effect has been more pronounced and deeply felt in the public sector of developing countries like South Africa. As Hanna, Bishop, Nadel, Scheffler, and Durlacher, state (2011:2):

> In many developing countries, public sector corruption is a key barrier to effective service delivery. Corruption can prevent the equitable allocation of goods and services to citizens by seeping into all aspects of life, from starting a new business to getting a passport or to seeing a doctor. It can take many forms, from bureaucrats asking citizens for bribes to perform basic services, to hospital employees stealing medicines that were meant to be distributed to the poor, to bureaucrats receiving salaries for jobs that they do not accomplish. On a macro level, many scholars believe that corruption impedes economic growth and development.

It is trite to say that South Africa is facing a scourge of corruption and other self-serving behaviours, often amongst the upper echelons of governing power, which is often labelled a symptom of apartheid. In the case of *Glenister v the President of the Republic of South Africa and Others* (Glenister II), the South African Constitutional Court observed that "[c]orruption has become a scourge in our country and it is posing a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights". As aptly summarised by the UN Office on Drugs and Crime:

> Corruption is an insidious plague that has a wide range of corrosive effects on societies. Corruption undermines democracy and the rule of law. It leads to violations of human rights, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish (UN Office on Drugs and Crime, 2004:iii).

As Ahmed *et al*., (1992) correctly note, there are many areas in which corruption is likely to take place. Examples are the state procurement and tender processes; the disposal, sale and allotment of government property; embezzlement of public funds; and many other shop-floor malpractices.

Though this study does not intend to look at specific corruption and corrupt practices, it suffices to state that corrupt practices include but are not limited to: fraud, bribery, extortion, nepotism, conflict of interest, cronyism, favouritism, theft, fronting, embezzlement, influence-peddling, insider trading/abuse of privileged information, bid-rigging, rent-seeking, state capture, kickbacks and money laundering. The list is not exhaustive and many of the practices/crimes are indeed not listed as crimes by South African substantive criminal law, which makes policing and managing them a greater task both legally and administratively.

Numerous institutional, legal and regulatory frameworks exist in South Africa designed to combat corruption or to allow for mechanisms to combat corruption (O'Brien, 2013:3–6; Kututwa, 2005:5; Majila, Taylor & Raga, 2017:88-89; Mosselini, 2013:3–4; Naidoo, 2012:10; Adetiba, 2016:27). In brief, the current approach to combatting corruption occurs within a legislative framework supported

by institutions that implement and effect the mandate extended by enabling statutes. The control-based approach is multi-faceted and executed through legislation, supporting regulation, audit trails, anti-corruption structures, law enforcement, and public vigilance and reporting structures, amongst others." From a structural or institutional perspective the following are examples of structures/institutions with anti-corruption or corruption investigation mandates in the South African milieu: the Office of the Public Protector, as it discharges its functions and obligations as mandated by sections 182–183 of the Constitution; the Auditor-General as mandated by sections 188–189 of the Constitution; the South African Police Service's (SAPS) Directorate for Priority Crime Investigation (Hawks); the Special Investigating Unit (SIU) established in terms of the Special Investigating Units and Special Tribunal Act, Act No. 74 of 1996 (SIU Act); the Asset Forfeiture Unit (AFU) established in the Office of the National Director of Public Prosecution to focus on the implementation of chapters 5 and 6 of the Prevention of Organised Crime Act, No. 12 of 1998; the Special Anti-Corruption Unit (SACU) launched in 2011 as part of the Department of Public Service and Administration with a mandate to assist the SIU; the National Treasury; and the Financial Intelligence Centre (FIC), established in terms of sections 2–45 of the Financial Intelligence Centre Act No. 38 of 2001.

In this study, a critical appraisal of the strategies and structures available in South Africa to combat corruption is undertaken. The study will interrogate various aspects of corruption and the responses thereto in the South African milieu.

South Africa is by no means an isolated example of corrupt societies, or a society burdened by a lack of appropriate response to corruption. It is submitted, however, that what is important is how the country responds to corrupt activities or to persons acting corruptly. The how part can be determined with reference to the success of the country's anti-corruption agencies and the clamping down of the prevalence and rise of corrupt activities.

1.1.1 The Challenge of the Escalation of Corrupt Activities in South Africa

Public perception of and dissatisfaction with corruption in South Africa has been on the upward trajectory over years. Grand scandals such as the State capture has dampened the jubilation of South Africa as the post-colonial Africa success story; and put a doubt on the efficacy of the country's anti-dumping agencies and normative frameworks. A review of the literature on anti-corruption legislation in South Africa reveals that it has not been successful, and highlights additional acts that need to be regarded by the law as offences. Corruption and corrupt practices have permeated all levels in society and the public service, painting anti-corruption efforts and the applicable framework as toothless. Interestingly, this is all happening in the presence of a myriad anti-corruption strategies, institutions and legislative frameworks. Masiloane and Dintwe (2014:186) remarked that the existence of numerous legislative and policy frameworks relevant to corruption and corrupt activities in the South African public sector has not reduced the growing scourge of corruption and its prevalence. According to Majila, Taylor and Raga (2014:223&227), there is every indication that corruption, particularly in the public sector, continues to escalate in South Africa. Indeed, historical anecdotes on corruption show that the problem is not abating either. For instance, the then head of the Special Investigating Unit (SIU) Willie Hofmeyr in his report to the Portfolio Committee for Justice and Constitutional Development in October 2011 stated that "SIU was investigating 588 procurement contracts valued at R9.1-billion and about 360 conflict-of-interest matters valued at R3.4-billion" (Sibanda, 2019a).

Cases of grand corruption, maladministration and illicit enrichment are common place in South Africa. For instance, a number of government executives have been found with hands in the cookie jar and their transgression widely reported. Notable being the Public Protector of the Republic of South Africa, report *In the extreme: Report No.11 of 2011/12 of the Public Protector on an investigation into allegations of a Breach of the Executive Ethics Code by the Minister of Cooperative Governance and Traditional Affairs, Mr Sicelo Shiceka, MP*, which addressed allegations that the late Sicelo Shiceka, then Minister for Cooperative

Governance and Traditional Affairs, misused government resources by visiting "a girlfriend in a Swiss prison" (Sibanda, 2019a). Also, the Public Protector report entitled *Against the Rules Too, Report of the Public Protector in terms of Section 182(1) of the Constitution of the Republic of South Africa, 1996 and Section 8(1) of the Public Protector Act, 1994 on an investigation into complaints and allegations of maladministration, improper and unlawful conduct by the Department of Public Works and the South African Police Service (SAPS) relating to the leasing of SAPS accommodation in Durban*, 2011. The report followed an investigation that Gwen Mahlangu-Nkabinde, then Minister of Public Works, was involved in the "awarding of two tenders worth R1,116 billion and R604 million respectively to a politically well-connected businessman for the lease of new premises for the SAPS at above reasonable market price" (Sibanda, 2019a). The most infamous corruption scandal related to the upgrades at the homestead of former President Jacob Zuma in Nkandla at the cost of R60-million. The allegations of corruption and maladministration of the Nkandla project were investigated and resulted in the issuing of the report by the then Public Protector Thuli Madonsela in 2013, entitled *Secure in Comfort: Report by the Public Protector on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province,* Report No: 25 of 2013/24, March 19 2014, which "revealed that the former president and his family had unduly benefited from upgrades which has escalated from R60-million to R246-million in costs" (Sibanda, 2019a).

Below is sample typology of recent commissions and enquiries relating to corruption and maladministration in South Africa, which is reflective of the challenge and malady of corruption and corrupt activities:

- *Commission of Inquiry into allegations for impropriety regarding Public Investment Corporation*: The Commission was appointed by the President of the Republic of South Africa on 17 October 2018, under section 84(2) (f) of the Constitution, under the Honourable Justice Lex Mpati, the former President of the Supreme Court of Appeal, as Commissioner. The mandate of the

Commission is, amongst others, to look into whether a director or employee of the Public Investment Corporation has misused their position for personal gain; and whether legislation or policies regarding the protection of whistle blowers reporting corrupt activities were complied with. The deadline of the Commission to submit an interim report of its findings was by February 15, 2019 and to submit their final report to the President on the April 15, 2019. The researcher had no sight on the interim report at the time of submission for examination.

- *National Prosecuting Authority Act: Enquiry into fitness of Advocate Nomgcobo Jiba and Advocate Lawrence Sithembiso Mrwebi to hold the office of Deputy National Director of Public Prosecutions and Special Director of Public Prosecutions:* The enquiry, led by Justice Mokgoro, was instituted in terms of section 12(6) of the NPA Act, also heard allegations of corruption and interference with the functions of the NPA is prosecuting corrupt activities.

- The Commission of Inquiry into allegations of fraud, corruption, impropriety or irregularity in the Strategic Defence Procurement Packages (SDPP): This Commission, popularly known as the Seriti Commission or the Armaments Procurement Commission, chaired by Judge Seriti, former judge of the Supreme Court of Appeal, was formally announced as constituted on 24 October 2011 by the President, in terms of section 84(2)(f) of the Constitution, to investigate allegations of fraud, corruption, impropriety or irregularity into the Strategic Defence Procurement Package (SDPP).
- *Enquiry into the fitness of advocate VP Pikoli to hold the office of National Director of Public Prosecutions, 2008*: This Enquiry, which was headed by Mrs F Ginwala, was another enquiry to question a head of the NPA's fitness and integrity to hold office, was established in terms of section 12(6)(a) of the NPA Act of 1998, following the suspension of Advocate Vusi Pikoli ("Adv Pikoli") from office as the National Director of Public Prosecutions ("NDPP") by the President on 23rd September 2007. In the context of this study, it is important to note that the terms of reference included determining: a) "Whether he, in exercising his discretion to prosecute offenders, had sufficient regard to the nature and extent of the threat posed by organised crime to the national security of the Republic" and "Whether he, in taking decisions to grant immunity from prosecution to or

enter into plea bargaining arrangements with persons who are allegedly involved in illegal activities which constitute organised crime, as contemplated in the NPA Act, took due regard to the public interest". (Pikoli Enquiry Report, 2008:6-6).

- The Commission of Inquiry into allegations of state capture, corruption and fraud in the Public Sector including organs of State, 2018: Currently this Commission, headed by the Deputy Chief Justice Raymond Zondo, has had ripple effect following sordid details of allegations of State capture and the supposed involvement of some government executives in enabling grand corruption and the capture of the state.

The challenge of South Africa as a country battling with combating corruption and related corrupt activities is further highlighted in the scores and the raking the country obtain in corruption perception index (CPI) of Transparency International. The CPI reflects South Africa as a country besieged by corruption and corrupt practices. For instance, South Africa scored 43 points out of 100 on the 2017 CPI.

Table 1: South Africa Corruption Index 2008–2018

Source: https://tradingeconomics.com/south-africa/corruption-index

Table 1 attests that South Africa's tumultuous relationship with corruption and corrupt practices seems to have hit high levels over the years, with the country's

international corruption perception index at a low. Corruption Index in South Africa averaged 46.79 points from 1996 until 2017, reaching an all-time high of 56.80 points in 1996 and a record low of 41 points in 2011. The escalating problem of high corruption perception of South Africa persists to date and there have been calls to put in place measures to address this. Responding to the 2017/2019 CIP, Sibanda (2019a) remarked that "CPI puts South Africa at an unenviable position number 73, with a score of 43 in the perceived level of public sector corruption out of 180 countries /territories in the world.

RANK	COUNTRY/TERRITORY	SCORE
1	New Zealand	89
2	Denmark	88
3	Finland	85
3	Norway	85
3	Switzerland	85
6	Singapore	84
6	Sweden	84
8	Canada	82
8	Luxembourg	82
8	Netherlands	82
8	United Kingdom	82
12	Germany	81
13	Australia	77
13	Hong Kong	77
13	Iceland	77
16	Austria	75
16	Belgium	75
16	United States	75
19	Ireland	74
20	Japan	73
21	Estonia	71
21	United Arab Emirates	71
23	France	70
23	Uruguay	70
25	Barbados	68
26	Bhutan	67
26	Chile	67
28	Bahamas	65
29	Portugal	63
29	Qatar	63
29	Taiwan	63
32	Brunei Darussalam	62
32	Israel	62
34	Botswana	61
34	Slovenia	61
36	Poland	60
36	Seychelles	60
38	Costa Rica	59
38	Lithuania	59
40	Latvia	58
40	Saint Vincent and the Grenadines	58
42	Cyprus	57
42	Czech Republic	57
42	Dominica	57
42	Spain	57
46	Georgia	56
46	Malta	56
48	Cabo Verde	55
48	Rwanda	55
48	Saint Lucia	55
51	Korea (South)	54
52	Grenada	52
53	Namibia	51
54	Italy	50
54	Mauritius	50
54	Slovakia	50
57	Croatia	49
57	Saudi Arabia	49
59	Greece	48
59	Jordan	48
59	Romania	48
62	Cuba	47
62	Malaysia	47
64	Montenegro	46
64	Sao Tome and Principe	46
66	Hungary	45
66	Senegal	45
68	Belarus	44
68	Jamaica	44
68	Oman	44
71	Bulgaria	43
71	South Africa	43
71	Vanuatu	43
74	Burkina Faso	42
74	Lesotho	42
74	Tunisia	42
77	China	41
77	Serbia	41
77	Suriname	41
77	Trinidad and Tobago	41

Table 2: Global Corruption Data 2019. (Source: Transparency International)

Table 2, read with the narrative of **table 1**, shows that South Africa's CPI is still high considered from a global perspective. It pales in comparison with Botswana, Seychelles, Singapore and Hong Kong to name a few. Botswana, a country that together with Hong Kong and Singapore is regarded by many as exemplary with regard to the South African corruption management, was ranked 34 with the score of 61 as the second least corrupt country in the whole of Africa after Seychelles. (Sibanda, 2019a). In terms of the 2017/2018 CPI corruption perception of South Africa remained unchanged since 2016/2017.

Unlike comparator countries – Botswana, Singapore and Hong Kong – there is a growing doubt cast on the effectiveness of the law-directed anti-corruption approaches in South Africa and the country's anti-corruption institutions (Majila *et al*., 2014:223&227). According to Cronin (2013), this failure can be attributed to poor management, which results in weak application of laws and regulations, and the subsequent deterioration of the application of internal systems, which in turn, creates opportunities for corruption.

The ethical and moral ability of the anti-corruption agencies to fight corruption and not to find themselves involved at the center of corruption scandals is also questionable. For instance, in a study that explores corruption and related offences in selected Gauteng police stations of the South African Police Service (SAPS), Rajin (2017:12-3) finds that even the image of the police who are supposed to be the vanguard of or against corruption have their "image blemished by corruption". Typical being the arrest and conviction of the late former Commissioner of Police Mr J Selebi, and the many numbers of corruption investigations and convictions involving the police (Rajin, 2017). The dire consequence of the involvement of police in corruption or perception of their involvement in corruption when they should be at the forefront of fighting it has resulted in communities "fast losing trust in the entire Criminal Justice System (Rajin, 2017:2). This reality of corruption within law enforcement ranks has let to Rajin (2017:17) "famously stating that Corruption, if allowed to continue, will spread throughout the organisation, fermenting and becoming an epidemic until it leads to the growth of "rotten trees" and eventually a "rotten apple" orchard'". However, the problem of corruption is not only confined to the law enforcement sphere, the problem is wide spread in government perpetrated by government executives and public servants (Rajin, 2017:17).

Currently the issue of corruption, integrity and legitimacy is not only confined to law enforcement agencies. The NPA has also been rocked by allegation of unfitness of its officers to hold office, which in part stem from their alleged involved in corrupt activities in the form of partiality in prosecuting corruption. Typical example in the Mokgoro Commission of Enquiry, which was set up to probe, amongst others, the fitness of former NPA head, Advocate Jiba to hold office. It is submitted that the events that led to the establishment of the Mokgoro Commission fly on the face of

established case law that directs the NPA to act with impartiality in the interest of the general public and not certain individuals or government executives. Exemplifying the litany of these cases is *R v De Kock* 1914 EDL 348, which stated (at 354) that:

> The Crown Prosecutor should have no other interest in the case than to lay before the court such facts as may assist the court in arriving at the truth. This is his sole and only duty.

Other relevant cases speaking to the integrity of the NPA include for example *S v Chogugudza* 1996 (1) SACR 477 (ZS). The court in *S v Chogugudza,* at 487h, said:

> Prosecutors are placed in positions of authority. It is their duty to ensure that accused persons are dealt with properly and in accordance with the law. As officers of the court, their bounden obligation is to uphold the law and by their conduct set an example of impeccable honesty and integrity. A failure to do so will lead to an erosion of confidence in the minds of the public.

Addressing the impartiality of the prosecuting authority the court in *S v Takaendesa* 1972 (4) SA 72 (R.,A.D.), at 74F-G, held that "[i[f the prosecutor had been aware of the true facts and concealed them from the court, he would have been guilty of a gross dereliction of duty and one that could only be strongly condemned." It is relevant to mention this case because prosecutors or former heads of the NPA at the Mokgoro Commission should be considered to have been in dereliction of their duties, if they were aware of the alleged corrupt activities of the government executives but elected to cover them up by declining to prosecute or applying delaying tactics to the executives not to see their day in court. It is submitted that such alleged acts highlight the challenge of the problem of ineffectively and/or unprofessionally dealing with corruption in a matter that does not instil confidence in the general public, which compromises the independent position of the prosecuting authority as just a tool subservient to the executive or political masters (see *S v Bothma* 1971 (1) SA 332 (C) at 344F). It is further submitted that such questionable conducts by members of the NPA with regard to fighting corruption fails to honour what the court in S v Majavu 1994 (2) SACR 265 (CK), at 275H-H to

276A (quoting Rand J in *Boucher v The Queen* (1955) 110 CCC 263 at 270), regarded as the role of the prosecution authority officers: "…to be efficiently performed with an ingrained sense of dignity, a seriousness and justness of judicial proceedings." Also, to "… to carry out their public functions independently and in the interest of the public," as remarked by the court in *Carmichele v Minister of Safety and Security and Others* 2002 (1) SACR 79 (CC) at 82H-I.

1.2 PROBLEM STATEMENT

A research problem should always address an important question in order that the answer can make a difference in some way or another and should further advance the development of knowledge that will lead to new ways of thinking and suggestions (Leedy & Ormrod, 2010:45). A research problem is thus "an intellectual stimulus calling for an answer" (Frankfort-Nachmias & Nachmias, 1992:51). According to Welman, Kruger and Mitchell (2005:14), a research problem is some challenge or problem in either a theoretical or practical situation that a researcher seeks to obtain a solution for. Problems related to the combating of corruption in South Africa range from the prevalence and the growing incidents of corruption itself, to the effectiveness and efficacy of the relevant law enforcement agencies tasked with investigating and prosecuting corruption. Similarly, the legislative or normative framework based on which these law enforcement agencies are established and operationalised have faced legitimacy crisis. In particular, their autonomy from political interference and investigative and prosecutorial integrity has come under the spotlight with the malady of State Capture. Even the role of an institution like the National Assembly has been put to question (Landsberg *et al*., 2006:7).

On paper, and focusing predominantly on the existence of globally comparable anti-corruption institutional and normative frameworks, South Africa appears like a country having a good handle on corruption. But, realism points to corruption as endemic in the country and threatens the existence of good governance. To put it in the words of Van Vuuren (2014:1):

> The way in which South Africa has responded to issues of corruption is evidence that the country exists as a functioning democracy. South Africa has successfully developed laws and institutions that have formulated a response to instances of

> corruption at a national level. It is not a fundamentally corrupted state, nor does it use heavy-handed means to fight corruption. The rule of law generally prevails. *However, digging deeper reveals a country that is grappling with measures to counter corruption and the abuse of power. The law is applied inconsistently and corruption fuels already high levels of economic inequality*. (Researcher own emphasis).

The South African government has for a long time not put its money where its mouth is. “It would appear as though government commits to the fight against corruption mostly in speeches only and to a very limited extent take action on corrupt individuals, posits Rajin (2017:21). There has now been some publicly evident actions taken by the government against corruption, such as the arrest of Bosasa State Capture syndicate in 2019, with Mr Angello Agrizzi who blew the whistle on the State Capture at the Zondo State Capture Commission of Enquiry. His arrest including other current and former Bosasa functionaries came alongside the arrest of former commissioner of the Department of Correctional Services (DCS), Mr Linda Mti and the former DCS CFO Patrick Gillingham (Makhosandile Zulu, The Citizen, 2019).

Likewise, the Presidency is now alive to the problem of corruption, particularly concerned about the State Capture revelations, and has committed to ferociously fight corruption. During his 07 January 2019 State of the Nation Address (SONA), President Cyril Ramaphosa announced the imminent establishment of an independent anti-corruption directorate (IACD) within the National Prosecuting Authority (NPA). The announcement was met with mixed reactions of excitement at the prospect of a dedicated anti-corruption unit on one hand and with the scepticism that saw the announcement as nothing by re-inventing the bringing to life of a politically bias toothless dog. It is submitted that the latter reaction may be justified based on the challenge that rendered the now defunct Directorate of Special Operations (also, known popularly as Scorpions) and the Directorate for Priority Crime Investigation (commonly referred to as the Hawks) inefficient. In a more pointed attack on the President’s announcement of the establishment of the directorate, Hoffman (2019) stated:

> Against this background the decision of the President to announce, during his SONA on 7 February 2019, that he intends to establish a State Capture Investigative Directorate in the National Prosecuting Authority is perplexing. He is a lawyer, he must surely understand that the anti-corruption machinery of state cannot be independent and secure in its tenure if it is within his own executive gift, ahead of the executive branch of government, to create it and to end its existence, as well as to determine its terms of reference. The provisions in the NPA Act upon which he will rely in establishing the new unit are clearly inconsistent with the Constitution as it was interpreted in the two cases mentioned above.

As stated already, the above doubt may be justifiable given what has happened before and the caution issued by the courts, which highlighted the independence of anti-corruption agencies as problematic. In *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32 (*Glenister III*), at para 32, the Constitutional Court stated that "[t]he overriding consideration is whether the DPCI legislation has inbuilt autonomy-protecting features to enable its members to carry out their duties without any inhibitions or fear of reprisal.

Another problem South Africa has had to deal with is the many and sometimes fragmented legal framework designed to address criminality in the country. A perception seems to be that corruption activities are poorly managed. With this perception or rather a challenge, can it not be considered streamlining the South African anti-corruption institutions, some with the broad mandate like the Office of the Public Protector, as an answer? Blaauw (2016:xv), for instance has argued, it is difficult for an office with a broad mandate to efficiently and effectively discharge its mandate. He uses as an example, removal from the mandate of Office of the Ombudsman in Namibia the function of investigating corruption and assigning it to the ACC as having increased the effectiveness of the Ombudsman. On the other hand, the ACC played a role of "an interlocking institution" with respect to fighting corruption (Blaauw, 2016:xv).

Majila *et al*., (2014:223&227) cite Cronin (2013), who attributes the failure of South Africa's poor management of corrupt activities to weak application of laws and regulations, and the subsequent deterioration of the application of internal systems which, in turn, create opportunities for corruption. It has been confirmed with the event in early 2019 when after sitting on an investigative report of evidence of corruption at Bosasa, the SIU sprung to action after those implicated in their reports presented damning allegations at the Zondo State Capture Commission of Inquiry. It had to take a public admission by those implicated for the SIU to act to be seen doing something.

In sum, notable problems in the South African corruption management architecture are inefficiencies within and among institutions with regard to anti-corruption mandates; lack of effective and efficient enforcement of the current legislative framework dealing with corruption; lack of effective prosecution of corruption cases and judicial effectiveness; a lack of effective investigation and/or follow-up on complaints of corruption; inefficient application of disciplinary systems; underdeveloped management capacity in some areas; diminishing integrity of anti-corruption institutions, with particular reference to the NPA and the SAPS; political interference and diminished autonomy of anti-corruption agencies in dealing with corruption, executing their powers and functions; and societal attitudes that weaken anti-corruption efforts (RSA, 2009:8). In other words, there is a lack of a co-ordinated, centralised, independent yet accountable response to corruption; this in turn causes a top-down approach resulting in public lack of trust, thus weakening legitimacy and ultimately the rule of law. According to Montesh (2007:03), the lack of proper communication, guidelines, and specificity regarding the exact functions of the different functionaries, contribute to the ineffective and inefficient manner of dealing with corruption in South Africa.

1.3 AIM AND PURPOSE OF STATEMENT

The statement of purpose of the research provides the major objective or intent or "road map" of a study (Creswell, 2013:134). Likewise, Locke, Spirduso and Silverman (2014:214) posit that research aims need to be clear, specific and concise. In simple terms, the aim and purpose of the research is discovered by asking the question: "What is my research for?" (Mason, 2002:20). According to Denscombe

(2002:27), the main driving force behind research is the desire to solve a practical problem or to improve procedures. Babbie (2010:92) reasons that three of the most useful purposes of conducting research are exploration, description and explanation and that most studies will accordingly comprise some or all of these elements.

This study critically evaluates South African anti-corruption strategies and structures from an historical and comparative perspective. In particular, this study investigates the current situation regarding the effectiveness of anti-corruption strategies in South Africa. The specific intention is to evaluate the strengths and weaknesses of the current procedures used to investigate corruption cases and process corruption crime scenes. Ultimately, recommendations on how to improve the current system are made.

1.4 RESEARCH QUESTIONS

Research questions specify exactly what is to be investigated. They are not the broad goals of research. They are specific things that are to be observed, measured and interrogated in order to shed light on the broader topic (Denscombe, 2010:15). According to White (2009:87), research questions play an important role in directing and focusing the research. Questions should clearly indicate what the research aims to achieve and what it does not. It is important that questions are formulated in a way that effectively "bounds" the study, thus informing readers, and reminding researchers, exactly what topics the research intends to address.

Leedy and Ormrod (2013:39) state that questions can be an excellent way of collecting data and providing guidelines on how the researcher should analyse and interpret data. De Vos *et al*., (2011:352) as well as Flick (2011:90) encourage researchers to follow a logical sequence and limit the research questions. The following research questions guided the research study and achieved the research goal:

1.4.1 What is the prevailing scholarship and discourse on fundamental issues, concepts and knowledge in corruption as a phenomenon?

1.4.2 What are the impacts of corruption on the society and governance in general?

1.4.3 How does ethics influence the maintenance of effective and efficient anti-

corruption strategies and good governance?

1.4.4 Which leadership approaches will assist in forming a governance structure that is resistance to corruption in the public sphere?

1.4.5 What are the key national legislative or normative framework and South Africa's regional and international obligations to combat corruption?

1.4.6 What are the successes and failures of the South African anti-corruption agencies in their fight against corruption?

1.5 OBJECTIVES OF THE RESEARCH

According to De Vos *et al*., (2011:108), research objectives identify specific issues the researcher intends to examine and should be clearly stated and specific. Each objective should describe only one issue. The following are the specific issues addressed in this study:

1.5.1 Identify the relevant theories of corruption, analyse them, and apply them to determine the causes and effects of corruption and its impact on organisations and society.

1.5.2 Review the current South African anti-corruption legislative and regulation framework.

1.5.3 Conduct comparative studies of anti-corruption structures and strategies in countries that are known to have effective anti-corruption strategies in place.

1.5.4 Make suggestions and recommendations intentioned to help the country formulate and design effective and efficient anti-corruption framework.

1.6 VALUE OF THE RESEARCH

De Vos *et al*., (2011:107) and Denscombe (2010:24) are of the opinion that research must be able to be used for practical purposes, should be useful to the intended target group and must contribute to the generation of new knowledge. In this study it is thus expected that:

1.6.1 From the unique nature of this research, organisations and individuals may benefit by considering and implementing the research results.

1.6.2 Forensic investigators, auditors and detectives in various South African anti-corruption agencies and government departments will benefit from this study as it can be used as a toolkit for additional knowledge and appreciation on how to execute their powers and functions towards fighting corruption.

1.6.3 Additional knowledge regarding the effectiveness of anti-corruption strategies and the formulation of a single anti-corruption agency in South Africa will come to light.

1.6.4 The findings of this research can be positively utilised to the benefit of the academic world, prospective and current students in the field of criminal justice and forensic investigations.

1.7 STUDY ASSUMPTIONS

Assumptions are things that are accepted as true, or at least plausible, by researchers and peers who will read the study. The working assumptions in this study are the following:

1.7.1 South African law enforcement agencies have always considered and discharged their anti-corruption duties according to the spirit and the letter of the existing framework.

1.7.2 South African anti-corruption agencies and institutions have the requisite understanding and competency to deal with the plethora of enabling legislation, policies and procedures intended to combat corruption and related criminality.

1.7.3 South African anti-corruption agencies are conversant with the various ways in which corruption manifests itself.

1.7.4 South African anti-corruption agencies are well resourced, independent and free from political interference and are able to execute their mandate with no fear or favour.

1.8 RESEARCH APPROACH, PARADIGM AND METHODOLOGY

The underlying research paradigm and methodology in this study are as follows:

1.8.1 Research Approach

As explicated by McMillan and Schumacher (2001:428), there are a number of strategies available in a qualitative approach, namely participant observation, in-depth interviews and artefact collection. This study does not focus on data collection through questionnaires, systematic data analysis, observations and/or interviews. The study relies mostly on library materials, which include but are not limited to textbooks, reports, legislations, regulations, charters, policies, amendments to legislation, journals or academic journals, government gazettes, the Constitution, and international or national and local journals.

1.8.2 Research Methodology (Data Collection)

To start with, it must be noted from the outside in this study methodology is understood as a scientific discipline involving setting out and defining the most appropriate ways of discerning the subject of investigation in the study. Thus, in this study legal methodology (Vibhute & Aynalem, 2009:16) is used to discern law and legal phenomena of corruption. According to Chen *et al.,* (2007) methods denotes a range of approaches used to gather data, which are to be used as a basis for inference and interpretation, for explanation and prediction. Thus, methods is in essence data collection or data gathering (Sibanda, 2015:59).

Below are the data collection methods used in this study:

1.8.2.1 Literature Review and Document Analysis

Documents as a data gathering technique are described by Maree (2011:82) as "written communication that may shed light on the phenomenon researched". There is a distinction between a literature review and document analysis. A literature review involves published documents, such as books and journal articles, whereas documents may include government documents and company minutes; these documents are not published but may provide valuable information about the study to the researcher.

This study is premised in part on the literature review in Chapter 2. According to Creswell (2009:25), the foundation for conducting a literature review is to share the results of other studies that are similar to the study being undertaken, to provide a framework for establishing the importance of the study undertaken, and to provide a benchmark for comparing the results of the study with other findings. For the purpose data collection in this research, a literature review was conducted in the fields of corruption, bribery, fraud, anti-money laundering, money-laundering, crime, organised crime, terrorism, prevention, deterrence, education, investigation, forensic investigations, and other related subjects and presented as Chapter 2. Thus, the study is primarily a desk-top study.

The literature in this research was used inductively, as it was incorporated throughout the discussion of the research and was also used to substantiate, compare and contrast the themes and results that emerged from the study (Creswell, 2009:27).

According to Leedy and Ormrod (2013:51), the role of literature review is to "look again" at what others have done in areas that are similar, though not necessarily identical, to one's own topic of investigation. Fouché and Delport (in De Vos et al. 2011:134) and Creswell (2009:29) recommend the following steps when collecting literature in a study:

a) *Finding appropriate literature/ Data Location:* The research topic is determined, studied and analysed in order to find similar literature on the problem. The researcher will identify key concepts, namely corruption, bribery, fraud, anti-money laundering, money-laundering, crime, organised crime, terrorism, prevention, deterrence, education, investigation, investigators, in an attempt to find literature on the topic and research questions in the study. The separate concepts of the topic, as well as the key words of the research questions, are used to search the computerised database of the University of Hong Kong SPACE and University of South Africa (Unisa) library for journals, books, research reports, short dissertations, dissertations and theses related to the topic. In addition, the researcher requests the Unisa subject librarian to conduct a literature search. The researcher searches the online computerised databases of the University of Hong Kong SPACE and Unisa library websites

that are most frequently reviewed by social science researchers, such as Google Scholar, ProQuest, the Social Science Citation Index and others. The internet is also searched using “search topics/words” to find material relating to this research.

b) *Document selection:* The researcher reads through all the relevant literature obtained, and the literature directly related and central to the researcher’s study is duplicated for further study. During this process the researcher continually strove to obtain a sense of whether the obtained literature will make a useful contribution to the topic under study. Thus, throughout the process of identifying relevant literature, the researcher compiled a literature map, providing a visual picture that illustrates how the study fits into the larger body of the literature obtained through the literature review. Summaries were compiled of the relevant literature that are discussed in the relevant chapters of the study and are listed in the list of references.

c) *Document analysis*: The documents found and selected as indicated above were analysed. Documents selected for analysis included public documents, such as court records or case law reports – reported and unreported cases, forensic investigation reports, government gazettes government policy documents, newspapers, letters and e-mails, such as the accessible Gupta email leaks. Also secondary documents / academic documents such as journal articles, books and conference papers.

1.8.3 Research Paradigm

In this study, research paradigm is as a set of beliefs and assumptions that guide the researchers on how to successfully executive their studies (Creswell, 2009). Thus the research paradigm is intended to guide the inquiry in this study, as observed by Creswell and Plano Clark (2011: 39). With the many understanding of research paradigm in existence, it is not surprising when each researcher “approaches research with a plethora of interlocking and sometimes contradicting philosophical assumptions and stances” (Sibanda, 2015:51).

The following research paradigms are used to analyse and interpret available data to answer research questions or phenomena in this study:

1.8.2.1 Interpretive and Descriptive Paradigm

The primary research paradigm in this study is interpretive. The study focuses mainly on interpreting existing laws/pieces of legislation and/or judgements, and observing and analysing the implementation of the existing anti-corruption framework and structures. Also, on interpreting observations and views on the subject from literature review.

With regard to descriptive paradigm, the researcher provides a descriptive analysis of the ineffectiveness of anti-corruption strategies in South Africa; the lack of synergy between the various anti-corruption strategies in the South African government; and the lack of interaction between these anti-corruption strategies and various government departments – circumstances that negatively impact non-compliance and adherence to policy. To this end, the researcher gathered, assessed and recorded all relevant information and/or data in order to classify and categorise it with the sole purpose of discovering and advancing the body of knowledge in this field of study. Using the information, data and knowledge gained throughout this study, the researcher identifies links and associations between government departments in order to build possible relationships to deal with the scourge of corruption in both public and private institutions.

1.8.2.2 Critical Paradigm

As the title of the study postulate, undertaken in the study is a “A critique of the South African anti-corruption strategies and structures” from a comparative lens. Thus, a critical paradigm is used to achieve the objective of this study through critically investigating the anatomy and efficacy of the South African anti-corruption normative framework and its implementing agencies. To this end, critical discourse analysis is employed (Asghar, 2013:3124) in this study to allow the analytical and critical nature of the study, and also to expose and challenge the inefficiencies of dealing with corruption in South Africa.

1.8.3 Comparative Paradigm

Fombad (2017:984) posits that comparative legal research, as a research paradigm "is of such critical importance to legal research" that it defies logic why it is not part of the design of African universities legal research studies. He argues, and correctly so, that "all legal research involves, directly or indirectly, some degree of comparison" (Fombad, 2017:985), and that it is indispensable that legal studies or legal research apply certain of the principles and methodologies of comparative law. To justify this argument Fombad writes:

> One reason for this is that *it is difficult to see how the law of a single country can form the basis of a serious independent scientific study.* This is because one can only appreciate the role of the South African Public Protector and scientifically assess and comment on its effectiveness by referring to similar comparable institutions in other jurisdictions. These do not have to be similar institutions operating in other legal systems, although this latter aspect has to be factored into the analysis and the conclusions that will be drawn at the end of the study. *No legal problem is inherently or exclusively national in nature or character.*
>
> Perhaps a more telling example is a study, for example, on "the limitation of rights under the South African Constitution of 1996."… *This [section] clearly directs the court as well as the researcher to undertake a comparative inquiry about the practices* in other free and democratic societies. Once again, it need not be a society operating under a different legal system but rather one that has a similar limitation clause. It is therefore clear that *because no legal system is self-contained and self-reliant, legal research on any topic is either explicitly or implicitly comparative* [Researcher's own emphasis].

The legal comparative research methodology was used in this study, focusing on selected national jurisdictions and on continental and international frameworks for anti-corruption is also employed. Comparative evaluation (Van Hoecke, 2011) is used with regard to carefully selected comparator jurisdiction, namely, Botswana, Hong Kong and Singapore, to determine how divergent their anti-corruption systems are with

South Africa in combating corruption. Also, to determine if there are any valuable lessons that can be learned from their normative frameworks and the operations of their anti-corruption agencies. Another important consideration highlighted by Fombad is that “comparative legal research is key to any research aimed at drafting harmonised laws or drawing up international conventions and agreements” (Fombad, 2017:991). In the context of this study, comparative research is important because legislative changes in the South African anti-corruption framework are made.

1.9 RESEARCH DEMARCATION AND LIMITATION

According to Goddard and Melville (2001:14), the process of demarcation specifically involves researchers determining the scope of the study; what variables are involved; how the study will be conducted; and what practical constraints or challenges will be experienced.

The following are the delimitations of this thesis:

1. As indicated in Chapter 3, the South African criminal justice system consist of many legislation dealing with specific areas of criminal justice, some mutually exclusive and others mutually inter-dependent. A focused academic study like this may not cover all these legislation. Thus in this study only a selected band of legislation is considered, namely: PRECCA, POCA, PFMA, MFMA, CPA, NPA Act, SIU Act, Public Protector Act, and the Criminal Laws Amendment Act. However, not all these selected legislation are dealt with in depth for the purposes of this study. Some are already addressed generally elsewhere in some major studies, such as POCA (see Basdeo 2014) and will be discussed to the extend they are relevant for the subject of corruption and corrupt activities.
2. In Chapter 4 a number of institutions are referred to as relevant to the broader scheme of fighting corruption. These are, for example, the Office of the Public Protector, the Office of the Auditor-General of South Africa, the South African Human Rights Commission, Parliament, and the several law enforcement divisions. Some of these institutions such as the South African Human Rights Commission are not dedicated specifically or primarily to fighting corruption or criminality in general and they will thus not be discussed extensively.

3. State capture, which is one of the key considerations in this study, was recently unearthed in South Africa. The Deputy Chief Justice Raymond Zondo Commission of Inquiry into State Capture only began its work in 2019. So are other commissions such as the Mokgoro Commission of Inquiry into the Fitness of Advocate Jiba to Hold Office at the NPA. These are very critically commissions to the investigation in this study. Unfortunately, this thesis may not have the benefit of the conclusions and outcomes of these commissions by the time of submission for examination. It is submitted that some of the conclusions and recommendations of the Commission may impact on the findings, submissions and recommendations of this study. Information on these commissions is thus based on testimonies and submissions at the commissions, some of which are yet to be cross-examined.
4. A number of bills relevant to this study have been introduced in Parliament and/or under discussions for introduction to deal with corruption. Notable is the PRECCA Amendment Bill, the Political Funding Bill, the NPA Amendment Bill, and the Ant-Corruption Commission Bill. Until they are enacted into law not too much reliance on them can be made in this study. Thus any discussion of their provisions is made to advance a specific argument or submission made by the researcher.

1.10 VALIDITY AND RELIABILITY

Creswell (2014:201) posits that each study draws strength on its validity, the accuracy and reliability of its findings. Thus the validity and reliability of the research must not only be accurate from the perspective of the researcher; it must also be accurate from the reader of an account and the participants, in case of empirical research, validity and reliability in this study was secured through the following strategies / approaches:

a) Soliciting critical expert peer-review of the study or parts of the study.
b) Avoid bias as far as possible. Cohen, Manion and Morrison (2007:150) describes bias as a “systematic or insistent tendency to make errors in the same direction, that is, to overstate or understate the true value of an attribute.” In this study self-reflection created an open and honest narrative and should resonate well with readers. Thus, the researcher indicated his research visit to

Hong Kong were he gained first-hand information on the anti-corruption regulatory and institutional framework of Hong Kong. This experience has partly influenced the researcher's election of Hong Kong as one of the three compactor countries alongside Botswana and Singapore. Good qualitative research contains comments by the researcher about how their interpretation of the findings is shaped by their background.

1.11 CLARIFICATION OF KEY TERMS AND CONCEPTS

According to De Vos *et al*., (2005:32) "definitions are used to facilitate communication and arguments", particularly because they present terms and/or concepts simply and clearly, thus avoiding vagueness or ambiguity. Defining terms focuses the researcher (Maxfield & Babbie, 2005:12). In defining a term or concept a researcher begins by declaring the term to mean "whatever you want it to mean throughout the research" (Berg, 2004:29). Berg (2004:36) highlights the value of conceptualising a term in order to ensure that readers understand what is meant by certain concepts and to further enable readers to consider how effectively identified key concepts are applied in a study.

The following key theoretical concepts of this research are therefore defined:

1.11.1 CORRUPTION

The word "corruption" has its origin in a Latin verb "*corruptus*", meaning, "to break". Literally, it means "a broken object". There is no universally accepted definition of corruption. Rajin (2017:7) correctly observes that the phenomenon of corruption is complex to define, and that it covers variety of activities or offences including the abuse of power and authority of public office (Rajin, 2017:16). The abuse of power and public office is broader than bribery as a corrupt activity. Conceptually, corruption is a form of behaviour that departs from ethics, morality, tradition, law and civic virtue. McCusker (2006:1) explains corruption with reference to its manifestation and its scale, be it petty, grand, political or bureaucratic corruption. The UN Manual on Anti-Corruption (2001:40), Transparency International, and multilateral financial institutions like the World Bank and Asian Development Bank define corruption as "abuse of public office for private gains".

The phenomenon of corruption is fully discussed in Chapter 2.

An observation by Fazekas and Toth (2017) that a broad and integrated understanding of corruption should be employed merits following in this study. For example, the authors advocate the adoption of:

> a broad approach that is adept at capturing high-level political corruption in situations where even some regulations could be enacted to serve rent extraction. Thus, in the context of public procurement, institutionalised grand corruption denotes the allocation and performance of public procurement contracts by bending prior explicit rules and principles of good public procurement such as public procurement laws to benefit a closed network while denying access to all others (Fazekas & Toth, 2017:322).

This definition that goes beyond defining corruption as "simple bribery in public administration is well fitted to the context of public procurement where political discretion is broad, and political and technocratic actors necessarily codetermine decision" (Fazekas & Toth, 2017:322).

Section 3(a)(ii) of the Prevention and Combatting of Corrupt Activities Act No. 12 of 2004 (PCCA Act) defines what conduct constitutes corruption. The PCCA Act came into force on 27 April 2004 with the repeal of the Corruption Act, No. 94 of 1992. Corruption is considered so serious that the court in *Phillips v The State* (370/2016) [2016] ZASCA 187 (1 December 2016) ruled that the PCCA Act does not limit the discretion of the sentencing court in determining punishment. In particular, Zondi JA held that a trial court must "have regard to all relevant considerations", otherwise another court would be able to interfere with the sentence imposed on the grounds of sentencing misdirection by the trial court. What is important for the purposes of this study is Zondi JA's pronouncement that in crimes, such as corruption all relevant issues must be taken into consideration. "But I do not agree with the reduction in this case of the sentence from seven years to four years by the learned judge, given the seriousness of corruption in South Africa". Otherwise one would be giving credence to an assertion debunked in *S v Sadler* 2000 (1) SACR 331 (SCA), that corruption and white-collar crime hurt society less because they are mainly crimes of an economic nature and individual crimes. The researcher agrees with the sentiment of

Baqwa J in *Mofomme v State* Case No: A812/2016 (9/11/2017), who stated that:

> [at para 22] The seriousness of the crime of corruption is such that, of the triad of the crime, the criminal and the interests of society, the latter looms the largest. Corrupt groupings and individuals ought to be left in no doubt that these tendencies shall not be condoned by the Courts. When our Courts, which symbolise justice, are seen to promote crime in any manner or shape, then society shall be left totally unprotected and it shall be open season for criminals and charlatans to turn it into what is colloquially referred to as a 'banana state'.

The court in *Mofomme v State* Case No: A812/2016 (9/11/2017), para 25, held that the crime of corruption is "not an individual crime; it's a crime that has wide-ranging implications which undermine the hard-won constitutional democracy". In fact, the court agreed with the dictum in *S v Shaik and Others* 2007 (1) SA 248 (SCA) that corruption as a crime which "threatened the constitutional order'' (at para 26). The country was at one point on a good trajectory when in cases like *S v Shaik and Others* 2007 (1) SA 248 (SCA) the accused's conviction in the High Court on corruption and fraud and sentence of 15 years' imprisonment were confirmed by the Supreme Court of Appeal (SCA). The SCA *in casu* stated:

> The seriousness of the offence of corruption could not be overemphasised. It offended against the rule of law and the principles of good governance, lowered the moral tone of the nation, and it threatened the constitutional order. No fault could be found with the reasoning of the trial court that no substantial or compelling circumstances existed in relation to counts one and three that would justify the imposition of a sentence other than the prescribed minimum of 15 years' imprisonment. [There was no appeal against the sentence imposed on count two.] In the result all the sentences imposed by the trial court stood. Appeals against convictions and sentences dismissed.

The word "corruptly" or the phrase "corrupt activities" is sometimes used in this study. However, the use of the word corruptly was not oblivious of its rejection in other

jurisdiction as vague and unconstitutional. For instance , in *Lameck & another v President of the Republic of Namibia & others* 2012 (1) NR 255 (HC) the definition of 'corruptly' contained in section 32 of the Anti-Corruption Act 8 of 2003 Act was declared to be inconsistent with the Constitution and invalid because of its vagueness. Interestingly, section 32 of the Namibian Anti-Corruption Act is couched broadly stating in part that term corruption includes "acts in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to – (a) any employment relationship; (b) any agreement; or (c) the performance of any function in whatever capacity."

1.11.2 FORENSIC INVESTIGATION

Van Rooyen (2008:14) submits that forensic investigation is in most instances associated with the investigation of computer-related crimes, corruption, fraud, embezzlement and other white-collar crimes. According to Bennett and Hess (2007:06), forensic investigation is a step-by-step enquiry, observation, thorough examination and recording of evidence and further is intended to establish facts using science to present evidence before a court of law. Forensic investigation professionals play a vital role in the detection and prevention of crime. This role is complementary to "the government anti-fraud and anti-corruption agencies in strategies and policies to curb menace of corruption in the system" (Mau, 2015).

1.11.3 CRIMINAL INVESTIGATION

According to Bennett and Hess (2004:06), criminal investigation, is a process of discovering, collecting, preparing, identifying and presenting evidence to determine what happened and who is responsible. This view is supported by Monckton-Smith (2013:2), who state that "criminal investigation" is a process organised to meet the demands of a system of justice and, often, the more serious the crime, the more complex and demanding the investigation.

1.11.4 FRAUD

The New South Wales Cancer Institute (2013:5) defines fraud as a "deliberate and premeditated turn of events which involves the use of deception to gain advantage from a position of trust and authority". The types of event include acts of

omission, theft, the making of false statements, evasion, manipulation of information and numerous other acts of deception. Fraud is regarded as a form of corrupt conduct (i.e. a sub-set within the definition of corruption) and therefore is subject to the same rules of reporting that apply to suspected corrupt conduct.

The South African SCA in *S v Sadler* 2000 (1) SACR 331 (SCA) stated that white-collar crimes like fraud and corruption were serious in and of themselves with devastating consequences for the society. Fraud and related white-collar crimes or corrupt practices entail serious and gross breaches of trust. Judge Squires stated:

> [par 11] I am satisfied that the circumstances of this case call for the imposition of a period of direct imprisonment and that the interests of justice will not be adequately served by leaving the sentence imposed by Squires J undisturbed. So-called "white-collar" crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of "white-collar" crimes as non-violent crime and its perpetrators (where they are first offenders) as not truly being "criminals" or "prison material" by reason of their often ostensibly respectable histories and background. Empty generalisations of that kind are of no help in assessing appropriate sentences for "white-collar" crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from "respectable" backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.
>
> [par 12] These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it.

> [par 13] It is unnecessary to repeat yet again what this Court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration …

1.11.5 MALADMINISTRATION

Maladministration is an activity or practice that results in non-compliance with regulations but is normally the result of a genuine mistake rather than any deliberate plan to gain an unfair advantage. Where a centre or provider repeatedly makes mistakes, this will eventually constitute malpractice (Institute of Leadership and Management, 2012:4).

It is submitted that there is a thin line between corruption and maladministration in South Africa. This was demonstrated by the Gauteng High Court decision ordering Cash Paymaster Services (CPS) to pay back R316 m to the South African Social Security Agency (Sassa). According to Tsoka J, the payment to CPS by Sassa was an unlawful one that "robbed a substantial amount of money intended for the most vulnerable and poor people of our country." The payment was fraught with acts of manipulation of services that generated the payments sought.

1.11.6 CONFLICT OF INTEREST

According to Schedule 1 of the Public Service Commission (PSC) Rules on managing conflicts of interest (2009), conflict of interest is defined as "any financial or other private interest or undertaking that could directly or indirectly compromise the performance of the public servant's duties or the reputation of a public servant's department in its relationship with its stakeholders".

Kanyane (2005:1) refers to Grupe (2003), who provides as practical examples of conflict of interest the following: "self-dealing, accepting benefits, influence peddling, using the employer's property for personal advantage, using confidential information, obtaining outside employment or moonlighting, and taking advantage in post-employment." Conflict of interests have been addressed in many state tender transactions. It is thus a requirement in the Declaration of Interest document that tenderers must declare any bond, whether family, friendship or work-related, with

any member of the tender board or the department concerned.

In *S v Tshopo and Others* (29/12) [2012] ZASCA 193 (30 November 2012), Hefer JA regarded declaration of interests as important to root out fraud in state tenders.

> [par 37] Fraud in the procurement of state tenders is a particularly pervasive form of dishonest practice. It undermines public confidence in the government that awards tenders, apparently without regard for nepotism, and it creates perceptions unfavourable to the services provided pursuant to such tenders. It is proving notably difficult for the authorities to identify and root out such malpractices. The courts are obliged to render effective assistance lest the game be thought to be worth the candle.

1.11.7 BRIBERY

Bribery involves the promise, offering or giving of a benefit that improperly affects the actions or decisions of a public servant. This benefit may accrue to the public servant, another person or an entity. A variation of this manifestation occurs where a political party or government is offered, promised or given a benefit that improperly affects the actions or decisions of the political party or government (Department of Public Service and Administration (DPSA), 2002:7).

1.11.8 FRONTING

Fronting is related to or is a sub-species of corruption in which, for example, black people are fictitiously presented as shareholders of companies that are essentially white-owned. When these companies bid for state tenders they benefit illegally from preferential rules of black economic empowerment (BEE) (Mynhardt, 2011:21). In South Africa fronting is explained in relation to the abuse of tender processes. Thus fronting with reference to the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act), section 1 (c), is the "conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based BEE compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person". It is "any practice or initiatives which are in contravention of or against the spirit of any law, provision, rule, procedure, process, system policy,

practice, directive, or any other term or condition pertaining to BEE under the codes" (Mynhardt, 2011:3).

Fronting was addressed in *Swifambo Rail Leasing v PRASA* (1030/2017) [2018] ZASCA 167 (30 November 2018) where the locomotive tender awarded was set aside after being found to have been secured through irregularities, corruption of officials of PRASA and "fronting" within the meaning of the BBEEE Act No. 53 of 2003. In this case PRASA alleged that Swifambo, which had a level 4 BBBEE rating, "was a "front" for Vossloh. "This company would not have been able to bid itself because it was not based in South Africa and did not meet the requirements of the procurement policy nor the request for proposals, which necessitated that it be Broad-Based Black Employment Equity (BBBEE) compliant" (*Swifambo Rail Leasing v PRASA* (1030/2017) [2018] ZASCA 167 (30 November 2018), para 25). However, Swifambo argued that it was aware that it was party to a transaction that was based on a fronting practice, thus it could not be held liable for violating the relevant provisions of the BBBEE Act.

1.11.9 State capture

The most demonstrative and succinct definition of state capture is put forward by Bhorat, Buthelezi, Chipkin, Duma, Mondi, Peter, Qobo, Swilling, and Friedenstein (2017:15), positioning it with corruption as follows:

> Corruption tends to be an individual action that occurs in exceptional cases, facilitated by a loose network of corrupt players. It is somewhat informally organised, fragmented and opportunistic. State capture is systemic and well-organised by people with established relations. It involves repeated transactions, often on an increasing scale. The focus is not on small-scale looting, but on accessing and redirecting rents away from their intended targets into private hands. To succeed, this needs high-level political protection, including from law enforcement agencies, intense loyalty and a climate of fear; and competitors need to be eliminated. The aim is not to bypass rules to get away with corrupt behaviour. That is, the term corruption obscures the politics that frequently informs

> these processes, treating it as a moral or cultural pathology. Yet, corruption, as is often the case in South Africa, is frequently the result of a political conviction that the formal 'rules of the game' are rigged against specific constituencies and that it is therefore legitimate to break them.

According to Myburgh (2017), state capture is systematic corruption that is symptomatic of the lack of leadership in South African public institutions. It led to one family exploiting the state's resources. More instructive in defining state capture and contextualising its understanding is the 2018 article by Dassah entitled *Theoretical analysis of state capture and its manifestation as a governance problem in South Africa* (Dassah, 2018). In a literature review, Dassah grapples with understanding the concept of state capture. The outcome of his literature review is that state capture arose out of the system of paying bribes to purchase political influence (Dassah, 2018). Amongst the many definitions of state capture referred to by Dassah is: "efforts of firms to shape the laws, policies, and regulations of the state to their own advantage by providing illicit private gains to public officials" (quoting Hellman & Kaufmann, 2001:1). Particularly interesting in the context of South African state capture is the "the propensity of firms to shape the underlying rules of the game by 'purchasing' decrees, legislation, and influence, or efforts of firms to shape and influence the underlying rules of the game (i.e. legislation, laws, rules, and decrees) through private payments to public officials" (Dassah, 2018 quoting Hellman *et al*., 2000:4).

1.11.10 ETHICS

Moral and ethical considerations are very important in the fight against corruption. (Thonzhe & Vyas-Doorgapersad, 2017:138) define *ethics* "as a system of moral principles relating to that branch of philosophy dealing with values on human conduct, with respect to rightness or wrongness of certain actions." Explicit in this definition is that ethics "constitutes the basic principles of correct action undertaken based on rules of conduct" (Thonzhe & Vyas-Doorgapersad, 2017:38).

A number of authorities cited by Thonzhe and Vyas-Doorgapersad (2017) highlight the importance of organisational ethics, and how public sector ethics enhance good

governance (Thonzhe & Vyas-Doorgapersad, 2017:139).

In Chapter 3 of this study, the relationship between ethics and occupation, and the importance of ethical leadership is explicated. For benefits of ethical leadership on combating corruption discussed (see Whitton, 2001; Pillay, 2016; Igoda-Gadot, 2000; Cheteni & Shindika, 2017; Gildenhuys, 2004; Naidoo, 2012; Okagbue, 2012; Igbim, 2018; Mendonca, 2001; Van Aswegen and Engelbrecht, 2009). Suffice to say at this stage, and stated by Igbim (2018:23), "trust and commitment are positive externalities that are associated with ethical leadership". It is this trust and subscription to ethical conduct that will enhance the image of South African authorities as they fight against corruption.

1.11.11 INTEGRITY

As noted by Hoekstra and Zweegers (2016), and correctly so, definitions of the word or phenomenon "integrity" are varied across the globe. And they are also dependent on the circumstances and the environment at play. In the Netherlands, for example, integrity is taken to be more than anti-corruption principles and values, and broadly refers to "promoting an ethical climate marked by features including openness, safety, respect, trust, leadership, and justice" Hoekstra and Zweegers (2016:54).

According to Huberts *et al.,* (2016:13), the following are visions of integrity or what the operational definition of integrity is about as identified in integrity research and policies:

- Integrity as wholeness
- Integrity as integration into the environment
- Integrity as a professional responsibility
- Integrity as conscious and open action based on moral reflection
- Integrity as a (number of) value(s) or virtue(s), including incorruptibility Integrity as compliance with laws and codes
- Integrity as compliance with relevant moral standards and values
- Integrity as exemplary moral behaviour

Relevant to the context of this study, Hubert *et al*., (2016:14) provides a typology of integrity violations, which links strongly to corruption and corrupt practices. These are:

- Corruption: bribery
- Corruption: favouritism (nepotism, cronyism, patronage)
- Fraud and theft of resources
- Conflicts of (private and public) interest through 'gifts'
- Conflicts of (private and public) interest through side-line activities Improper use of authority
- Misuse and manipulation of information
- Indecent treatment of colleagues or citizens and customers
- Waste and abuse of organisational resources
- Misconduct in private time

Furthermore Hubert *et al*., (2016:15, quoting Van Tankeren & Montfort, 2012) states the following:

> [R]egardless of the definition of integrity …, integrity policy can be described as the set of intentions, choices and actions designed to promote and protect integrity within organisations. That set may involve a wide range of initiatives and instruments, which will ideally be a combination of 'software' (ethical culture), 'hardware' (rules and procedures), and an 'operating system' (organisation and coordination of integrity policies).

In view of the expressions above, it is submitted that a definition of integrity and ethics as separate concepts is largely a matter of academic exercise. There is a very close and overlapping relationship between ethical and moral conduct on the one hand and the requirements to act with integrity on the others. This is particularly evident in the in-depth discussions in Chapter 3 of this study dealing with *Ethical dimensions of corruption and corrupt practices in governance and public service in South Africa, and in part 2*.

1.11.12 Fitness to Hold Office

The concept of fitness for the office of the NDPP that requires the person to be fit and proper to be "entrusted with the responsibilities of the office concerned." However, this concept is not explained nor defined in the NPA Act. In the Ginwala Commission, the commission chairperson declined to define the concept, but stated that (Ginwala Commission, 2008:1):

> amongst others, the person must possess an understanding of the responsibilities of such an office. There must be an appreciation of the significance of the role a prosecuting authority plays in a constitutional democracy, the moral authority that the prosecuting authority must enjoy and the public confidence that must repose in the decisions of such an authority. To that must be added an appreciation for and sensitivity to matters of national security.

It is submitted that the understanding of the concept "fit and proper" person in the legal profession may shed light on how the fitness of a person to hold NDPP office may be construed. Fit and proper is not explained in the legal practice legislation but court have sought to give the phrase or words 'fit and proper' some context. In *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA762 (T) by Boshoff JP at 782B, for example, said that:

> taken by themselves they have a variety of dictionary meanings which include in the case of "fit", adapted, adjusted, qualified or suited to some purpose, competent and deserving; and in the case of "proper", excellent, admirable, commendable, fine, goodly, of high quality, of good character or standing, honest, respectable, worthy, fit apt, suitable.

It is submitted that in line with the judgment in Kaplan v Incorporated Law Society, the enquiry into a person's fitness to hold office as envisaged in the NPA Act is a question of fact that involves a value judgment. It must be a determination that looks into the integrity and professional abilities and competency of such person to oversee the country's prosecution directorate and prosecute cases without fear or favour and with the greatest degree of impartiality.

1.11.12 INSTITUTIONAL EFFECTIVENESS

For the purposes of this study, a definition of institutional or organisational effectiveness by Blaauw will be adopted. According to Blaauw (2009:1):

> Institutional effectiveness denotes something different for the public sphere than it does for the private sphere because it accords each a particular role in the governing process. In the case of a government, institutional effectiveness refers to its ability to fulfil its functions and responsibilities as stated in, among other instruments, the constitution. Therefore, from a governmental perspective, effectiveness emphasises the checks and balances within government institutions. More specifically, the existence of institutional effectiveness is related to the way different elected and appointed agencies are perceived to have performed or are performing their duties. In simple terms, it alludes to the notion of political trust.

It is submitted that the definition by Blaauw resonates with the essence of this study, which is to finally determine the effectiveness of the South African anti-corruption agencies and legislative framework.

1.12 CHAPTER LAYOUT

This study consists of seven chapters. Chapter 1 demarcates the field of study and outlines the research design and methodology. It includes a statement of the research problem, research questions, research objectives and limitations, and provides an overview of the entire study.

Chapter 2, contains a literature review, setting out in a thematic approach current scholarship and debates engendered by such scholarship. It explores critical issues emanating from and guided by the research question and sub-questions.

Chapter 3, explicates the constitutional and legislative framework on anti-corruption in South Africa. For completeness, this chapter also makes reference to other related laws such as common law and the Criminal Procedure Act No. 51 of

1977 (CPA). The relevant case law is also referred to in order to give application content to the framework.

Chapter 4, undertakes a comparative analysis of selected countries and anti-corruption models. Specifically considered in this chapter are continental and international legal frameworks on anti-corruption. With respect to corruption frameworks and practices, the countries considered are Hong Kong, Singapore, and Botswana. These countries were identified for this study because, amongst other things, they show some common and interpretable patterns in combatting corruption. Botswana is a leading African country in combatting corruption. Regional anti-corruption initiatives and instruments such as those in the African Union (AU) and the Organisation of Economic Co-operation (OECD) are also considered.

Chapter 5, discusses in depth, the South African Anti-corruption Strategies, Structures and Related Institutions, which are the crux of this study. It also responds to the sixth research question (question 1.4.6) of this study that questions amongst others the successes and failures of the South African anti-corruption agencies in their fight against corruption.

Chapter 6, Foreign Jurisdictions and the Fight Against Corruption: Lessons from Singapore, Hong Kong and Botswana, a comparative enquiry of best practices and successes of foreign jurisdictions are undertaken.

Chapter 7, a comparative determination and appraisal of the South African anti-corruption strategies and structures is undertaken in this thesis. In particular, the thesis focuses on the efficacy on the anti-corruption agencies and the role they play in combating corruption in South Africa. This chapter contains a general conclusions and findings from data obtained from both literature review and qualitative research. The chapter makes a number of important submissions and recommendations for consideration by the South African authorities. Provisions for recommended constitutional and legislative reforms are suggested were possible.

1.13 SUMMARY

Chapter 1 contextualised the study by demarcating and outlining the research problem, research questions, research objectives and limitations, and research design and methodology. It provides an overview of the entire study. Moreover, the chapter clarified certain important terms and concepts in paragraph 1.8 such as *corruption* and *State capture*. Preliminary findings in Chapter 1 were that corruption is a serious problem in South Africa. This has been confirmed by both the 2017 and the 2018 Corruption Perception Index (CPI) of the Transparency International. A number of instruments are used to rate and measure country corruptions. The 2018 CPI, for instance, showed no improvement in South Africa's CIP from that of 2017. Like in 2017, South Africa is still ranked at number 73 with a global average score of 43. South Africa's ranking, according to Sibanda (2019 – Daily Maverick), is a far cry from the countries that the study used for comparative purposes. Singapore is ranked position number 3, Hong Kong ranked number 14 and Botswana ranked number 34 with a global average score of 61.

The next Chapter deals with literature review.

CHAPTER 2

REFLECTION ON EXTANT LITERATURE ON CORRUPTION

2.1 INTRODUCTION

According to Randolph (2009), the following is key to what a literature review is all about: “Conducting a literature review is a means of demonstrating an author’s knowledge about a particular field of study, including vocabulary, theories, key variables and phenomena, and its methods and history. Conducting a literature review also informs the student of the influential researchers and research groups in the field.”

In conducting a study entitled *A critique of the South African anti-corruption strategies and structures: a comparative analysis,* there is a need to contextualise the research with regard to relevant prior studies. Therefore, in a thematic approach, the literature review is conducted looking specifically at issues of the current and historical prevalence of corruption in South Africa; perceptions and understanding of the meaning and import of corruption and corrupt practices in South Africa and other jurisdictions, including the concept of state capture; best practices in the combatting of corruption and the appropriate institutional, legislative and regulatory frameworks in the selected comparative jurisdictions; and international and regional anti-corruption instruments. The consideration of regional and international instruments in particular is important given section 39 (1) of the Constitution, which requires that “When interpreting the Bill of Rights, a court, tribunal or forum – *(a)* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; *(b)* must consider international law; and *(c)* may consider foreign law”.

In brief, this chapter is an attempt to answer the following questions: What has been written about this topic before, if anything? What are the existing relevant debates? What are the key ideas and findings in the current literature on the topic and the specific problems identified? What are the gaps in the literature that call for further research?

2.2 CORRUPTION AS A SERIOUS OFFENCE

The seriousness of the crime of corruption has been pronounced in several examples of case law, and by different scholars. In *S v Shaik and Others* [2006] ZASCA 105; 2007 (1) SA 240 (SCA), para 222, the SCA stated:

> [the] seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance … Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe … It is thus not an exaggeration to say that corruption of the kind in question eats away at the very fabric of our society and is the scourge of modern democracies.

So serious is the crime of corruption that it may also blur the lines of other related corrupt activities. In *S v Shaik,* for example*,* Shaik was convicted of transgressing the PCCA Act, and for fraud.

It is submitted that the above definitions, or rather categorisations, of corruption are complementary, particularly considering other manifestations of corruption including state capture. There seems to be consensus amongst scholars on the negative impact of corruption all over the world, including its negative financial implications for the economy and the poor, and how it undermines good and effective governance, oversight and accountability and ethical leadership.

2.3 SOCIETAL ILLS OF CORRUPTION

Okpokwu (2016:17) points out that “corruption erodes public trust in government, deprives the citizens of basic services by transferring public funds into private gains of few individuals. It is the betrayal of public trust by those in positions of power.” It is an act that involves undue benefits in order to allow an unwarranted action or inaction (Doig, 2014:672). As unlawful conduct, corruption delegitimises the action taken and also affects the legitimacy of processes and consequences. With regard to the issue of legitimacy, the World Bank Report (2017:77) states:

> corruption undermines legitimacy because it affects public perceptions of the fairness of decision-making processes. In the long term, corruption negatively affects growth by diverting resources from more productive use. It negatively affects equity by disproportionately benefiting those in power, although in the short term it may grease the wheels of the economy.

A similar view is held by Stapenhurst, Johnston and Pelizzo (2006:15), who assert that "Corruption in politics undermines the legitimacy of political leaders and leads to public's disaffection with the government of the day. Corruption facilitates trafficking, money laundering and organised crime which ultimately contributes to weak economies, inequality, environmental damage, illegitimate leaders and also increases social polarization." It is submitted that generally many authors, scholars and commentators find corruption to be cancerous, repulsive, and eroding the very sense of good governance and public good (see for example Rajin, 2017; Pillay, 2016; Serfontein, 2015; and Sibanda, 2005).

The South African National Planning Commission (NPC) has conceded that corruption is "a monster which weakens government's ability to deliver services, increase social mobility and overcome inequalities, which in turn exacerbates the potential for corruption" (National Planning Commission, 2014:26). In addition, this has been observed in "many developing and under-developing countries" (Majila *et al*., 2014:1), with differing costs. From the point of view of governance and public good, it is clear that the implications of corruption are dire. It affects the rule of law and weakens the state institutions tasked with enforcing the country's laws; it affects the distribution of income, assets, unemployment and health to the comparative disadvantage of the poor (KPMG, 2016:9). The ANC National Policy Conference (ANC, 2017:4) also notes that "the magnitude of the scourge of corruption in the public sector, diverts these much needed and scarce resources from the upliftment of communities and also undermines development and social cohesion." According to Stapenhurst *et al*., (2006:2), factors that have a probability of increasing corruption are:

- Missing mechanisms to ensure government accountability and transparency (oversight bodies, active opposition parties, independent media, free and fair elections);

- Weak law enforcement structures (such as effective prosecution, specialised anti-corruption agencies, and an independent and well-resourced judiciary);
- Missing regulatory frameworks (legislation, codes of conduct, and audit requirements);
- Low levels of education and literacy;
- An unprofessional civil service (exposure to nepotism and patronage); and
- Lack of private-sector competition in service provision.

Corruption is also particularly damaging to good relations between citizens and the state. The costs are not borne equally and fall most heavily on the poor through the impact on the quality and accessibility of public services (NPC, 2014:25–26). The poor are the most affected by corruption and corrupt activities "as it effectively subsidises criminal elites with the public and private sector" (Van Vuuren, 2006:1).

2.4 DIFFERENT UNDERSTANDINGS AND MANIFESTATIONS OF CORRUPTION

The complex nature of corruption is best explicated by Serfontein (2015:1) who states: "Corruption as a constant global phenomenon, has become more complex and intense as competition for resources also increase." The following authors (sources) were deliberately quoted *verbatim* to buttress how differently corruption is understood. According to KPMG (2016:7), "corruption is pervasive in both developing and advanced economies. However, there exists no globally agreed-upon definition of corruption with lay persons using the terms interchangeably with transgressions including lobbying, bribery, fraud, collusion and theft". Stapenhurst *et al*., (2006:xi) hold that "[i]t is a disease that threatens the hope and aspirations of the poor for a better future for themselves and their children. Corruption drains finances that could possibly have assisted with educational programs for poor children." Doig (2014:672) provides an operational definition of corruption by stating that "[i]t involves the acceptance of an offer or reward in favour of acting or not acting, in favour of the giver; corruptly awarded contracts may also cause financial loss or poor quality of service to the electorate". As indicated by Khan, Khan, and Ahmed (2012:36), corruption "…is the root cause of under-development and poverty".

The words “fraud and corruption” have been widely and loosely used by scholars around the world. According to Apolloni and Mushagalusa (2013:8–9, 11):

> fraud is an economic crime that involves some kind of trickery, swindle or deceit. It involves a manipulation or distortion of information, facts and expertise by public officials positioned between politicians and citizens who seek to make a private profit, whereas, corruption is a pervasive and enduring fact in some societies that it has become an important aspect of the cultural norms and practices … corruption comes from a Latin word “*corrumpere*” which means to break something and during the action of corruption, the law, legal rule, a moral norm and in the worst situations communities and human personalities are broken.

Khan *et al*., (2012:36–37) assert that corruption “is universal and can lead to the destruction of democracy, violation of human rights, the collapse of markets, lower quality of life and an increased threat to social welfare. Corruption fuels the growth of good governance and further corruption.”

There are various definitions of corruption. Many scholars across the globe point out that corruption has to do with the “abuse of power”. According to Corruption Watch (2015:16); Liu (2016:171–172); the NPC (2014:25) and the National Development Plan 2030 (NDP); Newburn (2015:3); KPMG (2016:7); and Serfontein (2015:2), corruption is the “misuse of official position for personal gain.” Another definition is of corruption relates to abuse of public office for private ends (Bhorat *et al*., 2017:4). According to the PCCA Act, the definition of corruption includes any “gratification” that would induce either public or private actors to act in an improper manner during the performance of their duties “which then undermines growth and development by diverting resources away from development programmes. Its effects are particularly harmful to developing countries and for achieving good governance” (RSA, 2009:3). However, according to Walton (2015:15), “there is, however, concern that the definition fails to recognise the cultural, economic and social factors that frame transactions labelled as corrupt.” Walton (2015:15) also defines corruption as “the abuse of public office for private gain.” Nonetheless, according to Lascoumes and

Tomescu-Hatto (2008:25), “corruption remains normative and therefore, it is not surprising that it remains a matter of considerable dispute and that there is little agreement on how to define it.”

Khan *et al.*, (2012:40) identify various types of corruption, which are:

> *[T]ransactive* and *extortive corruption*, the former being an agreement between a donor and recipient pursued by them for mutual benefit and the latter entailing some form of coercion to avoid the infliction of harm on the donor; *investive corruption,* involving the offer of benefit without immediate link but in anticipation of a future gain in which a favor may be required; *nepotic corruption* concerning favors to friends and relatives in appointment to public office; *autogenic corruption* takes place when a single individual earns profit from inside knowledge of a policy outcome; *supportive corruption*, making reference to the protection or strengthening of existing corruption often through the use of intrigue or violence; *exploitative corruption,* where the public servant exploits the helpless poor servant; and *collusive corruption* where the citizen corrupts the public servant by a bribe because he gets financially and beneficially, better benefits. This sort of corruption depends on black money.

It is submitted that the categorisations by Khan *et al*., (2012:40) of corruption essentially depict different manifestations of the form and shape corruption and corrupt activities can take. Another phenomenon which is on the rise in the public and private sector is *sex for contracts corruption,* where older men and women press young men and women for sexual favours in exchange for contracts. This form of corruption is intricate to investigate, as there is no hard evidence unless the victim comes forward.

The following categorisation of corruption by Walton (2015) is also instructive for this study, particularly when understood in the context of state capture as discussed in paragraph 2.5:

2.4.1 THE DEFINITION OF PUBLIC OFFICE AND THE ABUSE OF POWER

According to the NDP 2030 (2015:446–451), public officials and elected representatives have the duty to administer public resources on behalf of the citizens and society "in an efficient, transparent and accountable fashion" and not for personal gain. However, this is not always the case and many have fallen into the trap of corrupt administration of public resources and the abuse of public office. The World Bank Report (2017:77) makes the observation that "corruption has been defined as the use of public office for private gain." The understanding of corruption as an abuse of public office for personal or private gain finds support in much academic literature and in the policy documents of development organisations. What is common in many of the definitions of corruption as an abuse of public office is the "focus on those working for the state. They link corruption to public officials acting out of private regard. The public office definition relates to the division between the public and private spheres: when the public and private spheres mix, corruption ensues" (Walton, 2015:16–18). This definition has been proposed for further modification by Disch, Vigeland, Sundet, and Gibson (2009:11), who says it must also refer to "[t]he abuse of entrusted authority for illicit gain." According to Disch *et al*., (2009), such an expanded definition "captures the complex and often highly political nature of corruption" and is wide enough to "cover all transactions between actors in state and non-state spheres where the structural or positional relation between the parties may influence the outcome but can still take account of non-transactional corruption like forgery" (Disch *et al*., 2009:11).

The downside of the definition of corruption as the abuse of public office, which I agree with, is that it oversimplifies the complexities of state-society relations in developing countries, particularly those with weak state institutions. Admittedly, it is commendable that the definition highlights how corrupt activities and corrupt conduct lead those who are entrusted with public office to deviate from their official obligations to act ethically and responsibility in the public interest. Corrupt activities conceptually have a broad definition and include behaviour, according to Khan *et al*., (2012:38), such as "bribery (use of reward to pervert the judgement of a person in a position of trust); nepotism (bestowal of patronage by reason of relationship rather than merit); and misappropriation (public resources for private-regarding uses)" that negatively impact the public welfare.

Another shortfall of the abuse of power definition is that although it broadens the meaning of corruption. As put by Walton, the definition or rather the understanding in this sense "still exclude[s] much morally dubious (or corrupt) behaviour. Like the public office definition, the abuse of power definition includes reference to 'personal gain" (Walton, 2015:16–18).

A view by Ades and Tella (1996) in trying to understand the causes of corruption and dealing with theories on the consequences of corruption is that one of the many approaches employed to combat corruption of bureaucrats must be incentives. This, they argue, may include providing them with wages that will disengage them from corrupt activities. Unfortunately, this view seems to suggest that public service is a business opportunity. It is submitted that those entering the public service should not have as their priority the need to be rich.

2.4.2 CORRUPTION AS INSTITUTIONAL AND INDIVIDUAL DECAY

Corruption has a corrosive effect on the ethics and morals of the actors. U-Myint (2000) in Khan et al. (2012:45) also agrees that corruption on a grand scale has the negative impact of social decay. So serious is this effect that the Free State High Court in *Nakedi v S* (A173/2016) [2018] ZAFSHC 36 (29 March 2018), para 83, said that "[o]ver and above the seriousness of the offence, the appellant's moral blameworthiness in the circumstances must also be taken into account." Thus, Walton (2015:16–18) refers to corruption as "a form of individual or institutional decay". Also, that the people or institutions need to wield any power. Furthermore, there need not be any personal gain. Central in this definition is that it focuses on the "moral atrophy of individuals and institutions" (Walton, 2015:16–18). This resonates with the definition by Peter and Masabo (2009:50) of corruption as "an act or conduct of dishonesty which is intended to implicitly influence, deviate from and alter the just behaviour and accepted societal propriety in order to satisfy one's selfish and parochial interests." Newburn (2015:3) is of the opinion that "corruption is fundamentally an ethical issue. It is important to note that the NPC (2014:26) has asserted that "corruption is not only an institutional problem but also a moral and political one." In his observation, Van Vuuren (2013:20–26) is of the opinion that "corruption is no longer a crime which needs to be curbed, but it has become a crucial area of contestation in the criminalisation of politics.

Corruption is a fertiliser that enables renewed abuse of power and stolen opportunities, and largely cyclical in nature."

2.5 CORRUPTION AND STATE CAPTURE PRACTICES

2.5.1 RELATIONSHIP BETWEEN CORRUPTION AND STATE CAPTURE

State capture in essence is corruption undergird by a symbiotic relationship between those in government and private business. It relates to the influence exerted by private business on the affairs of the state (Shai, 2017:71) in order to promote personal private economic interest (Tudoroiu, 2013). A slightly different take by Disch *et al*., (2009:10) is that "state capture coexists with the conventional (and opposite) view of corruption in which public officials extort or otherwise exploit the private sector for private ends." It is submitted that this view is better understood from the point of the magnitude of state capture, its complexities and the ramifications it has. Bhorat *et al*., (2017:4–5) posit that it has far more devastating consequences than common corruption in that it is a

> systemic thread that is akin to a silent coup, which is a political project that is given a cover of legitimacy by the vision of radical economic transformation. The focus is not on small-scale looting, but on accessing and redirecting rents away from their intended targets to private hands and this requires high-level political protection including law enforcement agencies.

The researcher agrees with Bhorat *et al.*, (2017) that this sort of corruption is tantamount to a *coup d'état, "*an aberration in governance" (Dassah, 2018). The capturers will do their best to influence the government machinery as it relates to policies and advantages, amongst other things, for their personal gain through rent-seeking. As correctly observed by Maharaj (2017), state capture is "a bane to the ruling party". To use the words of Maharaj (2017), state capture has turned South Africa into a "shadow state". "The almost daily disclosures about the shenanigans of the ANC politicians and their redeployed government bureaucrats reveal that this beloved rainbow nation is being dismantled for capture and sale with huge discounts for buyers located in Saxonworld," observes Maharaj (2017). Like a government arising out of a *coup d'état*, a captured state suffers from legitimacy challenges and is afflicted by

personal gratification to the exclusion of the broader society through weakened institutions and weakened public officials (Funke & Solomon, 2002:2). Even the ANC has expressed concerns that "[t]his sort of corruption needs to be exposed and swift action taken regardless of the seniority of the people involved" (ANC National Conference Discussion Document, 2017:4).

It is perhaps apposite to refresh memories with reference to the 2016 State Capture Report by the former Public Protector Advocate Thuli Madonsela. The crux of the report has been succinctly summarised by Wolf (2017:2) as follows:

> Allegations of corruption, irregularity and personal enrichment are widespread and run deep: that is the over-riding message contained in the 350-plus pages of the State of Capture report. The report documents the involvement of the Gupta family in the appointment and dismissal of ministers and directors of state-owned enterprises (SOEs) resulting in the improper and corrupt award of state contracts and benefits to the Gupta family's business empire. Members of cabinet, a former cabinet minister and other persons testified that the Gupta family offered bribes and/or posts in exchange for certain benefits. The president and/or his family members were either present or facilitated the meetings.

State capture is example of government and public officials behaving badly and not setting an exemplary tone as representatives of the state by obeying the laws against corruption and corrupt practices. The importance of government and its employees observing the law was succinctly expressed by the Constitutional Court in *Mohamed v President of RSA* 2001 (3) SA 893 CC as follows:

> [68] [S]outh Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis in *Olmstead et al. v United States*: 'In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. ... Government is the potent, the omnipresent teacher. For

> good or for ill, it teaches the whole people by its example. … If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

It has been contended by Shai (2017:65) that the concept of state capture "has been used (and abused) by both scholars and philosophers to explain the configuration of the relations between the state and other stakeholders in several countries including South Africa, the United States of America (USA) and Britain, inter alia" due to the fluidity of its understanding. (For related studies, see Kebede; Hellman, Jones & Kaufmann, 2003). Others understand the concept from a political perspective (Labuschagne, 2017; Abby, 2013). But what is discernible from these studies, despite their differences, is that state capture is corruption and/or corrupt practice (Fazekas & Toth, 2016; Wolf, 2017).

It is submitted that the government and its employees allowed corruption and corrupt practices to multiply and to build resistance against good governance intervention during state capture. Less or no regard was given to the existing anti-corruption framework and strategies.

2.6 ORGNISATIONAL EFFECTIVENESS AND COMBATTING CORRUPTION

The effectiveness of the South African anti-corruption structures depends in part on the organisational effectiveness of the criminal justice system. In their book *Criminal Justice Organizations: Administration and Management* (2015), Stojkovic, Kalinich and Klofas dedicate a very important chapter to organisational effectiveness (Stojkovic *et al*., 2015:381) which, it is submitted, is important in understanding the legislative and institutional effectiveness (or not) of South Africa's law enforcement agencies. There are several theories or models for effectiveness. For the purposes of this study, the focus is on the degree of congruence between organisational goals and some observed outcomes. Effectiveness can be affected by several issues and/or challenges. Communication in organisations is a problem, particularly when undertaken by individuals or agencies with different views on how crime and offenders must be dealt with (Stojkovic *et al*., 2015:107). This has been a problem in South Africa often aggravated by the multiple networks of intelligence and law enforcement agencies. As highlighted by Stojkovic *et al*., (2015:111), role conflict has been at the heart of ineffectiveness of, between and among South African corruption agencies.

This challenge has been more pronounced between the SAPS and the Independent Police Investigation Directorate (IPID), which have different powers and obligations to investigate corruption. A typical example is the case heard on 21 June 2018 in the North Gauteng High Court in Pretoria in which the court ruled in favour of the IPID stopping SAPS members from interfering into the work of the IPID. The court held that:

> No member of the SAPSs may oversee or conduct an investigation, or render assistance with an investigation, in respect of a matter concerning a member of the [IPID] in which he or she has personal interest or a financial interest or any other interest which might preclude him or her from exercising or performing his or her powers, duties and functions in an objective manner.

The crux of the matter was that SAPS members with financial or other interests in the investigation of IPID must recuse themselves from the investigation. In this case members of the SAPS in the North West, themselves subject to the investigation relating to corrupt activities, wanted to conduct an investigation against three members of the IPID who were investigating them (Chabalala, 2018). The IPID Act, for example, encourages organisational effectiveness by organs of the state to assist it in performing its functions effectively (Janse van Rensburg, 2018).

The conflicting roles of these criminal justice agencies and the perceptions of their respective practitioners has a history of creating a climate or general perception that one of these agencies is committed to protecting perpetrators of corruption from prosecution. For example, in the case against former Acting Commissioner of Police Lieutenant-General Khomotso Phahlane, McBride alleged that he enjoyed full political protection by the Minister of Police. The whole incident, it has been argued, was a “massive political rupture between the SAPS, the Hawks and the Minister of Police on the one hand, and those seeking to expose alleged corruption and abuse of state power on the other” (Hoffman, 2017).

The organisational effectiveness of such agencies and structures created after independence and change of government are bound to suffer challenges with regard their effectiveness. According to Alfiler (1979), the Philippines is one country that experienced serious tensions between anti-corruption agencies immediately after

independence. The agencies were ineffective and plagued by instability. Abuse of public office and bureaucratic corruption in the Philippines from 1946 to 1979 characterised the anti-corruption agencies. So did using political influence and rent-seeking by those in a position of power for private gain (Alfiler, 1979). It is submitted that the state capture in South Africa and other reported incidents of corruption mirror the situation in the Philippines at the time; a period characterised by shades of organisational ineffectiveness.

2.7 ACCOUNTABILITY

According to Thornhill (2011:80), "South Africa's Constitution, 1996 is a prime example of the state's commitment to democratic ideals, transparent and accountable public administration which is a requirement for a democratic government." He further submits that "public accountability is deemed to be an inherent requirement in any political, administrative and managerial action in the public sector" (Thornhill, 2011:80). Girma (2012:1) posits that parliamentary oversight is "…of paramount importance as accountability." It is the primary means of holding accountable those occupying public office and entrusted with enormous powers to exercise during their tenure in that public office (Madue, 2012:47. See also Green, 2016:2). Moreover, in South Africa, parliamentary oversight is constitutionally mandated (Nyathela & Makhado, 2014:41; Legislative Sector, South Africa, 2012:8). Armstrong (2005:1–2) is of the view that "transparency without accountability is meaningless and makes a mockery of sound public administration".

Accountability depends on transparency or having the necessary information. Whereas, transparency and accountability without integrity may end up not serving the interests of the public. This could be directly translated into ethics infrastructure or national integrity system. The Constitution in chapter 10 section 195(1) (f) (g) makes provision for a public administration that is accountable and transparent by being responsive to the public (Constitution, 1996). This view is supported by the South African Local Government Association (SALGA) (2011:10–11) calling for a responsive, accountable and transparent public administration. "Accountability has become a symbol of good governance in both public and private institutions which refers to institutionalised practices of giving account on how assigned responsibilities have been carried out" (Oversight and Accountability Model of the South African

Parliament, 2009). “And answerability for failing to meet stated performance objectives” (Armstrong, 2005:1).

As already stated, in South African, oversight and accountability are functions of legislature mandated by the Constitution “to scrutinise and oversee executive action of any organ of state. It entails informal, formal, watchful, strategic and structured scrutiny by legislature and Parliament with regards to the implementation of laws, budgets, and strict observance of statutes and the Constitution” (Legislative Sector, South Africa, 2012:8). As a concept, accountability has been used in many different ways (Madue, 2012:48). It has been regarded as a part of the “social contract between citizens and the state which key to wellbeing and progressive change” (Green, 2016:2).

In his paper, Jelmin (2012:5&7) refers to two types of accountability. Vertical accountability and horizontal accountability. Jelmin (2012:5) points out that “the most important type of vertical accountability in a representative democracy is elections with which voters are able to reward or punish the elected representatives by voting for a particular party or individual; this is often seen as the cornerstone of representative democracy”. With horizontal accountability, “checks and balances are put in place for government institutions to hold each other accountable and ensure that none stands above the rule of law or intrudes on the rights and privileges of another. Horizontal accountability also includes political oversight and judicial and administrative accountability (Jelmin, 2012:10–11). De Jager (2009:16) agrees that “horizontal accountability is an affirming of constitutionalism and the rule of law, effectively ensuring that no one is above the law. It affirms the need for separation of powers of the state.”

Stapenhurst and Pelizzo (2002) in Malapane (2016:135–136) state that “for Parliament to effectively hold the Executive accountable, it firstly needs to understand the significance of its roles, assuming that Parliament and Members of Parliament (MPs) know and understand the importance of their roles … which is law-making, conducting oversight over the executive, facilitating public participation and ensuring that government delivers to the needs of the community as mandated”. Sections 56(b), 69(b) and 115(b) of the South African Constitution makes further provision for parliament, the legislature or parliamentary committees to ensure adequate

accountability. Disch *et al*., (2009:11) observes that the only way to "achieve a high standard of integrity and accountability" is when the country has "a well-functioning judicial system of courts, laws, police and public prosecutors."

2.8 APPROPRIATE AND DETTERENT PUNISHMENT FOR CORRUPTION

Discussed in depth in Chapter 5 the court in *Phillips v The State* was dissatisfied with the sentenced imposed by the trial court for corruption, advising that PRECCA does not limit the penal discretion of the sentencing court and that sentences imposed by the courts must be appropriate to the offence of corruption. The question is, how do we do that?

The UN Anti-Corruption Convention, for example, gives little sanctions and sentencing guidelines for corruption offences save to say that a number of consideration are found in the different Articles of the Convention. Article 12(1) provides that "each State Party shall take measures, in accordance with … its domestic law … to provide effective, proportionate and dissuasive civil, administrative or criminal penalties" in cases of defilement of corruption prevention standards and offences in the private sector. Article 30(1) provides that "each State Party shall make the commission of [corruption] offences … liable to sanctions that take into account the gravity of that offence." Article 30(7) goes further to state that those convicted of corruption whilst holding public office must be disqualified from holding such public office. However, Article 37(2) allows mitigation in sentence or immunity from prosecution should the accused persons provide "substantial cooperation" with the investigators or the prosecutors. Most importantly, Article 30(10) in my view calls for individualisation of the punishment by requiring that the State Parties should seek to promote the reintegration of convicted persons into society.

A rather harsh approach taken against corruption in sanctioning and sentencing of offenders was agreed to by parties at the 27th of January 1999 Criminal Law Convention on Corruption hosted by the Council of Europe, European Treaties, in Strasbourg, France. It was resolved under article 19 of the Convention that when considering sentences for corruption and corrupt practices, each Party must impose ". . . effective, proportionate and dissuasive sanctions and measures, including . . . penalties involving deprivation of liberty which can give rise to extradition." In terms of the Convention, it is important that convicted persons are "..subject to effective,

proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions" (Article 19(2)). In addition, to ensure that convicted persons do not benefit from illegal activities or proceeds thereof by confiscating "…the instrumentalities and proceeds (or the equivalent value thereof) of criminal offenses involving corruption" (Article 19(3)). Notable, and perhaps interesting for jurisprudence in a country like South Africa were foreign born citizens like the Gupta family are accused of grand corruption during the time of former President Jacob Zuma, is that the Convention goes to the extreme of proposing extradition for corruption offences. It is submitted that confiscation of the proceeds of crime and extradition of foreign nationals suspected of corrupt activities in South Africa will send a strong message of zero tolerance of corruption in South Africa.

According to Condrey (2008:2), taking into account the seriousness of the corruption offence in question remains important, even with the intention of sending a strong message of deterrence. Indeed, the issues of appropriate and deterrent sentence for corruption is critical to the jurisprudence on combatting corruption. A specific-minimum penal sanction for corruption has been rejected in Indonesia though. The argument is that such an approach from the "aspect of ontology essentially the opposite of the value of justice oriented on the basic idea of the balance of quality criminal offenses committed with the severity of penal as a form of protection of the public interest as well as acts of corruption and corruption victim" (Parman *et al*., 2014:33).

Condrey (2008:2) reveals that in France, under Article 432 of the Criminal Code, corruption may be punished by amongst other "deprivation of civil, civic and family rights" and "disqualification from holding public office or carrying the professional or societal activity within which the criminal act was committed". Condrey further postulates that in Northern Ireland sentencing in generally left to the discretionary powers of the judges to determine an appropriate sentence, which they must exercise within the confines of statute on maximum penalties. Also, that the regime of principles of sentencing have been. However, through case law, general principles of sentencing have been developed and adopted through case law. For example, the courts will always consider the proportionality between seriousness of the offence and the

personal circumstances of the offender; and that the plea of guilty ordinarily secures a reduce sentence (Condrey, 2008:8. see also Machin, 2005).

The United States is one of the jurisdictions with a well-established regime and clear sentencing rules and guidelines, which at federal government level are developed by the United States Sentencing Commission (USSC). Condrey (2008:10) reports that United States Code 18 U.S.C requires that that sentencing in federal must "[r]eflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense…" In relation to the offence of corruption, violation of the FCPA in criminal cases may lead to a sentence of a fine up to $2,000,000 (for a legal person) or a sentence of $100,000 and up to 5 years in prison for a natural person. Comparatively, the provisions of the U.S. Code § 3571 provides for fines of up to $250,000 for an individual, $500,000 for an organization, or twice the gross monetary gain for the defendant or loss to the victim (Condrey 2015:11). In *Apprendi v. New Jersey, 530 U.S. 466 (2000)*, the Supreme Court held that any fact that increases the time that a defendant may be incarcerated above the statutory maximum must be determined by a jury. The Supreme Court in *Southern Union Co. v. United States, 132 S. Ct. 2344 (2012)*, followed its advise in *Apprendi* V new Jersey by applying to the case some facts that would increase the defendant's criminal fine above the level otherwise set by statute.

Forfeiture of the proceeds of corruption can take pace in both criminal convictions against the person (in *personam*) and civil proceedings against the property (*in rem*). (Basdeo, 2013:228fn58 and 230). At federal government level criminal confiscation or forfeiture takes place pursuant to the Federal Rules of Criminal Procedure as an element of sentenced following a conviction based on the plea of guilty. This was demonstrated in *Libretti V United States* 516 U.S. 29 [1995] at 31, when the court sanctioned a forfeiture order against the accused in addition to the sentence of imprisonment and financial penalties. The accused was in this case ruled to have waived his right to trial by jury pursuant to section 31(e) of the Federal Rules, which could have ruled on the forfeitability of the property bin question. The United States Supreme Court in the case of *United States v Bajakajian* 524 U.S 321 [1998), at 325, held as the reason behind *in rem* forfeitures the fact that such property is the "instrumentality" of a crime.

In Bajakajian, the accused was charged with, *inter alia,* attempting to leave the United States without reporting, as required by 31 U.S.C. § 5316(a)(1)(A), that he was transporting more than $10,000 in currency, after customs inspectors found the respondent and his family preparing to board an international flight carrying $357,144, he. The Government also sought forfeiture of the $357,144 under 18 U.S.C. § 982(a)(1), which provides that a person convicted of wilfully violating §5316 shall forfeit "any property involved in such an offense." Respondent pleaded guilty to the failure to report and elected to have a bench trial on the forfeiture. The District Court found, among other things, that the entire $357,144 was subject to forfeiture because it was "involved in" the offense, that the funds were not connected to any other crime, and that respondent was transporting the money to repay a lawful debt. Concluding that full forfeiture would be grossly disproportional to the offense in question and would therefore violate the Excessive Fines Clause of the Eighth Amendment, the court ordered forfeiture of $15,000, in addition to three years' probation and the maximum fine of $5,000 under the Sentencing Guidelines. The Ninth Circuit affirmed, holding that a forfeiture must fulfil two conditions to satisfy the Clause: The property forfeited must be an "instrumentality" of the crime committed, and the property's value must be proportional to its owner's culpability. The court determined that respondent's currency was not an "instrumentality" of the crime of failure to report, which involves the withholding of information rather than the possession or transportation of money; that, therefore, §982(a)(1) could never satisfy the Clause in a currency forfeiture case; that it was unnecessary to apply the "proportionality" prong of the test; and that the Clause did not permit forfeiture of *any* of the unreported currency, but that the court lacked jurisdiction to set the $15,000 forfeiture aside because respondent had not cross-appealed to challenge it.

In South Africa criminal forfeiture is dealt with in the provisions of POCA, which is discussed in details in Chapter 4.3.3 *infra*. Chapter 6 of POCA specifically deals with instrumentality of crime or proceeds of crime forfeiture (Basdeo, 2013:233).

The sentencing guidelines, which are treated by sentencing courts as advisory, rather than mandatory following the 2005 the US Supreme Court in *US v Booker* that held mandatory Guidelines to be in violation of the US Constitution, are generally considered as a measure to bring uniformity for similar cases under similar circumstances. The US Federal Sentencing Guidelines are presented in a table

depicting the levels of the sentence to be imposed based on the severity of the offence and circumstances thereof (See Title 18 of U.S.C § 3553). Specific to corruption in public office or by persons holding public office Chapter 2 of the Guidelines §2C1.1 calls for a 4-level consideration of the following factors (Unknown 2018:653 - 658):

(1) If the offense involved more than one bribe or extortion, increase by 2 levels;

(2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.13 (Guidelines Manual (2014), § 2C1.1(b)):

The following cases demonstrate the application of the United States Federal Guidelines:

a) In *United States of America v Bridget McCafferty,* 2012 US Lexis 11247 (6th Cir 2012): a former judge, was convicted of 10 counts of making false statements to FBI agents arising out of a corruption investigation of another public official. The offense level was 6, with its corresponding guideline range for sentencing from 0-6 months. The district court

applied a 5-level adjustment moving the range to 8-14 months and sentenced McCafferty to 14 months. The upward departure and ultimate sentence were both upheld on appeal, with the court stating: "For a sitting judge to knowingly lie to FBI agents after she had unethically steered negotiations in a case to benefit her associates is a shock to our system of justice and the rule of law.

b) *United States of America v Richard G Renzi*, 769 F (3d) 731 (9th Cir 2014): The case involved the trial and sentencing of a former Arizona Congressman in respect to a $200,000 bribe payment (resulting in a 10-level enhancement). Renzi was sentenced to 36 months imprisonment and his friend and business partner was sentenced to 18 months imprisonment. In affirming the sentences, the Court noted the substantial power granted to Renzi, stating "The Constitution and our citizenry entrust Congressmen with immense power. Former Congressman Renzi abused the trust of this Nation, and for doing so, he was convicted by a jury of his peers".

The Canada Criminal Code states that proportionality is the "fundamental" sentencing principle "(Sec 718.1). A sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender. The sentencing guidelines are more pronounces and enlightening in the context of South Africa with regard to corruption of the likes of Bosasa and other companies. On the sentencing Principles for Corporations and Other Organizations, section 718.21 of the Criminal Code requires the consideration of the following factors:

(a) any advantage realized by the organization as a result of the offence;

(b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;

(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not about to pay a fine or make restitution;

(d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;

(e) the cost to the public authorities of the investigation and prosecution of the offence;

(f) any regulatory penalty imposed on the organization or one of its representatives in respect of conduct that formed the basis of the offence;

(g) whether the organization was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;

(h) any penalty imposed by the organization on a representative for their role in the commission of the offence;

(i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and

(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

Case law in Canada calls for a custodial sentence, even where there are significant mitigating factors, in cases of breach of trust by a public official as was the case in *R v. MacInnis* (1991), 95 Nfld. & P.E.I.R. 332 (S.C.), *R v. Macaluso,* 2006 QCCS 2301 and *R v. Gonsalves-Barriero,* [2012] O.J. No. 4369 (Ct. J.).

It is submitted, however, that the maximum of 5 years imprisonment sentence for bribery and other corruption offences committed by government officials and employees under sections 121-125 of the Criminal Code is rather a slap on the wrist and does not fully appreciate the seriousness of the crime of corruption, aggravated by the fact that the offender abused the public office or the position of trust. Typical example is the case of a two year sentence in *R v Murray,* 2010 NLTD 44 for the

"offender was sentenced to a two-year penitentiary term followed by a two-year probation order as well as an order of restitution. Murray was the Director of Financial Services for the House of Assembly in Newfoundland and Labrador. Using this position, Murray falsified expense claims. An agreed statement of facts provided that Murray received close to $400,000, which went directly to feeding a $500 a day gambling addiction" (2018:697) is in my view travesty of justice. The same can be said with the case of *R v Gyles*, [2003] OJ No 6249 when the Ontario Superior Court "imposed a sentence of two years imprisonment for municipal corruption and a concurrent sentence of two-and-a-half years for breach of trust." (2018:697)

It is submitted that the discussion herein revealed the varied manner in which the issue of corruption is handled, particularly the punishment meted out. However, the sentencing principle of proportionality of the sentence, individualisation of the determination of the appropriate sentence and deterrence in the interest of the society is observed by many jurisdictions; or the equivalents of these principles. It is submitted, however, that in respect to corruption in South Africa case law and literature review leans towards the imposition of hefty sentences. For instance, other than the concern in *Phillips v The State* for PRECCA related sentencing other court such as *Famanda v State* (930/2017) [2018] ZASCA 139 (SCA). In casu, Nicholls ACJ although ultimately setting aside the order of court a quo to refuse leave to appeal and substituted it with an order grating "leave o appeal against the sentence imposed by the Regional Court, Johannesburg to the Gauteng Local Division of the High Court, Johannesburg" (at para 17) expressed the following sentiments (at para 11) about corruption:

> There can be no doubt that the trial court was deeply concerned, and quite correctly so, that the image of the National Prosecuting Authority had been tarnished and the administration of justice had been brought into disrepute, by the appellant's actions. *The crime induced a 'sense of revulsion' particularly because it had been committed in the court precinct which should be a symbol of justice. Instead the appellant made a mockery of the criminal justice system*. (Researcher's own emphasis)

In South Africa, the Criminal law Amendment Act 105 of 1997 makes provisions for minimum sentences in sexual cases and certain serious offences such as armed robbery. However, the constitutionality of the Act was tested in a few cases. Stegam J in *S v Mofokeng* 1990 (1) SACR 502 (W) was highly critical of the Act, labelling a restriction of the discretionary powers of the courts and the muddling of separation of powers, an unjust legislation that offends against the sense of justice. Similarly, Davis J in *S v Jansen* 1999 (2) SACR 368 (C) at 373G-H, (See: 3) moaned that minimum sentences disregard all individual characteristics and grossly offends against the accused right to dignity. However, the constitutionality of the legislation was confirmed by the Constitutional Court in three case. In *S v Dukaza, S v Tilly, S v Tshilo* 2000(2) SACR 443(CC) the Constitutional Court declined to confirm the constitutional invalidity by the High Court of section 52 of the Act. According to Ackerman J, held that the provisions did not prevent a court considering any relevant factor to arrive to its decision on the correct sentence (at 446F, 448B-F, 449-A-C). In *S v Dodo* 2001 (5) BCLR 423 (CC) at 441 the Constitutional Court declared section 51 constitutional and not amounting to creating an environment of the courts to impose cruel, inhumane and degrading punishment contrary to the provisions of section 12 (1)(c) of the Constitution. The court in *S v Dodo* further ruled that the Act does not infringe upon the separation of powers, as was argued in *S v Jansen*. Also, than the sentencing discretion of the courts is not unfettered. But, insisted that there is still an obligation of the courts to consider the individual circumstances of the case.

In *Famanda v State* the appellant who was a prosecutor with the NPA, was convicted of corruption in contravention of s 9(1)(a) of PRECCA, together with following an undercover operation carried out at the Randburg Magistrate's Court for suspected corrupt activities involving magistrates, prosecutors and court orderlies in that court. The fact are that appellant and the other two accused received between R3500 and R800 to release police undercover agent arrested on a fictitious charge and detained in the court cells at the Randburg Magistrate Court (para 6). Accused 1 was sentenced to 15 years imprisonment and appellant and accused 2 were each sentenced to 10 years imprisonment in terms of the minimum sentencing legislation. Section 51(2) of the Criminal law Amendment Act 105 of 1997.

It is submitted that Nicholls ACJ, however, may have nullified the impact of his observation against the repulsive nature of corruption when he appeared to condone what he considered less serious corruption to allow the opportunity for the appellant to taper with the sentence imposed by the Regional court. The objectionable statement of the judge, at para 12, reads:

> As reprehensible as the appellant's conduct was, it cannot be ignored that the amount involved was R3500. Of this, it is unclear how much the appellant personally benefitted. I cannot agree with the view of the trial court that 'corruption is corruption' irrespective of the amount involved and it is the criminal intent that is punishable. *Logic dictates that corruption involving millions of rand should be viewed in a more serious light than that involving a few thousand rand.* That there are degrees of fraud and corruption, depending on the amounts involved, is a distinction acknowledged in the Act itself. In my view the appellant has a reasonable prospect of showing that the trial court misdirected itself in this regard or that the sentence was startlingly inappropriate. (Researcher's own emphasis)

2.9 ANTI-CORRUPTION AND INTEGRITY MANAGEMENT

The book by Huberts L and Hoekstra A (eds.) *Integrity management in the public sector The Dutch approach* 2016 is by far the most comprehensive and insightful academic publication issues of integrity management, the contents of which are also relevant to the subject of this study. It is submitted that the different contributions in this book put into a proper and thoughtful perspective the issue of governance, anti-corruption and integrity management in the public service. Thus, the researcher will be forgiven for referring to quite often in this section. The Dutch Integrity Management System, which has been in place since the 1990 to addresses issues including integrity violations and related integrity policies (Hoekstra & Zweegers, 2016:9). Moreover, the Dutch has introduced the 'Model Approach for Basic Integrity Standards for Public Administration and the Police Force (commonly referred to as Basic Standards). The Basic Standards sets up an integrated approach in issues dealing with integrity for whole public administration.

The following are set out as the seven principles of integrity infrastructure in the Netherlands:

The Seven Elements of the Integrity Infrastructure	
Commitment and Vision	Integrity policies can only succeed if the top of the organisation is willing to promote them and to provide sufficient resources for them. Additionally, it is necessary that the top develop a clear vision on integrity management: why do we want to pay attention to integrity, how do we define it, what strategy do we follow, what is our ambition?
Values and Standards	Public sector values and standards constitute the underlying basis for integrity policies. It is therefore important to establish the organisational values and standards and then to document them in a code of conduct. This will make it clear what the organisation and the employees represent and what they can be held accountable for.
Rules and Procedures	Values should be supported by a clear set of organisational rules and procedures. These are often summarised as internal administration and control systems. Examples are: work processes, the 'four-eyes' principle, separation of duties, and job-rotation procedures.
HRM Policies and Culture	Integrity is also an important subject for HR and should, for example, be part of recruitment, selection, screening and exit policies. In addition, introductory meetings, internal courses and staff meetings seem natural occasions on which to raise employee awareness and to improve the organisational culture.
Incidents and Enforcements	Investigating and sanctioning unethical behaviour is important. It gives a signal that integrity is highly valued and reduces the risk of future breaches. Provisions aimed at reporting and enforcement (such as reporting hotlines, integrity advisers, and investigation protocols) are important integrity elements.
Monitoring and Reporting	Monitoring integrity policies and programmes is necessary in order to be able to evaluate and to improve the functioning of the integrity policies. Evaluations provide information about the implementation and effective-ness of the integrity policies.
Organising and Embedding	The above integrity activities should be firmly embedded within the organisation. An integrity officer is the person appointed to develop

	the integrity management system for the organisation, to coordinate all integrity activities and actors and to advise the line management. This officer should draft an integrity plan/document which should cover all issues of this kind.

Table 3: *The Seven Elements of the Integrity Infrastructure* (Taken verbatim from Hoekstra A and Zweegers M. T*he Dutch National Integrity Office Supporting public integrity* in Huberts L and Hoekstra A (eds.) Integrity management in the public sector The Dutch approach. 2016. BIOS: The Hague)

In South Africa the Public Sector Integrity Management Framework was put in place to promote ethical conduct and augment the integrity management methods and standards in the public service (Kekae, 2017:15-16). Hoekstra and Zweegers (2016:67) have their fingers on the right spot with their observation that often times integrity systems are fragmented. Comparatively, the integrity management environment in the Netherlands is set up differently and uniquely from its South African counterpart. Noteworthy is that at places of employment in the public sector have confidential integrity councilors are established as a reporting centres whose duty is to take report incidents of undesirable employment and integrity matters "to the competent authority" for further handling. (Belling & Fenne, 2016:66). It is submitted that this has traces of whistleblowing regime in South Africa. An interesting observation is that there exist in the Netherlands several external integrity incidents reporting organisations. Also, that the country has an integrity investigation *Council* instead of a *National* Agency (Groot, 2016:75). This election to have a Council and not a national integrity investigation Agency has been explained by Groot (2016:75) as stemming from the fears that a central approach may be the efficacy of the Agency may be interfered with by the central govern, seeking to repress key investigations. Hoenderkamp (2016) explains the existence of integrity monitoring in the public sector. This monitoring mechanism is aimed at addressing criminality and similar violation by calling for "matters such as government decisions, their implementation and the distribution of public funds take place fairly, transparently and in accordance with the principles of a state under the rule of law." This public integrity monitoring system, in the researcher's view, enhance greatly the eradication of criminal activities such as corruption and corrupt activities. An important factor to take note of, which touches in part concerns addressed in recommendation 7.5.1; 7.5.2, 7.5.4, and 7.511 in Chapter 7 of this study regarding the autonomy and impartiality of the South Africa anti-corruption agencies, is the independence the *Rijksrecherche* enjoys when

investigating integrity matters in serious offences involving abuse of public office. The position as it stands currently in Netherlands is that the *Rijksrecherche* will take over once the integrity report reveals criminal wrongdoing, because it is a specialised and independent criminal investigation body dealing with matters of integrity. The *Rijksrecherche* enjoys the distinction that it "does not operate under the direct control of the minister who holds political responsibility for it. The *Rijksrecherche* operates under the authority and management of the Board of Procurators General, the highest authority of the Public Prosecution Service" (Hoenderkamp, 2016:92). Therefore, a clear separation of powers is created between the executive and the Judiciary because the *Rijksrecherche* is considered integral part of the Judiciary.

2.10 SUMMARY

From the analyses in Chapter 2, it is clear that corruption has been the subject of a significant amount of theorising and empirical research for decades. There are competing definitions all over the world, which can be found in various disciplines. It clear that there is no single uniform definition of corruption as has been discussed and described by scholars. Furthermore, there are jurisdictions that have been able to deal effectively with corruption, and notable amongst these is Botswana. The corrosive effects of corruption as identified by the different scholars have been highlighted, so were the gaps in the management of corruption. Relevant to the South African context corruption is a bane, a cancer that eats up the society and have the macro-economic, macro-political and macro-social impact on the citizenry and on the legitimacy of democratic institutions. Scandals reported in the different public protector reports bore evidence of how serious the problem of corruption is in South Africa.

CHAPTER 3

ETHICAL DIMENSIONS OF CORRUPTION AND CORRUPT PRACTICES IN GOVERNANCE AND PUBLIC SERVICE IN SOUTH AFRICA

3.1 INTRODUCTION

> Scandals involving public officials have captured world attention these days, on the threshold of a new millennium. Precipitated by events such as “sweetheart deal” privatisation, the diversion of aid, widespread public sector patronage, “crony capitalism”, campaign financing abuses, people are debating outright corruption and unprofessional behaviour in government. If they are not talking about actual criminal or immoral acts, they are condemning lacklustre performance in the public sector. In its discussions, the public does not distinguish among those in government, whether they are elected political leaders or career public servants. In public perception, all are tainted by the same brush of guilt or indolence (UN, 1997).

It is reported that South Africa appears to be reaching a state of crisis, at the heart of which is the shortage of good leaders – in particular, ethical leaders – who place service to the nation ahead of power and self-enrichment. Nothing less than ethical leadership is expected from struggle veterans and other leaders to tackle the triple challenges of unemployment, inequality and poverty (Reddy, 2018). Making reference to Hanekom *et al.* (1990), Puiu (2015:605) identifies the seven most common unethical problems in public sector, namely: bribery, nepotism and theft; conflict of interest; misuse of insider knowledge; use and abuse of confidential information for personal purposes; public responsibility and accountability; corruption; and the influence of interest and pressure groups. Corruption is the greatest challenge that cannot be addressed without reference to ethics. Ethical scandals are said to be commonplace in the world today (Agbim, 2018:20), from the Enron scandal in the US to state capture in South Africa. The current preoccupation with state capture and the myriad of

corruption scandals in South Africa involving public and government officials have brought to question issues of ethics and governance. It is also eroded public trust in the government. The state capture scandal has been followed by other serious corruption revelations such as those in the *VBS Mutual Bank – The Great Bank Heist* report released on 10 October 2018, authored by Advocate T. Motau. The report revealed a flagrant disregard of the relevant mutualisation rules by the bank management and several officials from specific municipalities that are fingered in involvement in corrupt practices. According to the report, an amount of almost R2bn was looted from the VBS Mutual Bank, and an "amount of R1.894m was gratuitously received from VBS by some 53 persons of interest, both natural and juristic, over the period 1 March 2015 to 17 June 2018" (Motau, 2018).

South Africa has another opportunity to seriously introspect and to consider the unavoidable paradigm shift of integrating ethical leadership and trust in governance and in the appointment of public office bearers. Ethical leadership and a governance and corporate culture that appreciates ethics will go a long way to curb corrupt practices in South Africa. As noted by Naidoo (2012:26), there still exists a gap "between ethical leadership, corruption and governance" despite the existence of some research on corruption and leadership and how the two affect governance. According to Cheteni and Shindika (2017:3), a great deal of research has particularly focused on ethics and neglected to pay attention to ethical leadership. It is for this reason that a number of African countries have witnessed severe maladministration of funds and corruption. There is thus a need for studies on corruption and corrupt practices to also address ethical leadership.

3.2 THE RELATIONSHIP BETWEEN ETHICS AND CORRUPTION

What is the relationship between corruption and ethics? Whitton (2001:3) makes the interesting observation that "[e]thical conduct and corruption in the public sector are the two sides of the one coin," in particular:

> To the extent that an organisation succeeds in enhancing its own ethical climate internally, and that which it operates in externally, (for example, by including suppliers and contractors within the scope of an ethics program), it reduces the acceptability of corruption. Conversely, control

opportunities for corruption and you make room for ethical practices to become established**.**

In an eloquently written article entitled *Ethics and accountability in South African municipalities: The struggle against corruption*, Pillay (2016) addressed the relationships between ethics, accountability and corruption. Interestingly, he uses as his case study corruption in municipalities in South Africa, a lack of ethics and accountability amongst municipal leaders are behind their corruption prone weak management. In the final submission, Pillay (2016:125) contends the "success or failure of ethics and accountability as the foundation of the perpetual struggle against corruption". Kekae (2017:111) wrote extensively on the role of corruption in combating fraud and corruption, quoting several notable scholars in public administration including Brytting, Monogue and Morino (2012) Manyaka and Sebola (2013). He acknowledged that "a high standard of professional ethics has become an integral matter for governments globally because they are highly concerned about the high levels of corruption in their public service." (Kekae, 2017:111). Kekae (2017:111) further proposed the formulation of a *Statement of Ethics to "*provide guidelines for expected behaviour and should include inputs from all employees". Kekae (2017) made reference to such a need to promote ethical behaviour and professionalism in terms of section 195 of the Constitution of the Republic of South Africa.

The fourth democratic general elections in 2009, where the ANC took 65.9 per cent of the nearly 18 million votes cast, saw the birth and rise of the now controversial and highly conflicted corruption scandals. Jacob Zuma as the country's president with 277 votes won out of the 400 seats of the National Assembly. However, in the 2014 fifth democratic elections, the ANC saw a decline in national votes from 65.9 per cent in the 2009 elections to 62.15 per cent, with Jacob Zuma being sworn in for a second term. In the same year the president was implicated in corruption scandals, which later saw the South African SCAs ordering the National Prosecuting Authority (NPA) to release spy tapes related to corruption against President Zuma (South Africa History Online, 2018).

According to Booysen (2013:31), the sense of achievement of the 1994 transition into a constitutional and democratic country, the euphoria and idealism amongst South Africans, have now diminished. South Africans have become nostalgic and are now

longing for the days of “Mandela democracy”. Booysen (2013:31) wrote, “[t]he contrast between the Mandela era and the current leadership feeds dissatisfaction with the current government”. The central question has been: how do we have a president (someone whose name looms large in the state capture allegations that are being investigated by the Zondo Commission) in office or in leadership, a leader who has been followed by many corruption cases and scandals in one of the most powerful positions in the country (that of being head of the Executive – the president). Someone whose personality negatively impacts the politics of the country and who allegedly has unwarranted or conflicted personal relationships with people (such as the Gupta and the Watson families) who are pillaging government resources?

What kind of an ethical leader does South Africa need and with what credentials? Former president Nelson Mandela was known to be an ethical, thought and reconciliatory leader, whereas his predecessor, former president Thabo Mbeki, is known more as an intellectual. Cheteni and Shindika (2017) attribute this to what we now see as state capture in South Africa, which implicated former President Jacob Zuma, the national executive and directors and deputy directors of SOEs. “This decadent ethical leadership dilemma in public entities needs to be urgently and adequately addressed” (Cheteni & Shindika 2017:3). Brown et al. (2005), cited by Cheteni and Shindika (2017:5), say in order for leaders to be perceived as ethical and be able to influence ethics-related outcomes, their subordinates must perceive them as attractive, credible and legitimate. Gildenhuys (2004:6) observes that as a public servant, serving the people requires complete and careful attention and dedicated loyalty to the democratic principles and fundamental human rights as enshrined in the Constitution.

3.3 RELEVANT THEORETICAL UNDERPINNINGS

3.3.1 SOCIAL LEARNING THEORY

As noted by Agbim (2018:24) the Social Learning Theory (SLT), proposed by Bandura in 1977, stands for the proposition that “individuals learn standards of behavior: (a) vicariously (i.e., by watching others); (b) through direct modeling; and (c) by verbal persuasion”. Used in the context of ethical leadership perspective, the view is that the efficacy of members of any organisation will be influenced by how morally and ethically their leaders conduct themselves.

The latter will be taken as role models on why and how not to get involved in corruption and corrupt practices (Agbim, 2018:24). Related to SLT is the Social Cognitive Theory (SCT) which holds that people are driven not by inner forces, but by external factors (Bandura, 1986). This behavioural change model is undergirded by the argument of reciprocal determinism, in terms of which human functioning is explained by a triadic interaction of behaviour, personal and environmental factors. The latter are considered to be situational influences, and in the context of ethical leadership it may be said that ethical leaders will positively influence their subordinates and others in the organisation to work towards being incorruptible. The generally agreed variables of the STC are: Self-efficacy – a judgment of one's ability to perform the behaviour; and Outcome Expectations – a judgment of the likely consequences a behaviour will produce. The importance of the following expectations (i.e. expectancies) may also drive behaviour: Self-Control – the ability of an individual to control their behaviours; Reinforcements – something that increases or decreases the likelihood a behaviour will continue; Emotional Coping – the ability of an individual to cope with emotional stimuli; Observational Learning – the acquisition of behaviours by observing actions and outcomes of others' behaviour.

3.3.2 STAKEHOLDER THEORY

The findings of a damning report into the failure of VBS Mutual Bank and the acts of corruption by those who had a fiduciary obligation towards the ordinary stakeholders in the bank better demonstrates what, according to the Stakeholder Theory (ST) proposed by R. E. Freeman in 1984, should not have happened if the leaders had observed governance and business ethics against corruption. According to the ST, those having the governance and oversight responsibility for an organisation have a duty to always act in the best interest of the stakeholders (Agbim, 2018:24). Likewise, their actions directly and indirectly affecting the organisation must not affect the interests of stakeholders in any form or shape. Did the officials and the board of governors at VBS Mutual Bank act in the best interest of its stakeholders? According to the findings published in *VBS Mutual Bank – The Great Bank Heist* report, they did not. Called the "a theory of organizational management and ethics" the ST advances the argument that ethical leaders are selfless and they will always put the interest of those they serve, or rather those they lead, instead of their own (Caldwell, Karri & Vollmar, 2006:213).

An ethical leader will be conscious of the debilitating consequences of corruption and related practices, will avoid involvement in corrupt conduct at all costs and will not harm the interest of stakeholders.

3.4 FORMS OF LEADERSHIP

3.4.1 ETHICAL LEADERSHIP

Naidoo says the following on the need for ethical leadership (Naidoo, 2012:26):

> [S]uccess in eradicating corruption depends on the promotion of good governance. However, success in promoting good governance requires effective leadership. Leadership in this regard can be in the form of exemplary moral and ethical leadership. Ethical leadership is needed to resist the abuse of entrusted power for private gain, as well as potential interference and to protect the anti-corruption agencies' operational independence, thus enabling good governance.

Ethical leadership is a part of the broader field of leadership that touches upon several theoretical bases of leadership (Okagbue, 2012:20). According to Agbim (2018:23), "[e]thical leadership is the demonstration of normatively appropriate conduct through personal actions and interpersonal relationships, and the promotion of such conduct to followers through two-way communication, reinforcement and decision-making." A study conducted on ethical leadership in the context of corporate governance identified certain attributes of ethical leadership, which included accountability – including ethical decision-making and responsiveness – by acting immediately to solve dilemmas; integrity – entailing honesty in disclosure of information to board members and shareholders; fairness; transparency and disclosure; and responsibility (Othman & Rahman, 2014:366).

Mendonca (2001:267) notes the urgent need for ethical leadership "in organizations and in society if we truly want to achieve the common good of human welfare at personal, organizational, and societal levels". Though the sustenance of ethical leadership has been questioned, the argument is that for any organisation to succeed it must espouse ethical leadership (Mendonca, 2012:63–64). This view reflects the calls for moral and ethical leadership in South Africa. The almost daily exposure of corruption and related scandals in the South African government and public service

have been blamed on the low moral compass of public officials and the "the outcome of the negligence of ethics and practice by organizational leadership" (see Mendonca, 2012). The view expressed is that ethical leaders will not hesitate to condemn acts of corruption, such as the Great Bank Heist in South Africa, for the sake of good governance (Mendonca, 2012:112).

Table 3: Criteria of leadership qualities in relation to corporate governance

Governance	Leadership response
▪ Dispersion of power ▪ Accountability ▪ Openness ▪ Integrity ▪ Honesty ▪ Objectivity ▪ Selflessness ▪ Fair rewards ▪ Look to long term	▪ Empower widely ▪ Give and obtain commitment ▪ Communicate freely ▪ Set an example ▪ Set and monitor standards rigorously ▪ Establish checks and balances ▪ Use servant-leader approach ▪ Motivate by opportunity rather than just money ▪ Think and act strategically

Source: Davies (2006:41)

Othman and Rahman (2014:367) opine that ethical leadership attributes aligns to and/or requires a "servant leader" type of leadership style because servant leaders, as perceived by their study subjects, "are leaders that are perceived as supporting ethical leadership in guiding a corporation towards corporate governance practices." Servant leadership as related to ethical leadership resonates well with the widely held view of former President Mandela as a "servant leader" whose moral and ethical

compass was impeccable in the way he led South Africa as the first president of the democratic South Africa. Former President Zuma is thus often juxtaposed with the late President Mandela in discussions on state capture and corruption and allegations of corrupt practices against him.

For the purposes of this study, ethical leadership is demonstrated by integrity, competence, responsibility, accountability, fairness and transparency. It therefore includes anticipating and preventing, or at least avoiding, the negative consequences of corruption and corrupt practices in the public sector and government in general. The most compelling summary of ethical leadership as a component of curbing corruption and corrupt practices is given by Naidoo (2012:28), who notes that it is "crucial that management creates an organisational culture of openness and transparency in which unethical conduct will become visible and in which employees and managers call one another to account". This can be achieved by, amongst other things, a comprehensive programme governing and effectively implementing an ethical climate and acting as the foundation of an institutional or organisational culture that anchored in ethical behaviour (Naidoo, 2012).

According to Van Aswegen and Engelbrecht (2009:228) ethical leadership "demonstrates the will and ability to strategically position, design, and sustain an organisation successfully, to develop employee competence and to direct human and organisational energy in pursuit of performance and achievement that stand the ethical test of effectiveness and efficiency". Being an ethical leader is about being both a moral person and a moral manager (Van Den Akker *et al*.,; Heres, Lasthuizen & Six, 2009). Ethical leaders increase awareness of what is right, good and important, and raise up followers up into leaders who go beyond their self-interest for the good of the organisation. The moral part of ethical leadership can be viewed as the personal traits and characteristics of a leader, such as honesty, trustworthiness and integrity, and the moral nature of that leader's conduct. Van Aswegen and Engelbrecht (2009, referring to Palanski and Yammarino (2007)), classify the various meanings of integrity into five general categories, namely: integrity as wholeness; integrity as consistency between words and actions; integrity as consistency in adversity; integrity as being true to oneself; and integrity as moral or ethical behaviour.

3.4.2 SERVANT LEADERSHIP

Okagbue (2012:43–47) points to the concept of servant leadership presented by Greenleaf in 1977 as a leadership approach that regards leaders first as servants of the people they lead. In particular, servant leaders prioritise service for the common good of all members of the organisation, instead of self-enrichment. As Okagbue (2012) correctly posits, the concept of servant leadership with its ethical considerations "makes sense in the public sector where public office holders hold their positions in trust for public." The number of corruption and self-enrichment scandals that have besieged the South African public service and government makes one ask whether individuals who are entrusted with public offices and public service in South Africa do have the ethical and moral fortitude to serve the needs of the people by putting the people's interests first.

Greenleaf's concept of leadership draws a distinction between two leaders, namely the leader first and the servant first. Greenleaf asserts that leader-first people are "into leadership because of their hunger for power or for other material and personal gain. Conversely, the latter are those who have the natural disposition that they want to serve others … Servant-leaders are committed to serving the needs and well-being of their followers, so that the latter come first before the leaders; the servant-leader is more concerned about public interest than self-interest" (Okagbue, 2012:44).

The essence of servant leadership was also encapsulated in the 1997 UN Report (1997:9), which states:

> With the advent of the modern state, government officials have been and are seen as stewards of public resources and guardians of a special trust that the citizenry has placed in them. In return for this public confidence, they are expected to put the public interest above self-interest. Thus the most commonly accepted definition of corruption is some variation of the notion, "the abuse of public office for private gain." It has been noted that "government ethics provides the preconditions for the making of good public policy.

In South Africa, the late struggle icon and Nobel Peace Prize winner, former president Nelson Mandela, was highly regarded as a servant leader because of the humility and "people first" posture that he embodied. Unfortunately, his ethical and moralistic public service qualities have not been replicated in the public service today. The public space is replete with cases of leaders and public servants in all levels of government embroiled in corruption and related practices. There is a serious lack of public service ethics articulation.

3.4.3 THOUGHT LEADERSHIP

Smith (2014:2) asserts that thought leadership creates trust, credibility and visibility that will lead to exponential growth. It is not about being known but rather being known to make a difference. Gumede (2017:77) points to the situation the African content is faced with, which is weak leadership infused with the challenges of massive corruption scandals. He points out that, because there are political and institutional weaknesses in the African continent, inevitably so, effective leadership is what the continent requires. He argues, "The African continent is in need of thought leadership that is capable of being critical and conscious … Africa needs a third liberation, the context of which must include freedom from the hegemony of imported knowledge, freedom from subservience to logic of global capitalism, freedom from the slavery of fake values and cultures, and freedom from the visionless and kleptocratic political elites" Gumede (2017:77).

In a business context, Van Halderen, Kettler-Paddock and Badings (2013:7) define thought leadership as an action promoting thought-provoking viewpoints the reframe the way customers think about key issues with the purpose of helping them towards new insights and solutions. However, in the context of good governance, according to the Institute of Company Secretaries of India (2018:5), thought leaders are the leaders of informed opinion and the go-to people in their areas of expertise that are often rewarded. They are mostly trusted sources who are able to move and inspire people with innovative ideas, able to turn these ideas into reality and show how to replicate their success. It is further appropriate to contest that the fast-changing contemporary world requires thought leadership under the following objectives (Institute of Company Secretaries of India 2018:7):

a) To provide expert and proficient set of knowledge;
b) To achieve the directed goals and purposes with precision and in time-bound manner;
c) To create a graph of probable opportunities and challenges in the targeted venture;
d) To find out and decide the mechanism to resolve the prospective challenges;
e) To create a roadmap of success of the targeted goals;
f) To have an impactful and inclusive growth as well as success of a venture;
g) To have the most targeted and achievable means to achieve the goals even in the changing and contemporary leadership of the globe.

3.5 CORRUPTION AND THE TELEOLOGICAL PRINCIPLES OF UTILITARIANISM AND EGOISM

There are studies that address the ethical dimensions of corruption, but the question is: Can corruption ever be regarded as ethical? Napal (2006:5) points to relativism and societal values prevailing at a given time to address the question of why acts of corruption are accepted in some jurisdictions "and justified either on the basis of the gains they bring to the individual who offered the bribe or undertake to seek the particular favour." Normative ethics literature distinguishes between decision-makers who consider some corrupt and questionable practices as not unethical and those that regard them as not particularly ethical.

The theoretical underpinnings of these two extremes can be explained with reference to two teleological principles or consequential theories of utilitarianism and egoism. According to Napal (2006:6), "[b]oth are founded on consequences, that is, any act or decision is justified on the basis of its consequences". According to utilitarianism, founded on the concept of utility maximisation, an ethical choice or decision must be made taking into account the conduct, practice or decision that "yields maximum utility or least harm" (Napal, 2006:6, referring to Adams & Maine, 1998; see also Okagbue, 2012:46–49). On the other hand, the theory of egoism stems from the view that human beings are naturally aggressive and selfish, and that egoists make decisions or

conduct themselves in a manner that maximises their own self-interests. In the context of this study, it would mean that public officials will engage in acts of corruption and corrupt practices because of their preoccupation with personal financial gain over ethics and public good. That is, they would act only in a way that contributes best to their self-interest. Napal (2006) posits that the "general belief is that the egoist is intrinsically unethical. An egoist would focus on short-term goals oriented and make the most of any opportunity they avail of, as long as they derive a benefit from it."

It is submitted that in South Africa moral duty, constitutional duty and relativism are the dimensions that militate against corruption having any justification. Corruption has a considerable impact on ethical thinking in the South African context. A number of reasons can be advanced for this other than the corrosive nature of corruption and corrupt practices. Moral regeneration and ethical leadership are regarded as key needs in South Africa. In terms of consequentialism, the morality of any action by public officials is judged entirely by its consequences, and for this reason some government ministers have fallen on the state capture sword because of the role they played in the whole saga, and/or because of their failure to disclose their dealings with the Gupta family. Consider the following in the South African context: would you have judged the Russian nuclear deal right or wrong, if it succeeded? What would have made the actions of the role players in the nuclear deal moral or immoral? Would it have been the untold financial suffering of the country that would have resulted from the nuclear deal?

3.6 ETHICAL GOVERNANCE, PUBLIC TRUST AND CORRUPT ACTIVITIES

Instructive in this study is the view by Vigoda-Gadot (2000) that to understand the relationship between ethical governance and public trust one has to also focus the following facets: (1) a focused examination of human and social elements; (2) a productive dimension of innovation and creativity; and (3) a normative aspect of morality and ethics.

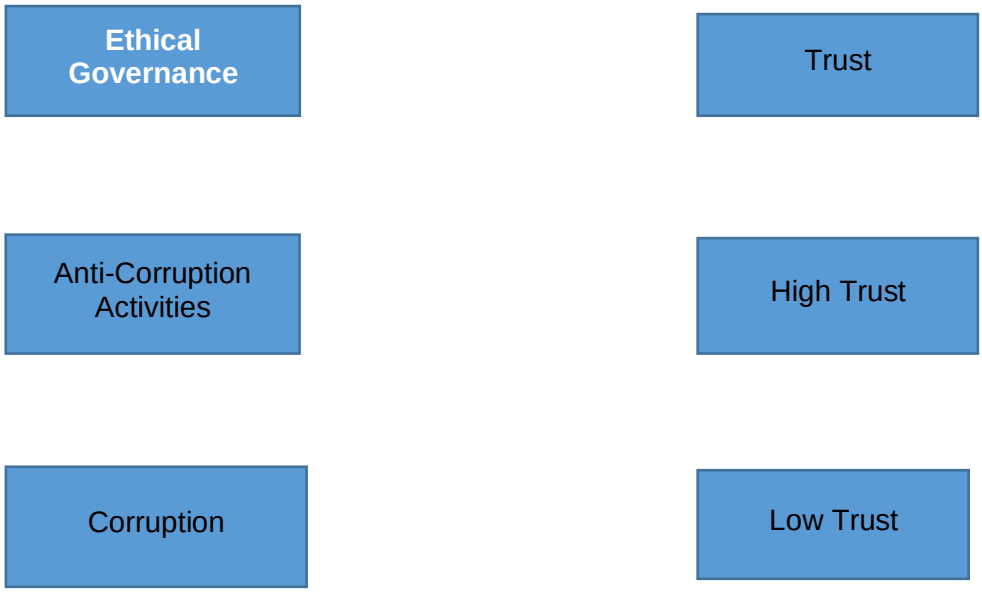

Figure 2: Trust and ethical governance in an anti-corruption context
Source: Author

According to Igbim (2018:23), "trust and commitment are positive externalities that are associated with ethical leadership". Importantly, an expectation of trust is that those bestowed with certain powers and responsibility should not act opportunistically, for instance by abusing their access to business and financial opportunities by directing these opportunities to themselves or to their friends and next of kin. A typical example is allegations that the former Minister of Finance Mr Nene might have used his influence to sway the PIC to give a financial loan to a consortium that included his son.

3.7 SOUTH AFRICAN PUBLIC GOVERNANCE AND ETHICAL LEADERSHIP

In her research paper *Creating a new ethical culture in the South African local government*, in conceptualising ethics, as derived from the Greek term "*ethos*", Matsiliza (2013:109) defines ethics as a moral system of a particular school of thought that is characterised by a spirit of culture, inner disposition or morality. Along with ethics comes appropriate and socially acceptable behaviour and conduct, responds Sebola (2014:297). Ethical leadership, as observed by Cheteni and Shindika (2017:3), has proved to have considerable benefits for both organisations and businesses. This is so because particularly in countries where relatively higher cases of corruption have been recorded, ethical leadership has proven to be an important pillar of successful organisational operations. However, it should be noted, according to the authors most

studies on ethics in the African context focus mainly on the private sector and neglect to give attention to the public sector as well.

The King IV Code is important as it also calls for ethical leadership. Not only does the code seek to promote corporate governance as integral to running an organisation (governing body). It also seeks to deliver governance outcomes such as ethical culture, good performance, effective control and legitimacy. Ethical leadership as encapsulated in the King IV report is characterised by the principles of integrity, competence, responsibility, accountability, fairness and transparency, taking into account the consequences of an organisation's activities and outputs on the economy, society, the environment and the capital that it uses and affects (King IV, 2016:20).

These values espoused in the King IV Code resonate well with section 195 of the Constitution, which makes provision for the public administration to be governed by democratic principles and values. South Africa, given its history, is in dire need of incorruptible ethical and thought leaders. In particular, section 195(1)(a) of the Constitution states that "a high standard of professional ethics must be promoted and maintained" in public administration generally. Furthermore, section 20(t) of the Public Service Act of 1994 implores employees appointed in terms of the Public Service Act to be accountable and to comply with the prescribed code of conduct by promoting exemplary conduct.

At political level, the apartheid era system was displaced to bring South Africa to where it is today, 24 years into a state with a constitutional democracy, "enhanced by the establishment of key institutions that support democracy, ethics and governance measures particularly in the public sector, namely the Public Service Commission (PSC) mandated to promote a high standard of professional ethics and a Public Protector to investigate any improper or dishonest act, omissions or offences referred to in the Prevention and Combatting of Corruption Act" (Cheteni & Shindika, 2017:5).

3.8 ETHICS MANAGEMENT AND ETHICAL GOVERNANCE AND LEADERSHIP: PERSPECTIVE FROM REGIONAL AND INTERNATIONAL INSTRUMENTS

Ethical leadership is crucial for good governance. The public interest would be difficult to protect without ethics in government. There is growing interest in public service ethics (Barberis, 2001) both on the national and international levels to ensure good governance. For example, some international bodies like the UN, the World Bank, the OECD, the AU and Transparency International have emphasised the importance of ethical practice among government officials and have linked ethical leadership with good governance (Okechukwu, 2012:4).

One of the known initiatives by the UN adopted by the General Assembly to encourage government ethics and fight corruption is the Action against Corruption (A/RES/51/59) which is associated with the UN International Code of Conduct for Public Officials, adopted in 1996. The UN Declaration against Corruption and Bribery in International Commercial Transactions (A/RES/51/191) adopted in 1996; the International Cooperation against Corruption and Bribery in International Commercial Transactions (A/RES/52/87) of 1998; and the Public Administration and Development Resolution adopted by the General Assembly (A/RES/50/225) were also designed to instil anti-corruption in the public service (United Nations, 1997:997; Sibanda, 2005, 2006). The UN also promotes public service professionalism and ethics through its Programme in Public Administration and Finance (United Nations, 1997:13).

The African Ministers of Civil Service had a meeting held in Rabat, Morocco from 13–15 December 1998, which was jointly organised by the African Training and Research Centre in Administration for Development and the UN Department of Economic and Social Affairs. It discussed at length issues around public service in Africa, in particular challenges of professionalism and ethics. The result was what is commonly known as Rabat Declaration, wherein these ministers agreed that each country take “the necessary measures to regenerate professionalism and promote ethics in its public administration” through a range of activities designed to foster effective, efficient and ethical workings of a professional civil service and human resources development within the African context. These and similar initiatives stress the need for an ethical and morally conscious public service which avoids ills such as corruption and related practices.

3.9 ETHICS LAWS, EDUCATION AND TRAINING IN THE PUBLIC SERVICE

The UN report on *Professionalism and ethics in the public service: Issues and practices in selected regions* stresses the importance of ethics education and training in public service. In particular, it states that ethical education must and should be part of all educational systems at all levels of public service. As correctly pointed out by Puiu (2015:606), "it is important that those managing public institutions are familiar with all … potential dilemmas and also with the instruments, mechanisms and tools they can use in order to prevent or fight against these ethical issues when they appear". This knowledge is part of sound ethics management, which by extension is the requirement for ethical governance and leadership. In South Africa, the National School of Government was officially unveiled on 22 October 2013, with the mandate to deliver a theoretical and practical approach to public administration management. The rationale behind the National School of Government is that "high-quality education, training and development that provide values, skills and knowledge for entry, in service and career progression purposes is arguably the most realistic and viable option for public servants" (Minister Lindiwe Sisulu).

The National School of Government is governed by a council that reports and is accountable to the Minister of Public Service and Administration. Key among the functions of the council is to be a custodian of governance and determination of policy, norms and standards on education, training and professional development within the public service. The professional development of public servants is critical if South Africa is to truly realise the constitutional mandate and expectation that civil servants and public officials must "maintain and strengthen the public's trust and confidence in government, by demonstrating the highest standards of professional competence, efficiency and effectiveness, upholding the Constitution and the laws, and seeking to advance the public good at all times". An important observation by Whitton (2001:3) is that codes of ethics and conduct are necessary in the public service. However, for these codes to be effective they must be "supported by a range of other mechanisms, training, and leadership by managers and political leaders alike". For example, the report that little or no training is provided to local government officials in Nigeria has not helped the country's notoriety for its ethical misconduct and corruption (Okechukwu, 2012:86–87).

3.10 SUMMARY

This chapter provided an overview of ethical leadership and an important framework to help prevent and combat corruption together with all its manifestations in the South African government and public sector in general. It is clear that South Africa, as it aspires to move forward and create more opportunities for young leaders to come through the ranks, that the country's political arena is in dire need of leaders who align themselves with the principles of good governance and accountability. Such leaders will have the country's best interests at heart when dealing with the scourge of corruption, which has had a negative impact on the economy of South Africa and potential investment by neighbouring countries. For this country to be able to move forward, it requires ethical and thought leaders who will uphold and respect their constitutional mandate without fear or favour and implement the principles of good governance.

South Africa (in both the public and private sectors) is perceived as a country without consistent management. To guard against this, it is of paramount importance that people are held accountable for their actions irrespective of their position in government. It goes without saying that ethics training coupled with the indoctrination of ethical conduct and behaviour in the public service should help public servants understand the role, values and importance of ethical leadership within the public service. It is clear that the lack of understanding of, first, the *Batho Pele* principles, and second the concepts of ethics and ethical leadership, has had a negative impact on service delivery in South Africa since the Zuma administration took over in 2009. Ethics and ethics in leadership should be seen to be the responsibility not only of public servants at lower levels in government, but of the entire public service (national and provincial governments) including the executive and political parties.

From the onset, and if South Africa and South African public servants and officials are to truly realise and carry out their constitutional mandate and expectations from the public, it is critical for them (public servants and officials) to take cognisance of the professional development of the public service, ethics, ethical leadership and governance in order to "maintain and strengthen the public's trust and confidence in government, through demonstrating the highest standards of professional competence, efficiency and effectiveness, upholding the imperatives of the

Constitution and laws governing the public service, and seeking to advance the public good at all times". As outlined by Gildenhuys, "ethics have various interconnections with other branches of philosophy, for example, metaphysics (the theoretical philosophy of being and knowing – the philosophy of mind), realism (the study of reality) and epistemology (the study of knowledge). This may be seen in such questions as whether there is any real difference between right and wrong and, if there is, whether it can be known" (Gildenhuys, 2004:15).

Serious cases of unethical conduct and leadership have been highlighted by the media all over the world, including the current State Capture Commission (Zondo Commission). Such conduct has had a serious and negative impact on the current ANC national and provincial government and has brought some State-Owned Entities (SOEs) to the point of bankruptcy due to corruption, maladministration and the abuse of power by senior government officials. In order for the South African government to regain the trust of the public, public servants, local and foreign investors, it is of critical importance that leaders who know and understand ethics, ethical leadership and thought leadership be appointed in senior government positions. Such leaders must further be willing to promote and uphold the ethos of ethical leadership, accountability, integrity and corporate governance in an effort to gain cooperation from public servants.

CHAPTER 4

ANTI-CORRUPTION NORMATIVE FRAMEWORK

4.1 INTRODUCTION

Societies and communities depend on the existence of an effective and efficient legal system and appropriate regulatory frameworks to ensure that everyone acts in an acceptable manner and that law and order prevail (Joubert, 2015:1). Furthermore, the legal system must be consistent with the South African Constitution. Thus, section 2 of the Constitution states that it is the supreme law of the country and that any other laws or conduct inconsistent with it are invalid. In terms of section 39(2) of the Constitution, every court, tribunal or forum must promote the spirit and objectives of the Bill of Rights when interpreting legislation. Within the area of criminal justice system certain sets of rules and laws must be in place to control and combat social ills such as corruption. The laws, to borrow from Joubert (2015:1), must indicate which rules are "prescribed for human conduct." As former President Nelson Mandela once said, there must be "a structural exercise of rule as opposed to the idiosyncratic will of kings and princes" (quoted by Davie, 2013:9).

The nature, origins and historical foundations of the South African legal system have been extensively discussed by several authors (Sibanda, 2008:331–33; Lewis, 2005:12; Du Toit, 2014:278; Mireku, n.d.:215; Schoeman-Malan, 2007:108) and the matter is not dealt with in detail here. The South African legal system is part of the Anglo-American family of laws, also known as common law, which exists in countries like Australia, England and Wales, Ghana, Liberia, New Zealand, the US, and Zimbabwe (Sibanda, 2008:331). It is a mixed legal system "which came about as a result of the accidental history of the country and its constituent parts. Roman–Dutch law in the seventeenth century was brought by the Dutch East India Company colonists in 1653" (Lewis, 2005:12). It is based on a mixture of civil law (Roman–Dutch) and English Common Law principles. Pienaar (2012:153) argues that the third element of this mixture, namely indigenous or customary law, "does not always receive the same attention." This is true, but customary law is gradually taking its rightful spot as one of the constitutionally guaranteed legal systems. Notable sources of the law in

South Africa include the Constitution, legislation, customary law, common law, case law and international law (Sibanda, 2008:332).

This chapter addresses normative anti-corruption frameworks both nationally and internationally. It is important because they guide how corruption and corrupt practices must be dealt with, with some specifically enacted to deal with corruption. Normative frameworks are essential in shaping governance structures and environments specifically enacted to deal with corruption (Van Vuuren, 2016:1). As was succinctly stated by the World Bank (World Bank Report, 2017:83).

> In modern states, law serves three critical governance roles. Firstly, it is through law and legal institutions that states seek to order the behavior of individuals and organizations so economic and social policies are converted into outcomes. Secondly, law defines the structure of government by ordering power – that is, establishing and distributing authority and power among government actors and between state and citizens. And thirdly, law serves to order contestation by providing the substantive and procedural tools needed to promote accountability, resolve disputes peacefully and change the rules. The rule of law is the very basis of good governance needed to realise full social and economic potential.

4.2 INTERNATIONAL ANTI-CORRUPTION INSTRUMENTS

South Africa is party or signatory to a number of regional and international instruments or conventions that seek to combat corruption and corrupt activities (Pereira *et al*., 2012:15): the United Nations Convention Against Corruption (UN Anti-Corruption Convention); the African Union Convention Against Corruption (AU Anti-Corruption Convention); the OECD Anti-Bribery Convention; and the Southern African Development Community (SADC) Protocol Against Corruption (SADC Anti-Corruption protocol) which is discussed below.

4.2.2 THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

The UN Anti-Corruption Convention was adopted by the UN General Assembly in 2003. Sibanda (2005) notes that the UN's efforts to combat bribery date back to the failed 1975 attempt to enact the UN Measures against Corrupt Practices of Transnational and Other Corporations. At the time such an attempt was doomed to fail due to political, legal and practical problems (Sibanda, 2005:7). Likewise, the UN failed to enact the International Agreement on Illicit Payments. Both these attempts were directed at setting up measures to deal with corruption and corrupt practices, particularly on international platforms.

South Africa signed the Convention in 2003, and ratified it the following year, 2004. The purposes of the convention are: a) promoting and strengthening measures to prevent and combat corruption more efficiently and effectively; b) promoting, facilitating and supporting international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and c) promoting integrity, accountability and proper management of public affairs and public property.

The key pillars of this convention are: prevention through effective and coordinated anti-corruption policies; establishment of independent anti-corruption bodies; ensuring competitive and fair public procurement; existence of an independent judiciary; and fair and transparent private-sector relations (articles 4–14); criminalisation, which requires state parties to prosecute an array of offences including mandatory offences such as bribery, embezzlement, money laundering, obstruction of justice, and other criminal offences such as passive bribery, trading in influence or influence trading, abuse of office or function (articles 15–42); international co-operation, which entails parties having in place mutual assistance procedures and measures as in an ordinary criminal justice environment, such as extradition; mutual legal assistance in investigations, prosecution and legal proceedings (articles 43–50); and assets recovery, which is central to the convention (articles 51–59). The idea behind asset forfeiture and recovery is that no one can benefit or profit from criminal acts such as embezzlement of public funds. To this end state parties must require their financial institutions to be vigilant.

In South Africa there are a number of legislative provisions that enable the country to meet its obligations pursuant to the provisions of the UN Anti-Corruption Convention. There is, for example, section 4 of the Prevention of Organised Crime Act No. 121 of 1998 (POCA) which criminalises wilful blindness to crime or knowingly dealing in property or forming part of the proceeds of unlawful activities; and concealing or disguising the nature, source, location, disposition or movement of the property or its ownership. Furthermore, section 5 of POCA criminalises obtaining the proceeds of unlawful activities, or agreeing with others to retain or control for oneself or on behalf of others the proceeds of unlawful activities, or facilitating such related prohibited conduct.

One criticism is that the UN leaves room for state parties to adjust their anti-corruption measures or regimes to their national need (Pereira *et al*., 2012:16–17). In an ideal world one would require deviation from internationally agreed undertakings. But one can also not ignore the fact that different countries have different social, political and developmental conditions and needs. Fostering a one-size-fits-all approach may not be a productive way to help fight corruption.

As a state party to the UN Anti-Corruption Convention, South Africa can be said to have in place all the required legislative and institutional environments. What must be considered is the efficacy of these anti-corruption structures.

4.2.3 The African Union Convention against Corruption

The African Union (AU) is the successor of the Organisation of African Unity (OAU). The AU adopted its Anti-Corruption Convention at the 2nd Ordinary Session of its General Assembly in Maputo, Mozambique, on 11 July 2003 through Decision Assembly/AU/Dec. 22 (II). It is the first region-wide agreement anti-corruption instrument adopted by the AU (Olaniyan, 2004) that South Africa has signed (Rity, 2003:10). In terms of article 2.1 the Convention was created to “promote and strengthen” the development by African states of mechanisms necessary to “prevent, detect, punish and eradicate corruption and related offences in the public and private sector”. (See also Snider & Kidane, 2007:639). According to Sibanda (2005), the convention has a much wider application to acts or conduct that can be considered to amount to corruption and to related corrupt practices. However, this wider application

has been criticised by Schroth (2005:32) as sometimes over-reaching. He particularly laments Article 13 as creating excessive jurisdiction claims “far beyond what is normal and customary” (Schroth, 2005:33). At issue is the deeming provision of article 13, which gives the legislator of a state party discretionary powers to deem certain theft or illicit enrichment occurring in other countries to affect the country’s vital interests, and to punish them.

Certain provisions of the AU Convention that are not expressly included in other conventions are worth noting. For instance, the convention expressly addressed as mandatory offences acts such as passive bribery of foreign and international public officials; active and passive bribery in the private sector; trading in influence; embezzlement, misappropriation or other diversion of property in the private sector; and illicit enrichment. In addition, there is the Prevention and Combatting of Corrupt Activities Amendment Bill (PRECCA) Bill (B) – PRECCA17 – that generally criminalises corruption. Section 23 of PRECCA fills the gap in legislation regarding illicit enrichment by empowering the National Directorate of Public Prosecutions (NDPP) to petition the judge for lifestyle investigation on the grounds that a person: (a) maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets; (b) is in control or possession of pecuniary resources or property not proportionate to his or her present or past known sources of income or assets; (c) maintains such a standard of living through the commission of corrupt activities or illegal activities; and (d) such investigation is likely to reveal relevant information of suspected unlawful activity.

Article 10 of the AU Convention deals with the corrupt funding of political parties. In the context of South Africa this may be highly important because of the high-level corruption and corrupt practices that involve political parties and figures. South Africa is currently in the process of legislating the regulation of political funding to repeal the Public Funding of Represented Political Parties Act of 1997. The Political Party Funding Bill was introduced in parliament in 2017 and the expectation is that it will be enacted into law by the end of 2019. The introductory statement of the Bill states as its purpose:

> To provide for, and regulate, the public and private funding of political parties, in particular: the establishment and management of Funds to

> fund represented political parties sufficiently; to prohibit certain donations made directly to political parties; to regulate disclosure of donations accepted; to determine the duties of political parties in respect of funding; to provide for powers and duties of the Commission; to provide for administrative fines; to create offences and penalties; to repeal the Public Funding of Represented Political Parties Act, 1997 and provide for transitional matters; and to provide for related matters.

Once enacted, this Bill will be one of the best additions to PRECCA's efforts to combat political corruption and corrupt practices associated with activities of political parties, including electioneering. It is noteworthy that the AU Convention calls for the establishment of an anti-corruption agency pursuant to Article 5(3) of the convention (Pereira *et al*., 2012:15; RSA, 2025:3). Anti-corruption agencies have proved to be important in countries like Hong Kong and Singapore, because when properly constituted they enable setting up independent and effective corruption-fighting bodies.

Article 11 addresses private sector corruption by calling on state parties to "adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector" (article 11.1); to "establish mechanisms to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights" (article 11.2); and to adopt such measures as may be necessary to discourage "paying bribes to win tenders" (article 11.3).

For a country like South Africa, the above provisions are very significant because they entail that corruption, whether public or private, must be dealt with. But some commentators argue that article 4 may be too strong a regulation, particularly with respect to article 11.1 which requires state parties to legislate against all the same acts in the private sector as in the public sector (Schroth, 2005:32). It must be said, too, that there are some identifiable weaknesses (Sibanda, 2007). Schroth (2005) is generally critical of the text of the convention. The researcher does not entirely agree with him, as some of the criticisms ignore the essence of this convention. It is submitted that legislating the same acts should be understood with regard to the fact that certain necessary qualifications will have to be made, given the differences

between the public and private sectors. A notable observation by Ogundokun (2005:34) is that “legal and institutional mechanisms as prescribed by the AU Convention may not necessarily suffice in combating corruption in Africa especially cases of systemic corruption.” This is partly true when one considers what countries like Botswana, Singapore and Hong Kong had to do beyond legislating to combat corruption. Suggested as part of ensuring the efficacy of an anti-corruption regime is recourse to social empowerment strategies and taking varied approaches such as the human-rights approach to fighting corruption and canvassing the human right to be free from corruption (Ogundokun, 2005).

4.2.4 THE SADC PROTOCOL AGAINST CORRUPTION

The SADC Anti-Corruption Protocol was adopted as a sub-regional anti-corruption treaty in Africa by the 14 SADC heads of state and government at their August 2001 summit held in Malawi. The protocol was ratified by South Africa in 2003 (Rity, 2003:9). The SADC Anti-Corruption Protocol focuses on prevention of corruption-related offences. It aims at establishing anti-corruption mechanisms on the national level and, on the other hand, through its provisions, promotes international co-operation between its signatories. The stated purpose of the protocol is: (a) to promote the development of anti-corruption mechanisms at the national level; (b) to promote cooperation in the fight against corruption by state parties; and (c) to harmonise anti-corruption national legislation in the region. Furthermore, the protocol requires signatories to take certain preventative measures, including developing a code of conduct for public officials; ensuring transparency in public procurement of goods and services; allowing easy access to public information; guaranteeing the protection of whistle-blowers; establishing anti-corruption agencies; developing a proper accountability and controls system; educating the public and making it aware of the ills of corruption; and taking a zero-tolerance approach to corruption. Much of the content of the purpose statement of the protocol and the stated preventative measures are covered in the AU Anti-Corruption Convention, the OECD Anti-Corruption Convention and the UN Anti-Corruption Convention. In fact, it can be argued that there is a lot of duplication.

Article 4(1)(g) encourages states to maintain and strengthen institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption. The SADC Protocol makes no provision for sanctions against member

states in cases where there is non-compliance. One concern about the implementation of the obligations emanating from the protocol is that the committee of the state parties responsible for reviewing country submissions on their anti-corruption measures "is rather tasked with reactive instead of active powers" (Pereira *et al*., 2012:16).

4.2.5 THE OECD ANTI-BRIBERY CONVENTION

As a regional body, the OECD was established in 1961 "to promote policies that will improve the economic and social well-being of people around the world" (OECD, 2015). It seeks to promote beneficial economic relations among member states and deal with any impediments to such relations. Corruption and corrupt practices, and unfair trading environments, are some of the impediments the OECD deals with under its structure and mandate.

The OECD is one of the organisations that has a strong drive and initiative towards combatting corruption and bribery. In May 1994 members of the OECD called for all countries "to introduce effective measures to deter, prevent, and combat bribery of foreign public officials in international business transactions" (Sibanda, 2005:7–8; OECD Anti-Corruption Convention, articles 1 and 2). Eventually, the OECD signed and adopted the OECD Anti-Corruption Convention on 17 December 1997 (Sibanda, 2005; Corr & Lawler, 1999; George, Lacey & Birmele, 2000; Gantz, 1998; Earle, 1998). Compared to the UN, which failed in its first two attempts to introduce an anti-corruption and anti-illicit payments instruments, the OECD set the tone for the "first successful international or cross-continent commitment to specifically deal with bribery of foreign public officials in the conducting of multinational business transactions" (Sibanda, 2005:8) with strong and effective sanctions. Pereira *et al*. (2012:16) writes that the OECD Anti-Corruption Convention and the regime it introduces are central to international business transactions: "most of its Member States are home to big international companies that could potentially be a source of bribe money."

In 2007 South Africa acceded to and ratified the OECD Anti-Corruption Convention. This came as no surprise because South Africa has always wanted to be one of the first African or non-European countries to join the OECD Convention, as is reported by Sibanda (2005:2). The convention is primarily focused on criminalising bribery of foreign public officials in international business transactions (OECD Anti-Corruption Convention, article 1).

It was therefore important for South Africa as a member of the OECD to put in place legislative measures, such as PRECCA to ensure that none of their nationals or companies registered in their territory could bribe foreign public officials and stay unpunished. It was also important to put in place an effective and efficient national anti-corruption legal framework.

4.3 DOMESTIC FRAMEWORKS

4.3.1 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA OF 1996

The Constitution of the Republic of South Africa of 1996 is often "hailed as one of the most progressive in the entire world. It provides the state with a progressive framework for the realisation of both political and socioeconomic rights" (Landsberg *et al*., 2006:6). Not only does the Constitution regulate the organisation and structure of South Africa, how the country should be governed, how laws should be promulgated and enacted (Joubert, 2015:4). It is also the supreme law of the land. Thus, in terms of section 2 of the Constitution, all other laws are subject to the Constitution. Any law found to be inconsistent with the Constitution shall be declared invalid. Chapter 2 of the Constitution is the Bill of Rights, section 39(2), which calls for every court, tribunal or forum to promote the spirit and objects of the Bill of Rights when interpreting legislation.

There are other provisions of the Constitution that are relevant in the fight against corruption and that must be taken into account when corruption offences or persons suspected of corruption are investigated and prosecuted. For instance, in terms of section 35(5) of the Constitution, 1996, evidence obtained in a manner that violates any right under the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. Also, as law enforcement agencies pursue corruption offences, they must be mindful that even those suspected of corruption and corrupt practices have an inherent dignity and the right to have their dignity respected and protected (section 10 of the Constitution). Furthermore, section 12 reminds us of the freedom and security of persons. This provision is important and must be read with the provision of section 35 of the Constitution that details how a person arrested for allegedly committing an offence, such as an offence of corruption, must be treated. This includes the right to fair trial and the right to be presumed innocent of corruption or corrupt activities until

found guilty. The courts have addressed many of the provisions related to section 35. For instance, the phrase “detained” in section 35 was interpreted by the court in S *v Melani* 1996 (1) SACR 335 (E) at 348 (i) to mean that a person is entitled to legal representation from the moment of arrest. This information should be imparted to any arrested person as soon as possible after his or her arrest and certainly prior to the person being invited or requested to participate in any proceedings in which he or she may by word or deed incriminate him- or herself (see also *S v Marx and Another* 1996 (2) SACR 140 (W) at 148f – i). It is therefore clear that state organs, such as the police should warn the suspect of his or her right to legal representation immediately upon arrest or at any other stage that his or her cooperation in the investigative process is requested. But what is the position with private forensic auditors or private persons?

Procedural justice provisions are entrenched in the Constitution and must be respected in corruption cases. In *S v Sebejan* 1997 (1) SACR 626 (W) in the Witwatersrand Local Division, Satchwell J held that a suspect who becomes an accused is entitled to the fair pre-trial procedures. This view was also followed by the Cape Provincial Division in *S v Orrie and Another* 2005 (1) SACR 63 (C). The requirement that a suspect is entitled to be informed of his or her constitutional rights, despite the fact that he or she is not an arrested, detained or accused person, was not followed in a number of other High Court judgments, such as *S v Ndlovu* 1997 (12) BCLR 1785 (N). Here it was held by the Natal Provincial Division that as the appellant in that case made a statement before he had been arrested or detained, it was not necessary to warn him of his constitutional rights.

Likewise, in *S v Van der Merwe* 1998 (1) SACR 194 (O) the Free State High Court held that there was nothing in the Interim Constitution 1993 that placed an obligation on a police official to warn a suspect of his or her constitutional rights before his or her arrest or detention. In this matter the accused was charged with murder. The investigating officer testified that he had encountered the accused at the crime scene. He asked the accused for an explanation, whereupon the accused handed him a firearm and made an exculpatory report about the events leading to the death of the deceased.

Before the accused provided the report, the investigating officer had not realised that he was talking to a possible suspect, and he therefore gave the accused no caution

whatsoever. However, after he had heard the accused's report he cautioned him in terms of the Judges' Rules, and arrested him. At no stage was the accused advised of his rights in terms of the Interim Constitution, 1993.

At his trial his lawyers argued that his statement is not admissible in evidence as his constitutional rights had not been explained to him before he made the incriminating statement. The accused objected to the admissibility of the evidence as to what he had told the investigating officer. The court held that it had the discretion to admit evidence about the accused's report. Factors that played a role in that regard included that the investigating officer had been *bona fide* unaware that the accused was a suspect when he asked him for an explanation, and no pressure or influence had accordingly been exercised on the accused to impart information. The court therefore allowed the statement as evidence against him. The Natal Provincial Division in *S v Langa* 1996 (2) SACR 153 (N) also declined to follow the Sebejan decision. Since then court jurisprudence has changed and investigating officers and/or law enforcement officers must not take chances when it comes to suspects' procedural rights.

In the case of *S v Mthethwa* 2004 (1) SACR 449 (E), an Eastern Cape High Court decision, the learned judge agreed with the Ndlovu, Langa and Van der Merwe judgements above, namely that the provisions of section 35 of the Constitution are not applicable to suspects, but ruled that is not the end of the matter. In this case the accused had been questioned and made a statement before the police had apprised him of his right to remain silent. At that stage he had neither been arrested nor was he an accused person. The accused was, however, clearly a suspect.

The right to privacy, which is contained in section 14 of the Constitution, is also important for law enforcement agencies to consider in their corruption investigations. One of the most frequent attacks against the admissibility of otherwise relevant evidence is based on the allegation that a suspect's right to privacy has been infringed. This is especially so in the context of searches and seizures of a suspect's property, the interception of his or her communications and in the context of an interview. Section 14 reads as follows:

> Everyone has the right to privacy, which includes the right not to have –
>
> (a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed.

4.3.2 THE PREVENTION AND COMBATTING OF CORRUPT ACTIVITIES ACT (PRECCA)

In one of the first pieces of writing comprehensively analysing the provisions of PRECCA after its enactment in 2004, Sibanda (2005) concludes by stating:

> The PCCAA is the most important anti-corrupt activities legislation to date. The Act signals an aggressive South African stance and a desire 'to unbundle the crime of corruption in terms of which, in addition to the creation of a general, broad and all-encompassing offence of corruption, various specific activities are criminalized'. The PCCAA is of such significance that it is expected to translate into tangible form efforts and developments in the prevention and combating of corrupt activities. Furthermore, for the first time in 46 years of anti-corruption legislation history, the PCCAA has introduced the offence of bribery of foreign public officials. The purpose of these developments and changes is clearly to bring the African anti-corruption policy into line with international developments, such as those of the OECD and the UN.

PRECCA became South Africa's comprehensive and internationally comparable national legislation to address corruption, modelled partly on the OECD Anti-Corruption Convention (Sibanda, 2005:2). It consolidates much of South Africa's anti-corruption legislation. In particular, PRECCA is an "extensively reconsidered version of the Prevention of Corruption Bill 19 of 2002" (Sibanda, 2005:2fn1) which the government sought to introduce at the time. PRECCA provides for, among other things, the strengthening of measures to prevent and combat corruption and corrupt activities; for the offence of corruption and offences relating to corrupt activities; for investigative measures in respect of corruption and related corrupt activities; for the establishment and endorsement of a register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts; for placing a duty on certain persons holding a position of authority to report certain corrupt

transactions; and for extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities.

One of the key essential features of PRECCA is authorising the NDP to investigate unexplained wealth of individuals and/or property suspected to be the proceeds of crime or criminal activities, and forfeiture thereof; the creation of a Register for Tender Defaulters by the Minister of Finance; requiring, as a duty, that any person who holds a position of authority and becomes aware of corrupt activities must report them; and granting the courts extraterritorial jurisdiction in respect of corruption offences such as where the crime of corruption is committed by a South African citizen (Madonsela, 2010:4–5).

Furthermore, one of the highlights and the defining characteristics of PRECCA is that it attempts for the first time in the history of South Africa to deal with bribery of foreign public officials, following in the footsteps of the OECD Convention. One can even find functional similarity between the preamble of the OECD Convention and of PRECCA. In this regard Sibanda (2005:3) notes:

> In terms similar to those employed in the preamble to the OECD Convention, the preamble to the PCCAA acknowledges, amongst others, that corruption, bribery and related offences endanger the stability and security of societies, undermine the values of democracy and morality, jeopardize free trade and the credibility of governments and provide a breeding ground for organized crime; it also states that there are links between corruption and other forms of crime, in particular organized and economic crime. The Corruption Act of 1992 only applied to acts committed locally and to the bribery of South African public officials. The Act contained no express prohibition on bribery committed abroad or the bribing of foreign public officials.

Recently a Bill was introduced to bring in some amendments to the PRECCA Act of 2004 – the Prevention and Combatting of Corrupt Activities Amendment Bill (PRECCA Bill(B) –PRECCA 17). According to its introductory statement the Bill is intended to deal with passive corruption in respect of foreign public officials; to extend the offence

of unacceptable conduct relating to ordinary witnesses to include whistle-blowers and members of the accounting profession; to increase the monetary sanctions provided for in the Act; and to provide for matters connected therewith. Importantly, the Bill introduces the offence of giving a bribe as a direct passive and active offence. A person who is compelled to give a bribe will escape criminal liability, if he or she reports the matter to law enforcement authorities within seven days. A number of provisions that were found lacking or not expressly stated in PRECCA are included in the Bill. For instance, a bribe to a public servant is dealt with more specifically. Something that will enhance the credibility of fighting public corruption is that the Bill introduces powers and procedures for the attachment and forfeiture of property of public servants accused of corruption.

With regards to the punishment of corruption, the Bill makes certain important amendments to PRECCA, including increasing the quantum of fines for convicted persons. For instance, section 5 of the Bill states that “Section 26 of the principal Act is hereby amended – (ii) in the case of a sentence to be imposed by a regional court, to a fine not exceeding R50 m, or to imprisonment for a period not exceeding 18 years or to both a fine and such imprisonment; or (iii) in the case of a sentence to be imposed by a magistrate’s court, to a not exceeding R10 m fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment”.

The Bill goes on to state “(i) in the case of a sentence to be imposed by a High Court or a regional court, to a fine not exceeding R30 m or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment; or (ii) in the case of a sentence to be imposed by a magistrate’s court, to a fine not exceeding R10 m or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment; or (c) section 28(6)(b), or 34(6) or (7)(b) is liable to a fine [of R250 000] not exceeding R5 m or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment.”

This section further states that “(b) In sentencing a corporate body, the court must ensure that the fine imposed properly reflects the seriousness of the offence, the amount of the gratification paid, the benefit derived and the annual turnover of the

corporate body, including that of any associated entities for the period preceding the offence".

As far back as 2016 in *Phillips v The State* (370/2016) [2016] ZASCA 187 (1 December 2016) the SCA addressed the appropriateness of sentences in corruption cases. In this case the appellant, a constable in the SAPS, was convicted in the Pretoria regional court of soliciting and accepting a bribe of R900 in contravention of s 4(1)*(a)*(i)*(aa)* read with sections 1, 2, 4(2), 24, 25 and 26(1)*(a)* of PRECCA. A sentence of seven years' imprisonment was imposed with two years conditionally suspended for five years. Still, the appellant appealed against this sentence. In considering the issue of the sentence, the judge referred to other cases. In particular, the court at para 13 cited *S v Narker & Another* 1975 (1) SA 583 (A) Holmes JA (Muller JA and Corbett JA concurring), which observed at 586B "Bribery is a corrupt and ugly offence striking cancerously at the roots of justice and integrity, and it is calculated to deprive society of a fair administration. In general, courts view it with abhorrence." The court in *Phillips v The State*, para 14, also quoted with approval *S v Mahlangu,* which at para 26 holds:

> Corruption has plagued the moral fibre of our society to an extent that, to some, it is a way of life. There is a very loud outcry from all corners of society against corruption which nowadays seems fashionable. Some even go as far as stating that corruption is rendering the State dysfunctional. It is the courts that must implement the penalties imposed by the legislature. It is also the courts that must ensure that justice is not only done, but also seen to be done. The trial court considered all the aggravating and mitigating factors and came to the conclusion that an effective imprisonment of four years was appropriate. In the circumstances of this case, the researcher agrees.

With respect to the sentence of the appellant, the court in *Phillips v The State* found the sentence disappointing and not appropriate the offence committed. Zondi JA, at para 14, stated as follows to demonstrate disapproval of the sentence of seven years with two years suspended for five years.

> In the present case the appellant's conduct was egregious. He manufactured a case against the complainant for the purposes of

> soliciting a bribe. The appellant used threats to inspire fear in the complainant's mind in order to induce the complainant to pay him R900. He abused his position as a public officer and, as if this was not enough, he pleaded not guilty and advanced a defence which he knew was hopeless. He showed no remorse. The appellant violated the complainant's constitutional right to freedom and security under s 12(1) and the right to have his inherent dignity respected and protected under s 10. In the circumstances, having regard to the serious nature of the offence, direct imprisonment was called for. There is also no merit in the appellant's submission that if the State had intended to argue for a heavy sentence it should have charged him with extortion which is more serious than corruption.

In summary, the court in *Phillips v The State* ruled that PRECCA does not limit the penal discretion of the sentencing court. However, the sentence must be appropriate to the offence. In this *casu* the offence, contravening section 4(1)*(a)*(i)*(aa)* of PRECCA, was serious. Thus, the court found that the trial court having regard to all relevant considerations constitutes a misdirection, warranting interference with the sentence imposed.

4.3.3 The Prevention of Organised Crime Act of 1998 (POCA)

POCA is the predecessor of the Drugs and Drug Trafficking Act 140 of 1992 and the Proceeds of Crime Act 76 of 1996, which dealt with civil forfeiture and criminal forfeiture of proceeds of crime respectively. POCA provides measures for law enforcement agencies and the NPA to combat organised crime and money laundering. It is submitted that the fact that corruption in South Africa has now become a sophisticated and very well organised crime, with corrupt benefits laundered through different channels, makes POCA one of the central legislation in the arsenal of anti-corruption agencies. The primary feature of POCA is to provide for the recovery of the proceeds of unlawful activity. Chapter 5 provides for freezing and confiscating the value of benefit derived from crime in cases where the accused is convicted of an offence. Chapter 6 focuses on property that has been used either to commit an offence or that constitutes the proceeds of crime. It provides for freezing and forfeiture of proceeds and instrumentalities of crime through a process that is not dependent on a

prosecution. Thus, POCA ensures that nobody benefits from criminality or ill-gotten benefits as has been determined by several Constitutional Court cases (See, for example: *S v Shaik and Others* 2008 (8) BCLR 834 (CC); *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae*) 2007 (3) BCLR 219 (CC); *Prophet v National Director of Public Prosecutions* 2007 (2) BCLR 140 (CC); *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (5) BCLR 476 (CC); and *Phillips and Others v National Director of Public Prosecutions* 2006 (2) BCLR 274 (CC)). Section 71 of POCA empowers the National Director to request information from government departments and statutory bodies in respect of investigations relevant to this Act without having to issue subpoenas (Madonsela, 2010:6). To surmise, POCA is relevant in prosecuting or fighting corruption because it enables the authorities to confiscate benefits of corruption, even in non-conviction cases (Basdeo, 2013:231).

The enactment of POCA in 1998 was influenced by the United States *Racketeer Influenced and Corrupt Organizations Act (RICO)* - 981(a)(1)(C) of 18 USC 1996 (as amended by the Civil Asset Forfeiture Reform Act of 2000), and the United Kingdom Criminal Justice Act of 1998 (Basdeo, 2014:1058) as the main South African legislation dedicated combat organised crime (Goga, 2014:68). Similar legislation appears in other jurisdictions, and comparator jurisdictions. For instance, In Botswana, assets forfeiture and/or recovery Proceeds of Serious Crime Act 19 of 1990. Forfeiture is also part of the criminal law in Hong Kong (Young & Stone, 2006), and in Singapore in conjunction with assets recovery done primarily in terms of the Mutual Assistance in Criminal Matters Act (MACMA), section 29 -32 (Wei, 2016:10)

POCA has been hailed for providing, *inter alia, "*a range of crippling fines and for orders such as confiscation and forfeiture" (Nel, 2003:97). POCA has not been free from criticism, some considered to have the blunting effect on its prevention power, though. Goga (2014:63) notes that POCA is conspicuously lacking in a clear definition of organised crime; and compensated for this omission with a listing of "criminal activities that would be covered by the law, as well as offering fairly broad traits of membership to a criminal group". One of the sternest criticism of POCA to date was by former deputy commissioner of the SAPS, advocate Godfrey Lebeya, who in his PhD thesis on organised crime definitions, states that "The POCA is not a model of legislative

coherence; it is a legislation that may be described as half-baked, which requires immediate return to the legislative oven." (Lebeya, 2012:119). It is submitted that it is not always easy to define organised crime in exact terms the same way it may not be possible to provide an exhaustive list of what constituted criminal activities for the purposes of organised crime.

The constitutional validity of POCA has been tested in several cases. Notable is the case of *Director of Public Prosecutions: Cape of Good Hope v Bathgate*, were the respondent's counsel argued against the restraint provisions of section 25 and 26 of POCA. The argument made was that the provisions were unconstitutional on the grounds of violation of the right to privacy and the right not to be deprived of property. Unfortunately, the argument was rejected by Van Zyl J who considered the restraint and confiscation provisions necessary evils, that are "both equitable and morally justified" (*Bathgate, para 25. See also* Nel, 2003). In *NDPP v Byriacou* 2003 (2) SACR 524 (SAC), at 532 – 534, the Supreme Court of Appeal said that granting by the courts of restraint orders is a matter of discretion, which must be "sparingly exercised" in "clearest of cases" where its factors favouring its granting "substantially outweigh the considerations against". But, in *NDPP v Rautenbach* 2005 (1) SACR 530 (SCA), at 532, it was held by the same court that the court should not frustrate the provisions on restraint order readily refusing to grant such an order under the guise of exercising its discretion. It is submitted that South African case law on restrain orders and forfeiture order in general is still under continuing construction, and that the law in this area may not be said to be saddled as yet. In fact, the interpretation of and relationship between POCA and the International Co-operation in Criminal Matters Act 75 of 1996 (ICCMA) dealing with restraint orders in criminal matters has been a subject of a court challenged. (See also *Savoi and Others v National Director of Public Prosecutions and Another* [2014] ZACC 5). Criminal assets forfeiture orders remain constitutional dilemmas as pointed out by legal scholars, sometime raising a "serious impasse between public interest and constitutional rights", as pointed out by Basdeo (2014:1048).

The courts, as in *NDPP v Geyser* 2008 ZASCA 15 [25 March 2008], para 19, confirmed that POCA can be used in serious crimes that are not 'organised" crimes. In the context of anti-corruption activities, it would mean POCA assets forfeiture orders can be used against people who benefitted from corruption.

4.3.4 The Criminal Procedure Act of 1977 (CPA)

The Criminal Procedure Act 51 of 1977 (CPA) regulates matters relating to criminal proceedings in a court of law and contains various provisions relating to the powers, duties and functions of members of the prosecuting authority in 145 provisions. These include provisions relating to the power to search and seize, withdraw a charge and stop a prosecution, the attendance of witnesses in court, the issuing of summonses, admission of guilt, bail, the release of an accused person, summary trials, the charge, the plea, jurisdiction, preparatory examinations, trial before different courts, conduct of proceedings, witnesses, evidence, competent verdicts, previous convictions, sentence, reviews and appeals, and victim compensation. Therefore, the CPA constitutes one of the critical general pieces of legislation with respect to the anti-corruption measures as far as procedural matters are concerned. For example, a search related to the alleged offence of corruption may be conducted pursuant to section 20 of the CPA, which prescribes a search by virtue of a search warrant.

Though essentially a procedures legislation, CPA co-exist with and supplants corruption and organised crime legislation. In *NDPP v Byriacou* 2003 (2) SACR 524 (SAC), at 530, for example, the respondent convicted on 102 counts of receiving stolen property and sentence to 15 years imprisonment was ordered to return property to the value of approximately R4.5 million to its rightful owners pursuant to section 34(1)(a) of the CPA. It is submitted that section 34(1)(a) of the CPA is akin to a residual assets recovery provision secondary to the relevant forfeiture provisions of POCA. Therefore, a person convicted of corruption and organised crime can be deprived of the proceeds of his/her criminal conduct through PRECCA, POCA or the CPA depending on the circumstances of each case.

4.3.5 The Protected Disclosures Act of 2000 (PDA) and the Witness Protection Act of 1998 (WPA)

The Protected Disclosure Act No. 26 of 2000 (PDA) is important in protecting whistle-blowers from any undue repercussions as a result of the disclosure. When the PDA was introduced in 2000 South Africa became one of the first countries in the world to introduce comprehensive workplace whistle-blower protection legislation (Sibanda, 2003). The PDA has been used mainly in employment contexts to encourage and support those making disclosures in the workplace (Madonsela, 2010:6). Vettori (2009:291) also submits that PDA is an "indirect means of monitoring employer obligations". This view stems from the fact that employers will always be worry of being reported from violating their obligations in the workplace. However, this study does not concentrate on the PDA. Through whistle-blowing unlawful activities or misconduct are exposed, even those that happens behind closed doors such as corruption in a society or organisation. Thus, whistle-blowing is important in the fight against corruption. The provisions of both PDA and PRECCA assist in satisfying the country's obligation to protect whistle-blowers under the national and regional conventions. The UN Anti-Corruption Convention, for example, articles 33 and 38, require member states to have in their anti-corruption instruments legal protection against any unjustified treatment of any person who reports in good faith and on reasonable grounds acts of corruption.

On 31 July 2017, President Jacob Zuma assented to the Protected Disclosures Amendment Act No 5 of 2017 (the PDA Amendment). The PDA Act brings about numerous changes to the Protected Disclosures Act, No 26 of 2000 (the PDA). In particular, it is stated in the Act that its purpose is to:

> To amend the Protected Disclosures Act, 2000, so as to extend the application of the Act to any person who works or worked for the State or another person or who in any manner assists or assisted in carrying on or conducting the business of an employer or client as an independent contractor, consultant, agent or person rendering services to a client while being employed by a temporary employment service; to regulate joint liability of employers and their clients; to introduce a duty to inform employees or workers who have disclosed information regarding

> unlawful or irregular conduct; to provide for immunity against civil and criminal liability flowing from a disclosure of information which shows or tends to show that a criminal offence has been committed, is being committed or is reasonably likely to be committed; to create an offence for the disclosure of false information; and to provide for matters connected therewith.

The PDA Amendment Act brings changes in a form of new provisions extends addition key obligations on whistle-blowers and employers alike. In terms of section 1(d) of the new PDA Amendment, for example, a "occupational detriment" for whistleblowing now include a person being subjected to a civil claim "for the alleged breach confidentiality agreement arising out of the disclosure of a criminal offence or information which shows or tends to show that a substantial contravention or failure to comply with the law has occurred, is occurring or is likely to occur." A newly created provision, section 3A, is that an employer and its client are jointly and severally liable for those instances where the employer "under the express or implied authority or with the knowledge of a client" subjects an employee or worker to an occupational detriment." Thus, an employer who subject an employee to an occupational detriment for disclosure of a known corrupt activity will be liable to such an employee. It is submitted that the PDA Amendment enhances the anti-corruption efforts because it introduced a new obligation on employers to take or authorize appropriate internal action after receiving and dealing with information about improprieties. Corrupt practices may be one such impropriety. Furthermore, the PDA Amendment strengthens openness and accountability without fear of reprisals or occupational detriment.

In 2015, the Deputy Public Protector, Advocate K Malunga, published a report 2015 that collated whistle-blowing protections contained in various pieces of legislation. He noted that in addition to the PDA, there are provisions in the Companies Act 71 of 2008, PRECCA, the National Environmental Management Act 107 of 1998 (NEMA), Protection from Harassment Act 17 of 2011, Witness Protection Act 112 of 1998, and the Promotion of Access to Information Act 2 of 2000. More related to the PDA and PRECCA on the protection of whistle-blowers is the Witness Protection Act No. 112 of 1998. The Act "encourages state witnesses to give evidence in trial proceedings and commissions of enquiry by providing them with protection" (Madonsela, 2010:7).

4.3.6 The Promotion of Access to Information Act of 2000 (PAIA)

The Promotion of Access to Information Act No. 2 of 2000 (PAIA) is highly regarded as promoting transparency "by giving effect to the Constitutional right of access to any information held by the state and information held by any other person that is required for the exercise or protection of any rights" (Madonsela, 2010:6–7). Kekae (2017:77) remarks that PAIA puts "into practice the constitutional right of access to information that is in the possession of the State and any information that another person is in possession of and may be required for the exercise or protection of any rights." According to its preamble it was enacted:

> to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith.

The preamble of PAIA and its provisions has been explicated further in the Manual on the Promotion of Access to Information Act 2 of 2000 (see generally Kekae (2017:77).

4.3.7 THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT (2000) (PAJA)

Section 33(1) of the Constitution guarantees everyone "the right to administrative action that is lawful, reasonable and procedurally fair." A dismissal from service recommendation by IPID, for example, of a member of the SAPS following alleged criminal misconduct will qualify as an administrative action. Section 33(3) requested the enactment of national legislation to give effect to this right, which came in the form of the Promotion of Administrative Justice ACT (PAJA). Peekhaus (2014:570) regards section 33 of the Constitution as a "specifically articulated constitutional right of access to information places South Africa among a minority of countries globally that attribute such a fundamental level of importance to this right". Currie and Klaaren (2002) hails PAJA as one of the most important pieces of legislation enacted in South Africa, with far reaching implications. The broad scope of PAJA and section 33 of the Constitution with regard to just administrative action has been attributed "an underlying belief in the critical lynchpin role this right plays in advancing the civil, political, and socio-economic rights contained in the Constitution's extensive Bill of Rights," says Peekhaus (2014:570-571).

The PAJA promotes transparency in administrative decisions requiring "administrative action that is lawful, reasonable and procedurally fair, and the right to written reasons where one's rights have been adversely affected by administrative action" (Madonsela 2010:7). It is submitted that PAJA assures accountability and transparency needed in the fight against corruption. Its purpose is stated in the preamble as:

> To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto.

PAJA has far reaching consequences in the realm of administrative justice. To start with, it fosters administration effectiveness and accountability. Also, promotes law and order by providing for a scheme of reviewing administrative decisions made by public officials. Kekae (2017:78) posits that PAJA "together with the 1996 Constitution … embraces the "*Batho Pele*" (People First) principles and promotes South Africans citizens' rights to justice administration." Relevant to this study is what Ngcobo J said regarding the right to access to information in in *Brümmer v Minister for Social Development and Others*, stating that (para 62-63):

> The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information." Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights.

PAJA was tested in *President of the Republic of South Africa and Others v M & G Media Limited* 2011 (2) SA 1 (SCA) case, which was about appeal to access a report in the possession of the President of the Republic. The respondent, Mail and Guardian has sought access to the report since 2008 using internal remedies to no avail.

M and G had to resort to the courts and the North Gauteng High Court granted the order under PAJA compelling the President to disclose the report. The leave to appeal the High Court decision was denied by the Supreme Court of Appeal. Relentless was the Office of the Presidency that it mounted an appeal to the Constitutional Court, and the latter referred the case back to the court of first instance (Peekhaus, 2014:570), which ordered that the report be released. In the words of the Court, at para 132, in the "circumstances the Court should not hesitate to let the Constitution and the statute take effect. The report should be released." Public interest consideration were critical in the court coming to its decision. In particular, Cameron J (Jafta J, Nkabinde J and Van der Westhuizen J concurring) stated the public should never "fear that courts may assist in suppressing information to which the Constitution says they are entitled (at para 130). Judge Cameron further said that "[t]o give secret judicial examination of disputed records a central place in deciding claims to exemption, instead of enforcing the burden government rightly bears to justify withholding information, is in the researcher's view a grave error" (at para 31).

4.3.8 The Public Finance Management Act of 1999 (PFMA)

The Public Finance Management Act No. 1 of 1999 (PFMA), supported by regulations, promotes the effective and efficient use of resources by departments and constitutional institutions. The PFMA is central to the strategy on improving financial management in the public service. Also, it advances a healthy organisation sustainability "through effective and efficient use of limited resources" (Xhati, 2016:7). In part, the PFMA places certain duties and responsibilities on executive officials in charge of state finance. The Act sets out clear procedures with regard the effective and efficient management of assets, liabilities and expenditure of the State (Kekae, 2017:73). The preamble of the PFMA states as its purpose:

> To regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.

The Act consists of 95 sections, of which some provisions are particularly relevant to this study. For instance, accounting officers of these institutions are required to maintain i*nter alia "*effective, efficient and transparent systems of financial and risk management and internal control; a system of internal audit under the control and direction of an audit committee; and an appropriate provisioning and procurement system which is fair, equitable, transparent, competitive and cost-effective" (Madonsela, 2010:7).

A view is that PFMA can also serve as an accountability yardstick because it requires public officials to exhibit openness and transparency in their activities (Kekae, 2017:75). The sound financial management principles of the PFMA has been replicated at municipal level through the Municipal Finance Management Act of 2003 (MFMA). Kekae (2017:75) posits that "Managers must be accountable and be able to manage finances within the set financial management framework." Mathebula (2014:936) made a good observation that notwithstanding the good intentions underlying PFMA, "a democratic South Africa's financial management continues to be embedded with corruption, fraud and theft". In the realm of financial mismanagement and corruption, Mathebula (2014:940) makes reference to the wastage of public resources and finances in the Nkandla corruption scandal. While the good intention of ensuring that public money is safeguarded against corruption and other malpractices, it should sadly be announced that both the PFMA and the MFMA have failed to be deterrents, particularly failing to act as a preventative tool against corruption and thiefdom (Mathebula, 2014:942). Unfortunately, the VBS Scandal has revealed a flagrant violation of PFMA provisions and dictates.

4.3.9 Financial Intelligence Centre Act of 2001 (FICA)

The Financial Intelligence Centre Act No. 38 of 2001 (FICA) was enacted specifically to:

> establish a Financial Intelligence Centre and a Money Laundering Advisory Council in order to combat money laundering activities and the financing of terrorist and related activities; to impose certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities; to amend the Prevention of Organised Crime Act, 1998, and the Promotion of

> Access to Information Act, 2000; and to provide for matters connected therewith.

Section 1(1) defines what money laundering is and section 29 obliges authorities to follow and report suspicious and unusual transactions. In terms of section 1(1), money-laundering defined as:

> an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of section 64 of this Act or section 4, 5 or 6 of the Prevention of Organised Crime Act.

It is submitted that FICA further assist not only in identifying the proceeds of unlawful activities, and acting as a disincentive for money-laundering activities (Hannman & Koen, 2017:107), as has been exposed in the Bosasa scandal at the Zondo State Capture Commission hearings. It helps in the control of corruption and corrupt activities through information exchange amongst relevant bodies both nationally and internationally. “Corruption and money-laundering are a related and self-reinforcing phenomenon”, highlighted Ahlers (2013:30) quoting the World Bank. Another important role of FICA is that its explicit reference to POCA means that even professions such as the legal professions are directly affected as corrupt individuals often lauder their money using the services of lawyers. FICA obliges institutions to exercise accountability and oversight by establishing and verifying the identity “of a client before concluding a single transaction with such client and to further keep a record of such identity for a period of at least five years” (Madonsela, 2010:7–8). A more telling account has been presented by Ahlers (2013), writing on FICA and politically exposed individuals.

4.3.10 Public Administration Management Act of 2014 (PAMA)

The Public Administration Management Act (PAMA) Bill was passed into law Parliament in March 2014. The Act is intended to promote the basic values and principles governing the public administration covered in section 195 (1) of the Constitution.

The values and principles, which are applicable to administration in every sphere of government, organs of the state and public enterprises according to section 195(2), are stated as follows in section 195(1) of the Constitution:

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public administration must be development-oriented.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

Section 3 of PAMA makes provisions relevant to good governance and administration free from corruption by stating as its objects the promotion and giving effect to the values and principles in section 195(1) of the Constitution; and facilitating the eradication and prevention of unethical practices in the public administration. Moreover, section 15. (1) of PAMA establishes the Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit. Section 15(4)(a) to (f) by tasking the Unit to further the crusade for clean and good administration (Kekae, 2017:91-92) through declaring as the Unit’s function:

(a) To provide technical assistance and support to institutions in all spheres of government regarding the management of ethics, integrity and disciplinary matters relating to misconduct in the public administration;

(b) to develop the norms and standards on integrity, ethics, conduct and discipline in the public administration;

(c) to build capacity within institutions to initiate and institute disciplinary proceedings into misconduct;

(d) to strengthen government oversight of ethics, integrity and discipline, and where necessary, in cases where systemic weaknesses are identified, to intervene;

(e) to promote and enhance good ethics and integrity within the public administration; and

(f) to cooperate with other institutions and organs of state to fulfill its functions under this section

4.3.11 National Development Plan 2030 (NDP)

As discussed in Chapter 1.1, corruption has many ills and effects on the socio-political economy of the country. The National Development Plan 2030 (NDP) was introduced to address several concerns that impact on the economy and corruption is one such concern (Kekae, 2017:96). NDP is simply a long terms development plan for South Africa, focusing of several key areas and collaboratively developed under the leadership of the National Planning Commission. In Chapter 14 of the NDP, corruption is listed as one of the key goals. The summary of the key goals on corruption are listed verbatim as follows (NDP p.445).

> Corruption undermines good governance, which includes sound institutions and the effective operation of government in South Africa. The country needs an anti-corruption system that makes public

servants accountable, protects whistle-blowers and closely monitors procurement.

These efforts to eradicate corruption need to include the private sector and individuals by increasing public awareness and improving access to information.

A strategy is needed to strengthen the independence of the judiciary, through improving the quality of judges and scaling up judicial training.

The NDP calls for a multi-prong approach to eradicate corruption. Suggested as also important in this approach is the creation of a corruption intelligence centre (CIC). It is submitted that the essence of the proposal for the establishment of the CIC is in part addressed in some of the researcher's recommendation discussed in the final chapter of this study. In particular, the researcher's recommendation on the establishment of the anti-corruption commission (ACC).

The focus on corruption eradication is that corruption tears the core of good governance and leads to a public service that is accountable. Thus the NDP identifies the following focus areas as the country moves towards the path of accountability and zero-tolerance to corruption in the public service, namely: " building a resilient anti-corruption system; strengthening accountability and responsibility of public servants; creating an open, responsive and accountable public service; and strengthening judicial governance and the rule of law" (Kekae, 2017:96). Functional effectiveness and independence of anti-corruption bodies are key to any efforts by any authority serious about fighting corruption. It was therefore a relief that the 2011 NDP stated as indispensable to a well-functioning anti-corruption system "adequate resources and staff with relevant skills and knowledge, exceptional legislative powers, information sharing that is of high level and well-coordinated, and functional independence." (Kekae, 2017:104)."

To surmise, the relevance of NDP 2030 to this study is that its vision speaks firms to the need to combat corruption and to tally eradicate it. This the vision proclaims that:

Our vision for 2030 is a South Africa that has zero tolerance for corruption. In 2030, South Africa will be a society in which citizens do

> not offer bribes and have the confidence and knowledge to hold public and private officials to account, and in which leaders have integrity and high ethical standards. Anticorruption agencies should have the resources, independence from political influence, and powers to investigate corruption, and their investigations should be acted upon. (NDP, p.447).

4.3.12 Public Sector Integrity Management Framework, 2013 (PSIMF)

Public sector integrity management framework (PSIMF) is aptly titled given integrity as the centrepiece public sector management, and should find resonance with many international and regional frameworks on corruption and good governance. For instance, the importance and centrality of integrity as a foundation of good governance has been acknowledged by the OECD (Kekae, 2017:97). In Africa, integrity in public service and good governance finds exposition in several continental and regional instruments. The African Charter on Values and Principles of Public Service and Administration, which was adopted by the African Union in 2011 and received in last signature in 2018 seeks, amongst others, to promote moral values as inherent attributes of public service agents; and also calls on state parties to combat corruption. With respect to corruption, the PSIMF stated that "promoting integrity and combating corruption in the public service established the ground for the private sector and is important to upholding trust in government" and that there must be a commitment to recourse to "ethical and anti-corruption methods" (Kekae, 2017:97). Kekae (2017) notes as some of the key consideration in the PSIMF information sharing, constant and effective monitoring, and the system undergird by integrity systems and independence (Kekae, 2017:98). It is therefore submitted that the PSIMF is very relevant to this study as it highlight what is relevant and important in the fight against corruption, particularly the independence and integrity of the public service office and of the law enforcement agencies and the judiciary.

4.3.13 The National Prosecuting Authority Act (NPA)

This section must be read with Chapter 5.2.1 of this study discussing in depth the NPA, its powers and functions. In here it suffices to express that the introductory statement of the NPA Act holds that the purpose of the Act is to "regulate matters incidental to the establishment by the Constitution of the Republic of South Africa,

1996, of a single national prosecuting authority; and to provide for matters connected therewith". Furthermore, the Preamble of the NPA Act stated the following ideals and intentions related to and/or associated with the NPA Act:

> WHEREAS section 179 of the Constitution of the Republic of South Africa, 1996 …, provides for the establishment of a single national prosecuting authority in the Republic structured in terms of an Act of Parliament; the appointment by the President of a National Director of Public Prosecutions as head of the national prosecuting authority; the appointment of Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament;
>
> AND WHEREAS the Constitution provides that the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority;
>
> AND WHEREAS the Constitution provides that national legislation must ensure that the Directors of Public Prosecutions are appropriately qualified and are responsible for prosecutions in specific jurisdictions;
>
> AND WHEREAS the Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice;
>
> AND WHEREAS the Constitution provides that the National Director of Public Prosecutions must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy which must be observed in the prosecution process;
>
> AND WHEREAS the Constitution provides that the National Director of Public Prosecutions may intervene in the prosecution process when policy directives are not being complied with, and may review a decision to prosecute or not to prosecute;

> AND WHEREAS the Constitution provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings;
>
> AND WHEREAS the Constitution provides that all other matters concerning the prosecuting authority must be determined by national legislation.

It is clear from the above restatement of the preamble to the NPA Act that the NPA plays a very important and central role in crime prosecution in South Africa. This role is confirmed in section 179(2) of the Constitution according to which the NPA is empowered to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental thereto. Corruption being one of the offences within the jurisdiction of the NPA to prosecute. Section 179(4) of the Constitution further requires that in doing so, the NPA must "act without fear or favour or prejudice." This is an important constitutional mandate that cannot be over-emphasised. At the helm of the NPA is the NDPP. The NDPP was established pursuant to section 32(2) of the NPA Act. According to section 179(5) (a) of the Constitution, the NDPP is entrusted with determining prosecution policy and issuing policy directives to drive the prosecution processes.

According to section 11(1) of the NPA Act, the president, after consultation with the minister and the NDPP, may appoint a maximum of four persons as Deputy Directors of National Public Prosecution (DNDPPs). The DNDPPs are subject to the control, direction and oversight of the NDPP and are also empowered to assign specified functions and powers to the DNDPPs. In terms of section 13(1) of the NPA Act, the president may, after consultation with the minister and the NDPP, also appoint Directors of Public Prosecution (DPPs) to different seats of the high courts, bestowing on them powers within those prosecutorial jurisdictions as part of discharging performance of the constitutional mandate and obligations of the NPA. This can be a differentiated appointment, with some powers and/or offences excluded from the jurisdiction of some DPPs.

4.4 SUMMARY

It was revealed in this chapter that the seriousness with which the country wants to tackle the scourge of corruption included the enactment of a host of laws and policies, some like the PRECCA and POCA, being of international standards and modelled on equivalents of other jurisdictions. Chapter 4, *Anti-corruption normative framework,* dealt with the current normative anti-corruption frameworks both nationally and internationally. The NPA is highlighted as key in the delimitation of the national prosecuting authority of the country in compliance with the provisions of the Constitution. Also addressed is the anti-corruption mandates under both international and regional conventions and treaties. Notable, with regard to the UN Anti-Corruption Convention and the AU Anti-Corruption Convention requiring states to have in place an effective and coordinated anti-corruption policies implemented by independent anti-corruption bodies and the independent judiciary (Pereira *et al*., 2012).

From a country perspective, it was clear that the NDP 2030 was intended to set a country of a path of straight and narrow with regard to corruption. It is submitted, and based on the above discussions, that South Africa could do much better in its fight against corruption if only the aspirations in the NDP 2030 could be followed alongside the currently impressive normative framework.

CHAPTER 5

SOUTH AFRICAN ANTI-CORRUPTION STRATEGIES, STRUCTURES AND RELATED INSTITUTIONS

5.1 Introduction

As noted in Section 2.6 the effectiveness of the South African anti-corruption structures depends in part on the organisational effectiveness of the criminal justice system. It is therefore important to have in place strategies and structures that promote such effectiveness. Some of the structures are outside the criminal justice system and located in other spheres such as the government. This chapter deals with anti-corruption structures and strategies to determine how effective they have been in fighting corruption. Like the US, South Africa has a multi-agency model in the fight against corruption and related activities.

Currently, anti-corruption structures or those in some form having the ability to be involved in combating corruption can be divided into three: *State institutions supporting constitutional democracy*; *criminal justice agencies*; and *other bodies*. Notable constitutional democracy bodies for the purposes of this study, or what are often referred to as Chapter 9 institutions: the Office of the Public Protector; the Office of the Auditor-General of South Africa (AGSA); and the South African Human Rights Commission (SAHRC). Those forming part of the criminal justice agencies and law enforcement in general include the Judiciary; NPA; the SAPS Commercial Crime Unit; the SAPS ACU; the Hawks; the SIU; the Independent Police Investigative Directorate (IPID); and the FIC. Although not established to deal specifically with corruption and related activities or criminal conducts only, the Judiciary (courts) deserve mention as one of the institutions in the forefront of the fight against corruption. The third group of related anti-corruption agencies includes the Presidential Commissions; Department of Public Service and Administration; the National Intelligence Agency; the South African Revenue Service (SARS); and the National Anti-Corruption Forum. In this group only the Office of the Presidency; Presidential commissions and the parliamentary portfolio committees will be addressed in this study.

5.2 CRIMINAL JUSTICE AGENCIES

5.2.1 NATIONAL PROSECUTING AUTHORITY

In terms of section 179(2) of the Constitution, the NPA is empowered to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental thereto. In doing so, it must act without fear or favour as proclaimed by section 179(4) of the Constitution. This is an important constitutional mandate that cannot be over-emphasised. At the helm of the NPA is the NDPP. The NDPP was established pursuant to section 32(2) of the NPA Act. According to section 179(5) of the Constitution, the NDPP is entrusted with determining prosecution policy and issuing policy directives to drive the prosecution processes. According to section 11 of the NPA Act, the president, after consultation with the minister and the NDPP, may appoint a maximum of four persons as Deputy Directors of National Public Prosecution (DNDPPs). The DNDPPs are subject to the control, direction and oversight of the NDPP and are also empowered to assign specified functions and powers to the DNDPPs.

In terms of section 13(1) of the NPA Act, the president may, after consultation with the minister and the NDPP, also appoint Directors of Public Prosecution (DPPs) to different seats of the high courts, bestowing on them powers within those prosecutorial jurisdictions as part of discharging performance of the constitutional mandate and obligations of the NPA. This can be a differentiated appointment, with some powers and/or offences excluded from the jurisdiction of some DPPs.

Clearly, the NPA and NDPP occupy a very important place in the South African criminal justice system and equally in the fight against corruption and corrupt activities. As observed by the Minister of Justice and Constitutional Development, Mr M Masutha, “the National Prosecuting Authority (NPA) … [is] an important component of the Justice Crime Prevention and Security (JCPS) Cluster” which “strives to implement its mandate within a coordinated approach together with all other components of the criminal justice value chain” (Annual Report National Director of Public Prosecutions 2017/18:17). It executes this duty in a holistic and co-ordinated manner, working together with other law enforcement agencies and agencies or units, such as the Directorate for Priority Crime Investigations (DPCI), the SAPS, the Anti-Corruption Task Team (ACTT), chaired by the Head of the DPCI, the SIU, the Specialised

Commercial Crime Unit (SCCU), the FIC, the SARS, the State Security Agency (SSA), IPID, the AFU and the National Intelligence Co-ordinating Committee (NICOC).

The role and the importance of the NPA and the NDPP is better explicated by the SCA in *Democratic Alliance v The President of the RSA & Others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2013 (3) BCLR 291 (SCA) (1 December 2011) which stated:

> [57] In order to fully appreciate the importance of the NPA and the NDPP in our constitutional democracy it is necessary, first, to bear in mind that the Constitution empowers those who govern and imposes limits on their power and, second, to consider the wider constitutional scheme in which both the institution and the individual are dealt with. A good starting place is an examination of the founding provisions of the Constitution. Section l(c) of the Constitution states that the Republic of South Africa is one, sovereign, democratic state founded, among other values, on the supremacy of the Constitution and the rule of law. Section l(d), commits government to democracy and to accountability, responsiveness and openness. Section 2 of the Constitution reaffirms that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid and that the obligations imposed by it must be fulfilled. Thus, every citizen and every arm of government ought rightly to be concerned about constitutionalism and its preservation.

In terms of the NPA Act, section 20(1)(c) the NPA has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings. This includes discontinuing criminal proceedings. Similar powers are included in the CPA. The powers of the NDPP were reaffirmed and crystallised by the Constitutional Court in *Democratic Alliance v President of the RSA and Others* 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC). According to the court the powers of the NDPP must be understood with regard to the provisions of section 179(2) of the Constitution. An important observation by the court that is relevant to the fight against corruption is that “the people employed by the prosecuting authority must themselves be people of integrity who will act without fear, favour or prejudice”

(*Democratic Alliance v President of the RSA and Others,* para 72). The court emphasised that "dishonesty is inconsistent with the hallmarks of conscientiousness and integrity that are essential prerequisites to the proper execution of the responsibilities of a National Director" (*Democratic Alliance v President of the RSA and Others*, para 49).

Furthermore, the Constitutional Court in *Democratic Alliance v President of the RSA and Others,* para 49, held that the president as the appointing authority of the NDPPA must ensure that –

(a) the prosecuting authority performs its functions honestly and without fear, favour or prejudice;

(b) decisions to institute criminal prosecution are taken honestly, fairly and without fear, favour or prejudice;

(c) prosecution policy is determined honestly and is appropriate to the needs of our country;

(d) the criminal justice system insofar as it concerns prosecutions is fairly administered;

(e) any improper interference, hindrance or obstruction of the prosecuting authority by any organ of state is not tolerated; and

(f) all Directors of Public Prosecutions carry out their functions honestly and fairly.

The NPA also has an international footprint through several activities, including being part of the delegation that represents South Africa at the Financial Action Task Force (FATF) and the OECD. In my view NPA participation in the OECD is crucial and relevant given the fact that the OECD is one of the few regional organisations that effectively combat corruption and from which best practices can be learnt by the NPA. It is the OECD that led the crusade against transnational corruption when it adopted the Convention on the Prevention of Bribery of Foreign Public Officials in International Business Transactions (Sibanda, 2005). Equally important is the involvement of the NPA in the operations of the FATF, which is an inter-governmental body responsible

for setting international standards and promoting regulatory and enforcement measures to combat white-collar crimes threatening the stability and the integrity of the international financial system (Annual Report: National Director of Public Prosecutions, 2017/18:19).

In the fight against corruption the NPA, for example, in 2017/2018 was successful in convicting 213 government officials of corruption and 37 other persons of corruption or related activities (see Annual Report National Director of Public Prosecutions, 2017/18:19).

However, the institutional foundation and the credibility of the NPA have been questioned in several cases. One such case is *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others* [2018] 1 All SA 471 (GP). The case involved the validity of the appointment of Advocate Shaun Abrahams as the NDPP. Ruling that Adv. Abrahams must vacate his office, Judge President Mlambo also stated that former President Jacob Zuma was conflicted in appointing the NDPP.

The centrality of former President Jacob Zuma in the NDPP as an establishment designed to fight corruption has been a thorny issue in South Africa. A view expressed has been that the former president has abused his powers to appoint or remove an NDPP in breach his duties under section 96(2)(b) of the Constitution. Section 96(2) prohibits the president from putting himself in a situation that will render him conflicted, particularly with regard to his official responsibilities and his private interests. The view was that the former president was attempting to ensure that those appointed as NDPP are sympathetic to his corruption case woes.

The issue of the conflicted former President Zuma in the matter was confirmed by the court, which further stated that in a rights-based order it is fundamental that a conflicted person cannot act; to act despite a conflict is self-evidently to pervert the rights being exercised as well as the rights of those affected. Section 96(2)(b) makes that clearly beyond the pale. If conflicted, the individual simply cannot act, is “unable” to act, whether section 90 was there or not (*Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South*

African Constitution v President of the Republic of South Africa and Others [2018] 1 All SA 471 (GP), para 112). "President Zuma would be clearly conflicted in having to appoint a NDPP, given the background to which we have referred, particularly the ever-present spectre of the many criminal charges against him that have not gone away," the court held (*Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others* [2018] 1 All SA 471 (GP). para 113).

Contentious in the *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others* was the 14 May 2015 settlement agreement concluded between President Jacob Zuma, the Minister of Justice Michael Masutha and the former NDPP Mxolisi Nxasana for the latter to vacate office in terms of section 12(8)(a)(ii) of the NPA Act. It was the contention of Corruption Watch and Freedom Under Law that the settlement agreement and the decision to authorise such agreement were corruptly sanctioned, unlawful and unconstitutional, and invalid. This contention was supported by Judge President Mlambo, who stated that Mr Nxasana "was persuaded to vacate the office by the unlawful payment of an amount of money substantially greater than that permitted by law …" Important to note is that the settlement agreement for the payment of R17.3 m to Mr Nxasana so that he would abandon his court action against the president and the minister challenging his suspension contravened National Prosecuting Act No. 32 of 1998 and the Public Finance Management Act No.1 of 1999.

The above cases portray the NPA as an institution that is crippled by corrupt influences and thus its ability to help fight corruption and corrupt activities is severely compromised. Furthermore, all the issues around the NPA, particularly with respect to prosecuting high-profile cases, suggest that it is operationally inefficient and ineffective in combatting corruption according to its statutory and constitutional mandates respectively. A case in point is the 2007 prosecution debacle at the centre of which was former president Zuma. As succinctly put in *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others,* para 20:

> at the end of that year, on 18 December 2007, Mr Zuma was elected as President of the African National Congress. Thereafter, the Acting NDPP, Advocate Mpshe, indicted Mr Zuma on 18 counts of racketeering, corruption, money laundering, tax evasion and fraud. On 12 September 2008 Nicholson J set aside that decision on the basis that it was tainted by political interference. On 4 November 2008 the enquiry into Advocate Pikoli's fitness to hold office, chaired by Dr Frene Ginwala, recommended that Adv. Pikoli's suspension be uplifted. However, on 8 December 2008, Advocate Pikoli was removed from office by President Motlanthe.

It is interesting to note that in the confirmation appeal case in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others [2018] ZACC 23*, at para 6, the Constitutional Court noted with approval the observation of the High Court that the history of the NPA, including the case in question, "has been one of paralysing instability". Political wrangling, infighting and challenges influence operations at the NPA. Also, it put in question the credibility of those appointed to head the NPA and their ability to fight corruption without fear and favour. The High Court in *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others* found the conduct and independence of Adv. Abrahams problematic in that "… as in the President's and the NPA's appeal to the SCA – Adv. Abrahams has associated himself, inconsistent with the imperative of prosecutorial independence, on all material issues with the position of the President." The court gave as an example of this association that runs counter to the independence of the NPA and the NDPP his arguments on the vacancy issue, the conflict issue, and remedies. This court said of the NPA's independence "[t]here is … a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts."

In fact, Section 32(1)(b) of the NPA Act prohibits any improper interference with or hindering or obstruction of the NPA including any of its members "in the exercise, carrying out or performance of its, his or her powers, duties and functions." The Constitutional Court in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others [2018] ZACC 23,* para 21, stated that the list of what may

constitute improper interference is not exhaustive and may take several forms including intimidation, promises or inducements, and corruptly bearing influence on the decision-making powers or the functioning of the NPA. It is important that the NPA executes its mandate independently, even in terms of the Constitution (Selabe, 2015:31).

Talking about the independence of the NPA, the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), at para 146, stated that "[t]here is … a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts". It is submitted that this independence is not only important to the organisational effectiveness of the NPA, it is crucial to ensuring that initiatives and efforts to combat corruption and related activities advance the goals of a well-functioning criminal justice system (see also *Corruption Watch NPC and Others v President of the Republic of South Africa and Others [2018] ZACC 23,* para 20). The Constitutional Court put it in clear and simple terms in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others [2018] ZACC 23,* at para 19:

> The reason why this guarantee of independence exists is not far to seek. The NPA plays a pivotal role in the administration of criminal justice. With a malleable, corrupt or dysfunctional prosecuting authority, many criminals – especially those holding positions of influence – will rarely, if ever, answer for their criminal deeds. Equally, functionaries within that prosecuting authority may – as CASAC submitted – "be pressured … into pursuing prosecutions to advance a political agenda". All this is antithetical to the rule of law, a founding value of the Republic. Also, malleability, corruption and dysfunctionality are at odds with the constitutional injunction of prosecuting without fear, favour or prejudice. They are thus at variance with the constitutional requirement of the independence of the NPA.

The NPA participates in the ACTT, which was set up to focus on fast-tracking the investigation and prosecution of serious corruption cases, and to increase success in fighting and preventing corruption in South Africa. The following were noteworthy finalisations through the work of the ACTT by the SCCU: in *State v Samuel Mzukisi Banzana,* the accused was charged with four counts of corruption in contravention of Section 12 of PCCA Act in that he requested and was paid "gratifications in order for contractors to be awarded construction contracts to the value of R41 174 000". The accused was subsequently convicted as charged and received a sentence of 12 years' imprisonment. Furthermore, a confiscation order to the amount of R351 000 was obtained (Annual Report National Director of Public Prosecutions 2017/18, at 55). In *State v Johannes Hermanus Engelbrecht* the accused was charged with and convicted of 16 counts of fraud, and was sentenced to 10 years' imprisonment (Annual Report National Director of Public Prosecutions 2017/18, at 52).

Comparatively, the Constitution of Uganda contains one of the clearest and most substantive provisions on the country's national prosecution authority, addressing the qualification and independence of the authority in no uncertain terms. Whereas the Constitution of South Africa addresses prosecutorial authority in what I consider to be very cryptic terms. It is submitted further amendments to the NPA Act can benefit from modelling some of the provisions on the provisions of the Ugandan Constitution. Sections 258, 259, 260, 261, 262 and 263 of the Ugandan Constitution provide, for example, as follows:

> ***258 Establishment and functions of National Prosecuting Authority***
> *There is a National Prosecuting Authority which is responsible for instituting and undertaking criminal prosecutions on behalf of the State and discharging any functions that are necessary or incidental to such prosecutions.*
>
> ***259 Prosecutor-General and other officers***
> *(1) There is a Prosecutor-General who is the head of the National Prosecuting Authority.*
> *(2) The office of the Prosecutor-General is a public office but does not form part of the Civil Service.*
> *(3) The Prosecutor-General is appointed by the President on the advice of the Judicial Service Commission following the procedure for the appointment of a judge.*

(4) The Prosecutor-General must be a person qualified for appointment as a judge of the Supreme Court.

(5) The term of office of the Prosecutor-General is a period of six years and is renewable for one further such term.

(6) Before taking office, the Prosecutor-General must take, before the President or a person authorised by the President, the oath of office in the form set out in the Third Schedule.

(7) The provisions relating to the removal of a judge from office apply to the removal of the Prosecutor-General from office.

(8) The conditions of service of the Prosecutor-General, including his or her remuneration, must be provided for in an Act of Parliament, but the remuneration must not be reduced during the Prosecutor-General's tenure of office.

(9) The remuneration of the Prosecutor-General is a charge on the Consolidated Revenue Fund.

(10) An Act of Parliament must provide for the appointment of a board to employ persons to assist the Prosecutor-General in the exercise of his or her functions, and must also provide—

(a) *for the qualifications of those persons;*

(b) *for the conditions of service, conduct and discipline of those persons;*

(c) *that in exercising their functions, those persons must be independent and impartial and subject only to the law and to the direction and control of the Prosecutor-General;*

(d) *for the structure and organisation of the National Prosecuting Authority; and*

(e) *generally, for the efficient performance and well-being of the National Prosecuting Authority.*

(11) The Prosecutor-General may direct the Commissioner-General of Police to investigate and report to him or her on anything which, in the Prosecutor-General's opinion, relates to an offence or alleged or suspected offence, and the Commissioner-General of Police must comply with that direction

260 Independence of Prosecutor-General

(1) Subject to this Constitution*, the Prosecutor-General—*

(a) *is independent and is not subject to the direction or control of anyone; and*

(b) *must exercise his or her functions impartially and without fear, favour, prejudice or bias.*

(2) The Prosecutor-General must formulate and publicly disclose the general principles by which he or she decides whether and how to institute and conduct criminal proceedings.

261 Conduct of officers of National Prosecuting Authority

(1) The Prosecutor-General and officers of the National Prosecuting Authority must act in accordance with this Constitution and the law.

(2) No officer of the National Prosecuting Authority may, in the exercise of his or her functions—

(a) *act in a partisan manner;*

(b) *further the interests of any political party or cause;*

(c) *prejudice the lawful interests of any political party or cause; or*

(d) *violate the fundamental rights or freedoms of any person.*

(3) Officers of the National Prosecuting Authority must not be active members or office bearers of any political party or organisation.

(4) An Act of Parliament may make further provision to ensure the political neutrality of officers of the National Prosecuting Authority.

5.2.2 SOUTH AFRICAN POLICE SERVICE

5.2.2.1 Anti-Corruption Unit (ACU)

A study by Meyer, Steyn and Gopal (2013) perceptively posits that the SAPS lacks integrity and is corrupt from within. This was as a result of the many media reports on the engagement of members of the SAPS in corruption and corrupt activities, and the responses of the participants in their study, which used a questionnaire to extract data. But this should not be seen as stating that there are no measures to combat corruption within the ranks of the SAPS. The first ACU of the SAPS was formed in 1996. It provided the public with access to date “on organisational action against corrupt members” (Faul, 2008:22). The ACU was closed in 2002 but not before it was instrumental in the charge and conviction of the head of KwaZulu-Natal’s organised crime unit for corruption (Faul, 2008). At its peak in 2002, 1 048 SAPS members were arrested and charged with corruption. The closure of ACU was part of restricting anti-corruption efforts within the SAPS. Faul (2008:22) argues that “despite difficulties in comparison it seems clear that the organised crime unit, with its broad and busy

mandate, has been unable to replicate the ACU's success in the sphere of SAPS corruption". The ACU, led by the National Police Commissioner, provided members of the public with data regarding SAPS members arrested, under trial and/or convicted for corruption.

5.2.2.2 Directorate for Priority Crime Investigation (DPCI)

The DPCI, commonly referred to as the Hawks, is part of the SAPS whose mandate is to focus on serious organised crime, serious corruption and serious commercial crime. It was established in 2009 with the mandate to fight "priority crimes", including corruption and organised crime (Kinnes & Newham, 2012). The DPCI is a successor to the Directorate of Special Operations (DSO), then commonly known as the Scorpions that was established in 2001, and which fell under the ambit of the NPA. The Scorpions were touted as one of the most visible and specialised units established after 1994 notwithstanding the many complaints against it. Goga (2014:67-68) support his view on the scorpions by referring to it high conviction rate that included cases such as terror activities of People Against Gangsterism and Drugs (PAGAD), and investigation of corruption around the arms deal that led to the arrest and conviction of Shabir Shaik. Interestingly, the Scorpions were disbanded following a decision by the ruling ANC. During its 2007 Polokwane National Conference the scandals besieged former president of the country Jacob Zuma was elected president of the party. Some may argue that the decision to disband the Scorpions was designed to protect Zuma from investigation and prosecution on allegations of corruption.

The Hawks manages, prevents, investigates and combats serious offences, serious organised crime, serious commercial crime and serious corruption (Madonsela, 2010:9; Corruption Watch, 2017). The location of the Hawks within the SAPS has been a contentious issue. Even the Constitutional Court in Glenister II, para 64, questioned the Hawks' continued existence within the SAPS, particularly with respect to its independence. The court held, at para 64, that it was:

> [p]ermissible to locate anti-corruption agencies within existing structures such as the NPA and the SAPS. However, the independence of the law enforcement bodies that are institutionally placed within existing structures in the form of specialised departments or units requires special attention. The centralised and the hierarchical

> nature of their structures and the fact that they report at the final level to a Cabinet minister, as in the case of the police and the NPA, present a risk of interference. The risk of undue interference is even higher when members of the unit lack autonomous decision-making powers and where their superiors have discretion to interfere in a particular case. What is required are legal mechanisms that will limit the possibility of abuse of the chain of command and hierarchical structure or interference in the operational decisions involving commencement, continuation and termination of criminal investigations and prosecutions.

Again, in *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32 (*Glenister III*), at para 32, the Constitutional Court stated that "[t]he overriding consideration is whether the DPCI legislation has inbuilt autonomy-protecting features to enable its members to carry out their duties without any inhibitions or fear of reprisals." With regard to the ills of corruption the court said, at para 220:

> Corruption threatens the very existence of our constitutional democracy. Effective laws and institutions to combat corruption are therefore absolutely essential. It is the task of the courts – and this Court in particular – to ensure that legal mechanisms against corruption are as trustworthy and tight as possible, within the demands and parameters of the Constitution.

It was following this judgment that the SAPS Amendment Bill (Bill 7 of 20120) was tabled in parliament in March 2012 to retain the DPCI as a directorate of the SAPS, whilst at the same time addressing concerns raised by the Constitutional Court in *Glenister II*. In terms of the proposed provisions of the Bill, the Minister of Police was empowered to appoint the head of the DPCI instead of the National Police Commissioner. The powers and independence of the DPCI head were also revised. For instance, the head of the DPCI could second staff from other departments without interference by the National Commissioner. Also, the head of the DPCI and not the National Commissioner was empowered to accept cases referred by provincial commissioners or the National Commissioner for investigation in terms of section 17D.

Perhaps an important development was that the Bill empowered the head of the DPCI "to overrule a decision by the National Commissioner should a dispute arise about which cases fall within the remit of the DPCI" (Kinnes & Newham, 2012:30). It must be argued, however, that the fact that under the Bill the budget of the DPCI was to be determined by the National Commissioner went against efforts to ensure the independence of the DPCI. The National Commissioner could easily render the DPCI less effective by restricting its funds.

5.2.3 SPECIAL INVESTIGATING UNIT (SIU)

The Special Investigating Unit (SIU) in terms of the Special Investigating Units and Special Tribunals Act No 74 of 1996 (SIU Act) to investigating, amongst others, public administration corruption and to help protect the interests of the public regarding public moneys and property (Goga, 2014:67). It investigates matters from a civil perspective and institutes civil action in the Special Tribunal. The importance of the SIU conducting its investigations from the civil law perspective is to ensure that compensatory awards are given (Camerer, 1999:5).

The powers of the SIU are extensive and include the power to investigate, to summon and interrogate persons, and the power to search for and seize evidence that may be relevant to its investigations. In terms of section 2 of the SIU Act, the SIU undertakes these investigations as long as they have been proclaimed in the Government Gazette along with its terms of reference, and can be amended by the president at any time (Section 2 (4) of the SIU Act). The SIU Act also determines which offences can be investigated by the SIU, upon request of the president. These, according to section 2(2) of the SIU Act, are:

i. Serious maladministration in connection with the affairs of any State institution;
ii. Improper or unlawful conduct by employees of any State institution;
iii. Unlawful appropriation or expenditure of public money or property;
iv. Unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
v. Intentional or negligent loss of public money or damage to public property;

vi. Corruption-related offences contained in Chapter 2 of the Prevention and Combatting of Corrupt Activities Act, 2004:32;
vii. Unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

The SIU operates with the referral system. It must, as soon as practicable after it has obtained evidence referred to in sub-section (1) (d) of the SIU Act, inform the relevant prosecuting authority thereof, whereupon such evidence must be dealt with in a manner that best serves the interests of the public (see Section 4 (2) of the SIU Act).

It would appear that the SIU is one of the busiest anti-corruption agencies in South Africa, with creditable results. In his report before the Portfolio Committee for Justice and Constitutional Development in October 2011, the then head of the SIU, Willie Hofmeyr, revealed that corruption involving government procurement "was costing South Africa as much as R30 bn each year" (Kinnes & Newham, 2012:34) and that about 588 procurement contracts to the value of R9.1 bn and 360 conflict-of-interest matters to the value of R3.4 bn were being investigated by the SIU. Alarmingly, he noted that these investigations concerned public corruption only and did not include private-sector corruption. The magnitude of public-sector corruption investigation by the SIU was staggering and paints a picture of the public sector flooded with corruption.

A point of concern, however, is that the SIU works on a system of referral as it relies on a presidential proclamation to institute investigations. An impression is that the SIU does not appear to have the autonomy to initiate an investigation. Nevertheless, it appears that it retains its independence during the investigative process, without government or political interference. It has submitted incidents such as the Gupta leaks, and overwhelming evidence presented by various anti-corruption movements portrays the SIU as having failed to execute its mandate as provided for in the SIU Act. This has led to citizens losing faith in this anti-corruption agency.

5.2.4 Specialised Commercial Crimes Unit (SCCU)

Another crime-investigating unit established in 1999 to deal with corruption and organised crime is the Specialised Commercial Crimes Unit (SCCU). The SCCU has its team of dedicated prosecutors who have been able to prosecute 700 cases by 2007 in Pretoria and Johannesburg (Goga, 2014:67). The SCCU obtained a conviction rate of 94.1 per cent in relation to complex commercial crime matters over the last year (2016) against a target of 93 per cent (Annual Report National Director of Public Prosecutions 2017/18, at 19). Section 28 of the NPA Act provides for the establishment of an investigating directorate headed by an investigating DPP. This section should be read with Chapter 6A (s17A to 17L) of the South African Police Service Act, 1995 (Act No. 68 of 1995) (SAPS Act), which provides for the establishment of a separate division in the SAPS, namely the DPCI, commonly known as the Hawks. These provisions, among others, ensure a multi-disciplinary and integrated approach in the prevention, combatting and investigation of priority crimes, including corruption offences. In terms of section 17D(3) of the SAPS Act, the National Head of the DPCI may, if he or she has reason to suspect that a national priority offence has been or is being committed, request the National Director to designate a DPP to exercise the powers of s28 of the NPA Act. In terms of section 17F(4) of the SAPS Act, the National Director must ensure that a dedicated component of prosecutors is available to assist and cooperate with members of the DPCI in conducting its investigations. Currently, no such component is in place.

The Asset Forfeiture Unit continues to play a critical role against the scourge of corruption and has delivered significant returns in the past few years, showing that crime does not pay. In an endeavour to curb the increase of corruption, the AFU froze assets to the value of R4.3 bn. An amount of R3.8 bn relating to corruption where the amount involved is more than R5 m was frozen. Recoveries in terms of POCA to the value of R308.3 m were also recorded during the last financial year. In line with its operational plan, the AFU has adopted a strategy that not only seeks to extend the footprint of asset forfeiture in the fight against crime but also to deliver maximum impact in several identified focus areas.

Through proper case selection and prioritisation, the AFU has made a concerted effort to strike a balance in the delivery of complex high-value cases and addressing other

identified priority focus areas. In this regard cases are prioritised according to national and regional priorities as determined by AFU with the assistance of its partners and stakeholders. The unit has prioritised a total of 113 cases, a combination of complex high-value and impact cases. The slow pace of finalising criminal investigations, including the delays in finalising forensic reports, remains a challenge in so far as it relates to the AFU's ability to achieve its seizure targets. In order to mitigate the said risk, the unit will continue to make extensive use of Chapter 6 (civil forfeiture) in order to reduce the turn-around time and to ensure maximum impact within the shortest possible time.

Seventeen cases with asset forfeiture potential to the collective value of R50 bn have been identified and are to be dealt with in terms of Chapter 5 and 6 of POCA. Billions of rand are expected to be recovered in future in respect of various investigations, spanning the country and across the globe presently and extending over the next three to five years. Similarly, it is envisaged that "comprehensive and complicated investigations will yield prosecutions and ultimately convictions and lengthy periods of incarceration for offenders" (Annual Report National Director of Public Prosecutions, 2017/18:19–20).

The SCCU maintained high conviction rates during this financial year. The impact on serious economic crime is evident as the advocates excelled by finalising 968 verdict cases and obtaining 911 convictions, representing a conviction rate of 94.1 per cent. Not only was the target of 93 per cent exceeded by 1.1 per cent but, compared to the previous years, an improved performance is noted. This achievement should be viewed against serious resource constraints that are still experienced in some offices.

The SCCU participates in the ACTT, which was set up to focus on fast-tracking the investigation and prosecution of serious corruption cases, and to increase the success of fighting and preventing corruption in South Africa. Members of the SCCU were instrumental in crafting the draft strategic plan for the ACTT, and are actively involved in the ACTT Secretariat.

The SCCU represents the NPA in the FATF and the OECD. The SCCU significantly contributes to the NPA's finalisation of money-laundering cases, and the co-ordination of enforcement action in the form of the prosecutions instituted and finalised.

During 2017/18 a total of 37 persons were convicted for corruption or related offences where the amounts involved were more than R5m. By their very nature, these matters are complicated and take a long time to finalise in both the investigation and prosecution phases. Many more cases were handled but there were a few that fit the category of amounts that exceed R5m.

South Africa has developed quite a wide-ranging legislative framework for combatting corruption, ranging from the PCCA Act, through the legislation dealing with financial and organised crime, public finance management and procurement legislation, to legislation promoting the public's access to information held by the public and private sectors. South Africa is also a signatory to several international conventions and treaties and is continually intensifying its efforts to defeat the scourge of corruption.

In line with the MTSF and NDP, a special focus was placed on the prosecution of corruption to improve investor perception and trust to invest in South Africa. The total number of government officials convicted of corruption during the current year is 213. This is 1.4 per cent more than the set target of 210 officials, even though it is 4.9 per cent lower than the number of officials convicted during the previous financial year. Against this backdrop, it is evident that a collective approach by all partners in the criminal justice value chain has ensured a heightened focus on corruption throughout this reporting period.

During the financial year 2014/15 the NPA broadened its vision in line with the new MTSF and included all government departments, as opposed to only JCPS officials being recorded from 2012 to 2014. Since September 2016 however, all national and provincial departments, inclusive of local authority and government agencies, are included.

5.2 COURTS

The more telling exposition of the role the courts play in South Africa is that by Hoexter (2014:v) who stated that "The judiciary and the Public Protector have been established with the purpose of ensuring that all comply with the Constitution". Section 165(1) of the Constitution postulates that the judicial authority of South Africa is vested in the court (the Judiciary), which, according to section 165(2), are independent bodies "subject only to the Constitution and the law" with an obligation to apply constitutional

provisions and the law “impartially and without fear, favour or prejudice” (see also Seedat, 2015:10).

The relevant provisions of section 165(1) reads:

> **Judicial authority**
>
> 165. (1) The judicial authority of the Republic is vested in the courts.
>
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
>
> (3) No person or organ of state may interfere with the functioning of the courts.
>
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
>
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
>
> (6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.
>
> [Sub-s (6) added by s. 1 of the Constitution Seventeenth Amendment Act of 2012.]

At the helm of the Judiciary is the Chief Justice, currently Chief Justice of the Constitutional Court Mogoeng Mogoeng. According to section 165(6) of the Constitution the Chief Justice is the accountable officer with regard the Judiciary and he is required to establish and monitor “norms and standards for the exercise of judicial functions of all the courts” in the country.

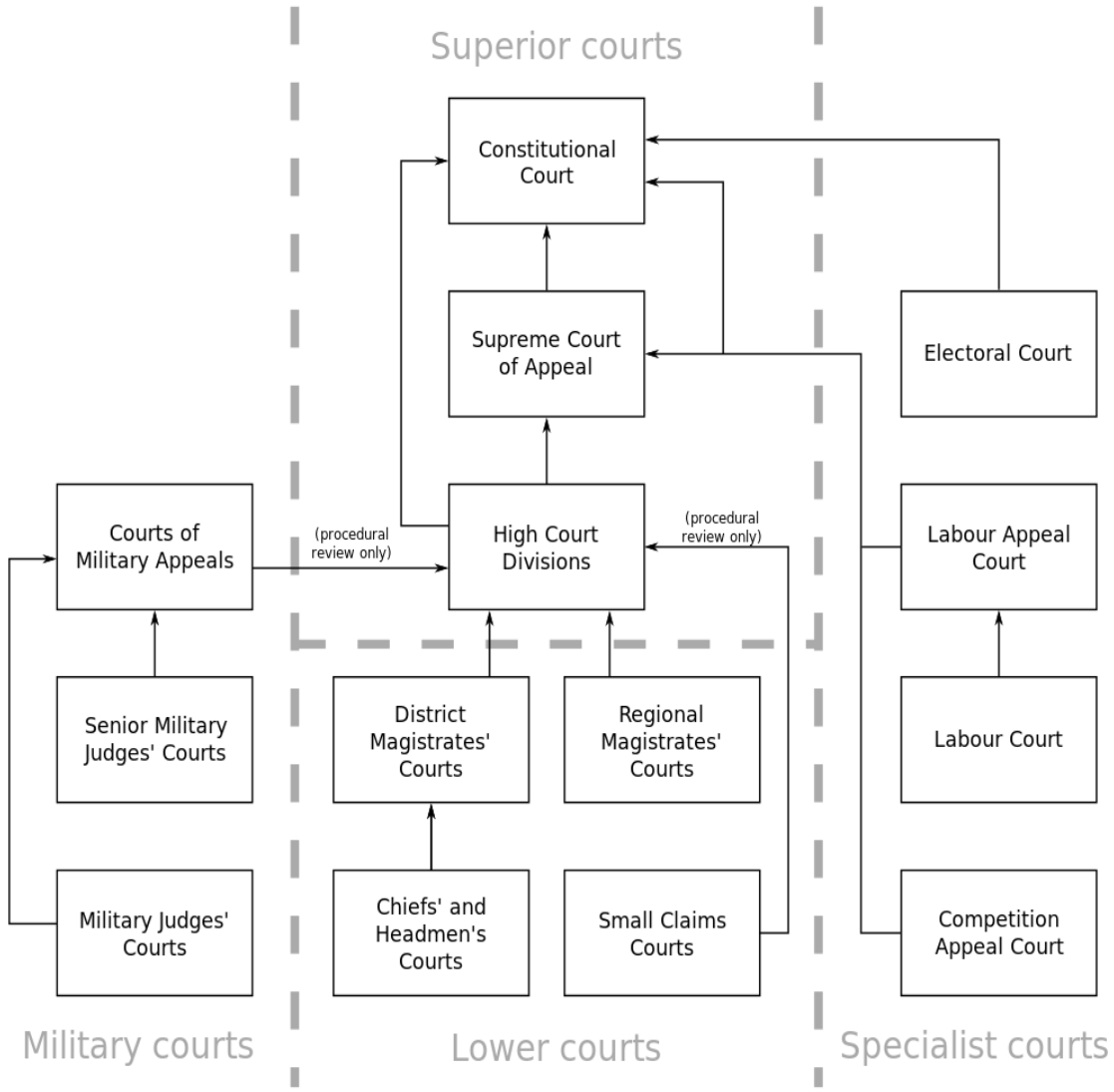

Figure 3: Schematic Representation of the Judiciary

South African courts are at the forefront of the fight against corruption, and have not hesitated to deal with the core of corrupt activities. Law books are replete with cases dealing with corruption issues with serious ramifications for the legal system. An interesting case that remains an eyesore, in my view, is the judgment of Nicholson J in *Zuma v National Director of Public Prosecutions* (2009] 1 All SA 54 (N); (8652/08) (2008] ZAKZHC 71; 2009 (1) BCLR 62 (N). *In casu* Nicholson J set aside the decision by the then Acting NDPP, Advocate Mpshe, to indict Mr Zuma on 18 counts of racketeering, corruption, money laundering, tax evasion and fraud. The reason for the setting aside was that the investigation and the prosecution were politically motivated. The Nicholson J decision was subsequently vacated by the SCA in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA);

2009 (4) BCLR 393 (SCA); (2009] 2 All SA 243 (SCA); (573/08) (2009] ZASCA 1.

Swifambo Rail Leasing v PRASA (1030/2017) [2018] ZASCA 167 (30 November 2018) involved the award of a tender by irregular and corrupt means, and with the involvement of "fronting" as prohibited by the Broad-Based Black Economic Empowerment Act 53 of 2003. PRASA, under the leadership of Lucky Montana as the Group Chief Executive Officer, "approved the award of a tender for the supply of various train locomotives to a recently incorporated company, Swifambo Rail Leasing (Pty) Ltd (Swifambo), the appellant". However, the award was subsequently rendered null and void because it had been procured or secured illegally in the form of the "dishonest and corrupt conduct of officials of PRASA". Swifambo pleaded innocent to the conduct of the officials of PRASA in order to have its contractual obligations with PRASA still enforceable (Swifambo Rail Leasing v PRASA (1030/2017) [2018] ZASCA 167 (30 November 2018), para 1). In arguing its case to disallow condonation for review, Swifambo cited the Constitutional Court in C*ape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC), In that case the City of Cape Town had awarded a tender that was later found to have been irregularly awarded. The City failed to have the contract nullified. The court said "the delay was unreasonable in the circumstances, refused condonation, and did not consider whether the award had been irregular" (*Swifambo Rail Leasing v PRASA*, para 38).

However, the Constitutional Court came to a different conclusion in *Swifambo Rail Leasing v PRASA* when it allowed condonation after a delay (S*wifambo Rail Leasing v PRASA*, para 3). According to the court, *Swifambo Rail Leasing v PRASA*, para 40:

> the overriding consideration in condoning delay is the interests of justice … in determining whether condonation should be granted, the relevant factors that require consideration are the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice; the reasonableness of the explanation for the delay; the importance of the issues raised and the prospects of success on review. The Constitutional Court endorsed this statement.

It must be appreciated that the Court in this case made the public interest of paramount importance in combatting corruption, which in my view should be the approach followed by other courts. In particular, the court in *Swifambo Rail Leasing v PRASA* stated:

> [41] There is undoubtedly a public interest in entertaining the application for review. At least R2 bn of taxpayers' money has been spent in pursuit of a fraudulent and corrupt tender. The explanation for the delay, if such there is, is clear and plausible. It is in the interests of PRASA and the general public that the award of the contract to PRASA be reviewed. And in Aurecon CC the court said that if the irregularities raised had 'unearthed manifestations of corruption, collusion or fraud in the tender, this court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention'.
>
> [42] In this matter, both PRASA and Swifambo were not innocent. The award of the tender to Swifambo was corrupt. And there is no reason to interfere with the exercise of the high court's discretion to grant condonation. It was in the interests of justice and in the public interest.

Case reports are replete with judgements that frown upon corruption and effectively punish offenders. The sentencing judgment in *S v Selebi* (judgment on sentence) (25/2009) [2010] ZAGPJHC 58 (3 August 2010) was a most scathing judgment, which, it is submitted, demonstrated how strongly corruption is disapproved of, particularly by persons in positions of power and influence who should always act in good faith in the public interest. Although lengthy, the relevant part of the judgment is quoted below to highlight the strong position the court took against corruption:

> [10] Mr Selebi, from 2000 until 2008 you occupied the position of National Commissioner of the SAPS. You led the service that is constitutionally enjoined to secure and preserve law and order in our country, to fight crime in all its forms and to protect all who find themselves within the borders of our country. This is indeed a high and illustrious office. Those under your command looked up to you with respect. They looked to you for guidance and direction.

The citizens of this country likewise looked up to you in your exalted office. They sought leadership in you in the fight against the scourge of crime which the people of South Africa were experiencing.

11. It is in this context and the esteem in which the office that you occupied is held that reference must be made to your performance in the witness box during the trial. No point would be served in repeating that which has already been said in the judgment that was delivered at the conclusion of the trial in regard to your flagrant mendacity. Mr Selebi, you were an embarrassment in the witness box. Firstly, you were an embarrassment to the office you occupied. It is inconceivable that the person who occupied the office of National Commissioner of Police could have been such a stranger to the truth. Secondly, you must have been an embarrassment to those who appointed you. There can be no doubt that had they known the extent that you were prepared to depart from the truth when you thought it was necessary to do so, they would not have been appointed you to that office. Thirdly, you must have been an embarrassment to the members of the South African Police Service who you led. It is not possible to measure the level of embarrassment of police men and women who are in the front line of the fight against crime, who daily put their lives on the line for their fellow citizens and whose credibility and truthfulness is relied upon by their fellow countrymen, when confronted by the reality that their former National Commissioner jettisons the truth when he thinks it will advance his case. These police men and women work in harsh conditions. They do so for the good of their fellow citizens. They deserve more than to be embarrassed in the manner already described. Fourthly, you must have been an embarrassment to all right-thinking citizens of this country. They are entitled to expect so much more from the National Commissioner of Police. For a citizen of this country it is incomprehensible that the National Commissioner of Police would be found to be an unreliable witness. Whilst there may be debate and difference of opinion as to competence, effectiveness, suitability and

> ability, it cannot be doubted that all the people of South Africa would join in rejecting a National Commissioner of Police who is found to be an untruthful witness. Fifthly and finally, Mr Selebi, you were an embarrassment to this court. It is beyond understanding that, a person who occupied the high offices that you did, including that of National Commissioner of Police in which you must have come into contact with the courts, could have believed that any court would have accepted your mendacious and in some respects manufactured evidence. The fact that you must have thought that this evidence would have been believed by this court is an embarrassment to this court in itself.

Similarly, the court in *S v Yengeni* [2005] ZAGPHC 117; 2006 (1) SACR 405 (T) at 427 lambasted the accused, describing corruption and other crimes of dishonesty by public office-bearers and officials in the public service as "of the most serious threats to our country's wellbeing, is to state the obvious … a pandemic that needs to be recognised as such and requires concerted and drastic efforts to combat it." It is submitted that the sentiments of the court in *S v Yengeni* still ring true today in South Africa. The corruption pandemic seems to be on the rise rather than abating.

5.3 INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE (IPID)

Oversight and accountability are crucial in the fight against corruption. In South Africa, the IPID was established by the Constitution and the IPID Act independent of the police; its primary function is to ensure that the police are accountable and responsive. The activities to discharge this function include investigating any alleged unlawful conduct by any police member. The IPID is the successor of the Independent Complaints Directorate (ICD), which had the responsibility of enforcing accountability to align the SAPS with democratic principles and respect of the rights in the Bill of Rights in discharging its duties and exercising its powers. Like its predecessor the ICD, the IPID has an oversight role over the police (Berg, 2013) and is also responsible for the accountability of members of the policing agencies. Unlike the IPID which is governed in terms of the IPID Act, the ICD was governed pursuant to section 10 of the SAPS Act. Ironically, the ICD was required to be independent from the SAPS. This flew in the face of the UNOCD Handbook on Police, Accountability, Oversight and

Integrity, that requires oversight institutions to “have full operational and hierarchical independence from the police and be free from executive or political influence”. Another important difference between the ICD and IPID is that the former was established as an independent civilian oversight body (ICOB), following in the footsteps of countries like Lesotho and Kenya. Section 222 of the Interim Constitution (Act 200 of 1993) made provision for an ICD as the country’s first ICOB. The relevant provision states:

> There shall be established and regulated by an Act of Parliament an independent mechanism under civilian control, with the object of ensuring that complaints in respect of offences and misconduct allegedly committed by members of the [South African Police] Service are investigated in an effective and efficient manner.

One of the corruption cases that the ICD investigated was that of former national commissioner Jackie Selebi. Mr Selebi was ultimately found guilty of corruption by the court in *State v Selebi* and sentenced to 15 years’ imprisonment. He was released on medical parole on July 2012 (Nanabhay, 2014:96). Below is the restatement *verbatim* from the writing of Nanabhay (2014), as it succinctly narrates the corruption case of *State v Selebi*:

> *Count 1: Corruption*
>
> The charge sheet against Selebi narrates the history of the relationship between Selebi and Glen Agliotti (Basson, 2010:199–200). This relationship began in 1990 when Agliotti desired to do business with the ANC and stumbled upon Selebi, the latter had then been tasked with the repatriation of former ANC members in exile (Basson, 2010). According to the court papers, in 2000/2001 Agliotti suggested the idea of a project with children suffering from mental ill health to Selebi and subsequently SAPS became a partner in the project. Soon thereafter, in 2002, Agliotti was appointed as a police informer, after which the liaison between Selebi and Agliotti began to spiral into a generally corrupt relationship (Basson, 2010:199–200). According to the court papers Selebi received cash and clothing for himself and his sons from Agliotti

(Joffe, 2010). This gratification was unlawful, since the act of receiving such gratification is denounced in Section 4(1)(a)(i) to (iv) of the Prevention and Combatting of Corrupt Activities Act (Joffe, 2010). It is further stated in the charge sheet that Agliotti's 'friendly' relationship became known to Brett Kebble, John Stratton and Paul Stemmet, who, together with Agliotti, abused and exploited the relationship by bribing Selebi via discreet methods (Basson, 2010:199–200). Basson (2010:200) notes from the following excerpt from the charge sheet: 'It was agreed between the parties that the bribes would be paid to the accused' (Nanabhay, 2014:101).

Soon after, Brett Kebble transferred $1 m 'for the purpose of conducting investigations and campaigns and to buy the favour and support of the accused (Selebi) to promote their business' (Basson, 2010:200). According to the charge sheet, there were other instances where monies were allegedly transferred to Selebi from Agliotti; for example, in August 2004, a crucial time in Selebi's career when he was preparing and campaigning to be elected president of Interpol (Basson 2010:200). At this time, he requested money from Agliotti to cover the costs of a dinner in Paris to the sum of R30 000. Further, in November 2004, Selebi asked Agliotti for R1 m and Agliotti transferred R310 000 (Basson, 2010:201). Selebi also received money from Agliotti for an overseas holiday with his family (Joffe, 2010: para 248). Agliotti testified in court to the effect that he made payments to Selebi because of an ulterior motive, that is, he needed Selebi to be part of his business dealings which made it necessary for him to keep Selebi close to him (Joffe, 2010: para 257)" (Nanabhay, 2014:101).

Count 2: Obstructing the ends of justice

This count is elaborated on extensively in Basson (2010), in which the author succinctly lists numerous instances of illegal and unethical conduct by Selebi, which the court viewed as amounting to the obstruction of justice. They were:

- First, Selebi imparted official information contained in the United Kingdom intelligence reports to Agliotti, which contained information that the latter was allegedly involved in drug smuggling (Nanabhay, 2014:103).

- Second, Selebi sheltered Agliotti from a police investigation by discussing with him particulars contained in a National Intelligence Estimate report in 2005;

- Third, in 2002, Selebi omitted to divulge Agliotti's involvement in a Mandrax drug bust;

- Fourth, Selebi agreed with Agliotti to use his (Selebi's) office to manipulate the prosecution of Billy Rautenbach;

- Fifth, Selebi shared privileged information regarding tenders for work in Sudan that the police were intending to advertise; and

- Selebi granted Agliotti preferential treatment regarding police services after a report of a housebreaking at Agliotti's residential complex (Nanabhay, 2014:104).

The IPID has been critical in ensuring that the SAPS, for example, act with credibility and pursue criminal activities such as corruption without fear or favour. In fact, the SAPS has an obligation to cooperate with the IPID. Section 29(2)(a) of the IPID Act, for instance, requires the SAPS or municipal police services to arrange for an identification parade within 48 hours of the request of IPID. However, it has not been plain sailing for IPID in discharging its constitutional mandate. It has on several occasion had to fight of political interference and threats to its institutional set-up. In particular its independence has been under threat and the Constitutional Court has had to intervene to safeguard its independence. A case in point is *McBride v Minister of Police and Another* [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP) in which an application was made by Robert McBride to have his suspension as the Executive Director of IPID and disciplinary action against him by the Minister of Police Nathi Nhleko set aside as constitutionally invalid. In 2015 in the High Court certain legislative provisions of the IPID Act were declared unconstitutional. Likewise, the Constitutional

Court declared certain sections of the IPID Act, Public Service Act and the IPID Regulations to be invalid "to the extent that they authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or remove from office the Executive Director of the Independent Police Investigative Directorate". The independence of the IPID was stressed by both courts making reference to section 206(6) of the Constitution, which requires the IPID to be independent. According to the Constitutional Court the powers given to the minister to suspend or remove the head of IPID were too over-reaching and encroached on the independence of the IPID. With regard to section 6 of the IPID Act, the court stated:

> [it] gives the Minister enormous political powers and control over the Executive Director of IPID. It gives the Minister the power to remove the Executive Director of IPID from his office without parliamentary oversight. This is antithetical to the entrenched independence of IPID envisaged by the Constitution as it is tantamount to impermissible political management of IPID by the Minister. To my mind, this state of affairs creates room for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or who is sympathetic to the Minister's political orientation. This might lead to IPID becoming politicised and being manipulated. Is this compatible with IPID's independence as demanded by the Constitution and the IPID Act? Certainly not.

The Constitutional Court in *McBride v Minister of Police and Another* [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP) issued an instruction to parliament to "cure the defects in the legislation" within 24 months – by 5 September 2018. Some delays were experienced with regard to meeting this deadline. Finally, the National Assembly passed a bill envisaged to comply with the instruction of the Constitutional Court. The Bill, once passed, will give more oversight powers to IPID and secure its independence, including any fear of arbitrary removal from office. To this end, the Bill inserted section 6A into the IPID Act, which reads:

Removal from office of Executive Director

6A. (1) The Executive Director may only be removed from office on the ground of misconduct, incapacity or incompetence –

(a) on a finding to that effect by a Committee of the National Assembly; and

(b) the adoption by the National Assembly of a resolution calling for that person's removal from office.

(2) The National Assembly may adopt a resolution contemplated in subsection (1)(b) with a supporting vote of at least two thirds of its members.

(3) The Minister –

a) may suspend the Executive Director from office at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person; and

(b) must remove the Executive Director from office upon adoption by the National Assembly of a resolution calling for the Executive Director's removal.

The structural and operational autonomy of the IPID was proffered by the Constitutional Court in *McBride v Minister of Police and Another* [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP), and also in *Glenister II.* The latter case dealt with the independence of the DPCI. The amendment to IPID Act by the insertion of section 6A promotes the structural and operational autonomy of IPID.

It is perhaps appropriate in the context of this study to conclude with the remarks that the fight between the IPID on the one hand, and the SAPS and government executives on the hand has reached all-time lows. For instance, it has been reported that the Head of IPID (Mr Robert McBride) has secured an opportunity to appear before the Zondo Commission. Also that McBride will at the Zondo State Capture Commission make some startling revelations that will include, corruption, capture of the criminal

justice cluster and subversion of justice enabled by a number of people that could include former Minister of Police and former Head of the NPA (Saba & Smit, 2019:4). It is submitted this and similar allegations pay credibility to concerns about the rocky inter-organisational relationship between the multiple anti-corruption agencies in South Africa. It would seem that the system is collapsing under the weight of its many in-fighting agencies, leaving corruption to fester and thrive unchecked.

5.4 CHAPTER 9 INSTITUTIONS

The reference “Chapter 9 Institutions” derives from the fact that the state institutions supporting constitutional democracy, discussed hereunder, are established in terms of Chapter 9 of the Constitution of the Republic of South Africa. What is interesting is that the establishment and the governing principles of this institutions are unique somehow unique, with the Constitution expressly protecting their independence and zero tolerance to interference to an extend mandating other state organs to help protect and promote the autonomy and independence of the Chapter 9 Institutions. It is declared in section 181(2) of the Constitution that:

> These institutions are independent, and subject only to the Constitution and the Law, and the must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

Section 181(3) of the Constitution continues on to bolster the independence of these institutions by requiring that:

> Other organs of the state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

5.4.1 The Public Protector

In *Public Protector v Mail and Guardian Ltd & others 2011 (4) SA 420 (SCA);* [2011] ZASCA 108, Nugent JA described the Office of the Public Protector as an “indispensable constitutional guarantee”, which “provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation”. The role the Office of the Public Protector assumes in South Africa can be simply explained by referring to how the courts describe its independence and relation to the national government.

For instance, in *Minister of Home Affairs v The Public Protector* (308/2017) [2018] ZASCA 15 (15 March 2018) the court said:

> [34] The Office of the Public Protector is not a department of state or administration and neither can it be said to be part of the national, provincial or local spheres of government: it is an independent body that is answerable only to the National Assembly.16 It is therefore not an organ of state as contemplated by subsection (a) of the definition. It is, however, an institution that exercises both constitutional powers and public powers in terms of legislation. It is, consequently, an organ of state as contemplated by subsection (b) of the definition.

A similar position was maintained earlier by the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); [2001] ZACC 23 para 27. The Public Protector is one of the so-called Chapter 9 institutions established pursuant to section 181(1) of the Constitution. It is of significance that Chapter 9 institutions derive their mandate from the Constitution. Section 181(2) of the Constitution, for instance, declares all the Chapter 9 institutions "independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice". There is further an obligation by organs of the state in terms of section 181(3) to "assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions". Furthermore, in terms of section 181(4) of the Constitution, persons or organs of state are prohibited from interfering with the functioning of any Chapter 9 institution, and they are accountable only to the National Assembly (Constitution section 181(5)).

The first Office of the Public Protector formed under the interim Constitution of 1993 to investigate and report on maladministration and other similar undesirable conduct within the government and public service. The powers, functions and obligations of the Public Protector are dealt with under sections 182 and 183 of the Constitution. Specifically, according to section 182(1) the Public Protector has:

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial actions. Public Protector has the power, as regulated by national legislation.

Additional powers of the Public Protector are covered in the Public Protector Act, which essentially gives effect to the relevant provisions of the Constitution. Section 6(4)(a) of the Public Protector Act further outline matters that the Public Protector may investigate and the procedural boundaries of his or her office. Section 6(4)(a) provides:

The Public Protector shall be competent –

(a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged -

(i) maladministration in connection with the affairs of government at any level;

(ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;

(iii) improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combatting of Corrupt Activities Act, 2004, with respect to public money;

(iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or

(v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.

Section 6(5) empowers the Public Protector to investigate similar misconduct within institutions in which 'the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act 1 of 1999)'; and section 6(7) allows her to investigate attempts to commit the types of misconduct specified in section 6(4) and (5). However, the Public Protector has no powers to investigate or review court decisions (see section 182(3) of the Constitution).

Other than the Constitution and the PPA, the Public Protector has some powers relevant to his or her operations from legislation such as the Electoral Commission Act No. 51 of 1996; the Executive Members' Ethics Act No. 82 of 1998; the Promotion of Access to Information Act No. 2 of 2000; the Promotion of Equality & Prevention of Unfair Discrimination Act No. 4 of 2000; and the PCCA Act. It was the on the basis of the Executive Members' Ethics Act that the Public Protector investigated the Nkandla saga.

The powers of the Public Protector are not unfettered nor is he or she compelled to investigate certain matter reported to him or her by certain persons or organs. In terms of section 6(3) "[t]he Public Protector may refuse to investigate a matter reported to him or her, if the person ostensibly prejudiced in the matter is "the state office or in the employ or service of the state who has not exhausted all remedies available to him or her under the Public Service Act of 1994".

Once investigations are completed the findings will, pursuant to Section 8(1) of the Public Protector Act, be made public. The investigation by the Public Protector of corrupt activities has been questioned, and some hold that involvement of the Public Protector in corruption investigations is beyond the primary mandate of the office (Pillay, 2004:586). The argument is that corruption investigation is primarily the mandate of agencies such as the SIU and the SAPS ACU. One of the many reports from the Office of the Public Protector, entitled *Secure in Comfort: Report on an investigation into allegation of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public*

Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province (Nkandla Report), shows the depth of investigation the Public Protector applied in dealing with issues. For instance, this highly detailed report points to a high level of maladministration, corruption, and corrupt activities that implicate the former President Jacob Zuma. According to Pillay (2004:58), "[t]he Nkandla case can be regarded as a litmus test of the effectiveness of efforts to ensure public accountability and curb public corruption in South Africa."

The Public Protector has investigated numerous other cases of maladministration, abuse of public office and corruption involving public offices and officials. The Nkandla case was one of the many high-profile ones. The Public Protector has investigated allegations of maladministration, corruption and potential conflicts of interest against a former minister of communications, and abuse of power and irregular appointment of a head of the South African Broadcasting Corporation.

In line with its mandate, the Public Protector made recommendations in terms of remedial actions that should be taken to address the findings described above. Having found out that the president benefited unduly from the construction at Nkandla, particularly with regard to the non-security aspects of the project, the Public Protector recommended that the president should work with the National Treasury to determine the cost of non-security measures and refund same to public purse. The refund of the money as recommended has become a major subject of contention, particularly in parliament, between the ruling and opposition parties. On a number of occasions, the president has had to appear before parliament to respond to questions on Nkandla, which has led to conflict between the ruling party, the ANC (which tends to support Zuma publicly), and the leading opposition parties, the Democratic Alliance (DA) and the Economic Freedom Fighters (EFF).

The Nkandla Report and processes taken by the former Public Protector Adv. Madonsela are not only significant because of how she exposed corrupt practices. It is also important to demonstrate the challenges the Public Protector experienced in investigating the case, some of which were in the form of undisguised political meddling. Others were personal attacks on her (Netwerk24 2014a). According to the CSO, they considered the legal action against the secretary and his deputy because "Not only did they criticize her, but made a series of personal attacks. For instance, an

ANC MP, Thandi Mahambehlala, attacked the Public Protector by saying its report was misleading" (Khoza, 2015). It must be said that "political will is undoubtedly a critical factor in the fight against corruption and the promotion of good governance" (Madonsela, 2010:2).

But it becomes problematic when instead of supporting work done by agencies such as the Office of the Public Protector they maliciously attack incumbents of such offices. The commitment from the government and political leaders to address the causes and manifestations of corruption is key in reducing or eliminating corruption (Nwokorie & Viinamaki, 2017:3. See also Lekubu, 2015). Abdulai (2009:388) contends that "political will is the decisive factor in determining the success or failure of anti-corruption reforms in any country". Brinkerhoff (2010:1) defines "political will as a commitment of actors to undertake actions to achieve a set of objectives, in this regard, with a view of reducing corruption and sustaining the costs of those actions over time." According to the NDP 2030 (2015:449), political will goes beyond mere public statements of support. It includes committing sufficient resources to anti-corruption initiatives and measures and taking strong and swift action against corrupt officials. Abdulai (2009:389) contends that "regardless of how wealthy a state may be, if its political leaders do not devote the required resources to anti-corruption resources, it is unlikely to win the fight against corruption". In his opening speech in parliament in 1999, the then President of South Africa, the late Dr Nelson Mandela, alluded to the fact that "South Africa's future depends also on our resolution as a nation in dealing with the scourge of corruption. Success will require an acceptance that, in many respects, we are a sick society and that It is perfectly correct to assert that all this was spawned by apartheid" (Mandela, 1999).

It is submitted despite the commendable achievements of the Office of the Public Protector in combating corruption within the ambits of its powers and processes, there is a danger lurking of institutional ineffectiveness as was identified by Blaauw (2016) with respect to the Office of the Ombudsman in Namibia. This office was previous burdened with many responsibilities including the investigation of corruption. Its operations were improved once the corruption investigation function was assigned to the ACC and it striped off "constitutional powers to deal with corruption" (Blaauw, 2016:9). However, Blaauw (2016:9) warned of the existing perception of corruption in

Namibia and suggests that "[i]mproving governance and controlling corruption require that [the Ombudsman and the ACC] work in tandem to achieve a common purpose and ends." This may sound like a self-contradictory position by Blaauw. But, a cursory reading entail that he is arguing that the Ombudsman and the ACC should not work in clinical isolation of each other. In the context of South Africa, the Office of the Ombudsman clearly is saddled with many responsibilities. Section 6(4)(a)(iii) of the Public Protector Act states that may investigate any conduct in relation to "improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combatting of Corrupt Activities Act, 2004, with respect to public money". This responsibility and related other covered in section 6(4) should be performed by the Public Protector, despite the existence of other institutions capable of investigating corruption such as the SIU and the Hawks. A counter-argument may be made that section 6(40(a)(iii) is not a mandate for the South Africa Public Protector to deal with every complaint of corruption including corruption in the public sector because it has as qualifier that the investigated act must be "with respect to public money". It is submitted that such a counter-argument will have some merit from the perspective that the Public Protector office was established as a constitutional body to help protect democracy and constitutional rights through amongst other enjoining the executives to observe the principles of good governance and accountability. Corruption relating to public money has the potential of undermining democracy and governance. Furthermore, 182(1)(a) of the Constitution empowers the Public Protector to investigate any conduct in state affairs or in the public administration in any sphere of government…" An improper conduct or offence in respect to public money is an issue of State Affairs. A system were public funds are plundered without repercussions will lead to the state of lawlessness and ultimately the death of democracy in favour of cleptocracy and undemocratic institutional cultures.

5.4.2 Auditor-General of South Africa (AGSA)

Like the public Protector and the SAHRC, the Auditor-General of South Africa (AGSA) a Chapter 9 institutions established under section 181(1)(e) of the Constitution, with its powers and functions covered under section 188 of the Constitution. In terms of section 188(1) of the constitution AGSA is responsible for auditing and reporting on

the accounts, financial statements and financial management of all national and provincial state departments, as well as administrations and all municipalities. The same obligation is mandated under section 4(1) of the PAA, which elaborates the powers and functions of AGSA.

Section 188(2) of the Constitution further provides that AGSA also responsible for auditing any other institution or accounting entity provided for in national or provincial legislation. This function is replicated in section 4(2) of PAA and section 122 Municipal Finance the MFMA. Furthermore, AGSA has discretionary powers, in accordance to Section 4(3) of the PAA, to audit and report on the accounts, financial statements and financial management of any public entity listed in the PFMA, and any other institution funded by the National Revenue Fund of South Africa, a provincial revenue fund or by a municipality. In terms of section 6(1) the president is responsible for the appointment of AGSA upon recommendation by the National Assembly. The AGSA must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice required by section 181(2) of the Constitution and section 3(b) of PAA. The AGSA is, as a consequence of its constitutional powers, the external auditor of all national and provincial state departments and municipalities of South Africa. As referred to under section 3(a) of PAA, AGSA is the supreme auditing institution of the Republic. It oversees the management of public finances, and must promote public sector transparency and accountability (Answer, 2008:1). Where corruption and maladministration is found such will be reported to the responsible accounting authority. It is from this perspective that it may be argued that AGSA indirectly plays a role in the fight against corruption.

An important provision of the Constitution, section 81(5), is that AGSA is accountable only to the national assembly, must report its activities and the performance of its functions to the assembly at least once a year (see also section 3(d) of PAA). It is submitted that this accountability line is important and critical in the realm of auditing to address allegations of corruption. Being independent from a body that has the responsibility to appoint it, the president, AGSA is enable to carry out its function impartially, without fear or favour.

AGSA plays an active role in supporting existing initiatives and programmes that aim to prevent corruption, such as the NACF. Furthermore, in terms of interaction around corruption-related issues, there is informal co-operation with a number of key agencies including the PSC, the PP, the SAPS and the NDPP. Cases of alleged corruption are referred to the appropriate agency based on the nature of the complaint or of the finding. The AGSA conducts several different types of audits (Commission, 2001:12–13; Van Vuuren, 2005:45), as prescribed in Chapter 3 of the PAA.

The forensic auditing conducted by the AGSA seeks to support the relevant investigating authorities and the NPA, as the cases are handed over to these institutions, by providing their accounting and auditing skills. It is unclear, however, if the AGSA continues to support these institutions during the investigations and resulting prosecutions, and if there is a follow-up and feedback mechanism to ensure the effectiveness of the system. Regarding the effectiveness of the auditing reports provided by the AGSA, however, Van Vuuren (2005:46) points to the fact that they are partly superficial. Van Vuuren (2005:46–47) points to two elements in this matter:

i. The materials provided to the AGSA for auditing purposes are insufficient to conduct a thorough auditing process, which undermines the reports produced by the AGSA, the accountability processes of the audited institutions, and the principle under which these institutions operate and get their funding from the National and Municipal Revenue funds; and
ii. The human and financial resources available to the AGSA. The AGSA makes use of private forensic auditors, claiming that 70-80% of such auditing is outsourced by the AGSA. Consequently, the role of these private auditors and the AGSA is hindered by either constraints in the exact mandate given to the private auditors or the amount of financial resources available to hire them.

Be that as it may, having auditing capacities, including forensic auditing, is a fundamental aspect of preventing and fighting against corruption, as the ultimate goal of corruption is to enable the corrupt public official or the person offering the bribe to benefit from an undue advantage. It is unclear, however, to what extent the AGSA is in fact able to assist in such cases.

5.5 OTHER BODIES

5.5.1 PARLIAMENT

Parliament and its oversight and accountability mechanisms are crucial in the fight against corruption. It is also expected of MPs to be exemplary, and they cannot act with impunity when engaging in corruption. The understanding is that "constitutionalism, accountability and the rule of law constitute a sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck" (Public Protector, 2016:3). As stated by Joubert (2015:10), democracy "entails government by the people for the people." Thus parliament should govern in the interest of the people, and that includes dealing decisively with corruption through its oversight responsibilities. Stapenhurst *et al*., (2006:3) and Madue (2012:45) respectively submit that good governance and accountability are important for a democratic political system to function properly. Also, that effective oversight is a key component of such good governance and accountability, and an effective parliament is a pillar of a quality democracy (Jahed, 2013).

Malapane (2016:144) argues that effective oversight is dependent on the willingness of parliament to take action. Unfortunately, up to now parliament has shown a certain lack of wiliness to deal with corruption within its ranks. MPs are mainly interested in holding on to their seats; they are not willing to risk losing them by speaking out against corruption within their party ranks (Malapane, 2016:145; Bruce 2012:50). Stapenhurst *et al*., (2006:3) observe that "Parliament that reflects well the interests of the citizens and not captured by other forces, become part of the solution to curb corruption." To date the South African parliament does not have a good reputation and allegations of state capture have engulfed it. It has also failed to effectively exercise powers conferred by section 56 of the Constitution that allow the National Assembly or any of its established committees to subpoena any person to give evidence or affirmation under oath, produce documents, require institutions to report to it and compel any person or institution to comply with a summons to fight corruption. Section 56 simply translates as accountability, which is explained as "a social relationship where an individual or an agency has an obligation to explain and justify his or her conduct, which is the hallmark of modern democratic governance" (Oversight and Accountability Model of the South African Parliament, 2009).

The million-dollar question is: with the recent state capture reports or activities that are casting a shadow on the former President and his allies, what role will parliament play in holding the Executive accountable in this regard? (Malapane, 2016:138).

5.5.2 THE PRESIDENCY

Section 83 of the Constitution states that the President is the head of state and the national executive, who must uphold, defend and respect the Constitution as the supreme law of the country, and in the advancement of the Republic, he must promote unity of the nation. So important is the President that section 85(1) of the Constitution vests the executive authority of the Republic of South Africa on the President. The importance of the position the President holds is highlighted by the provision of section 89(1) of the Constitution that allows for the removal of the President from office on the grounds of a serious violation of the Constitution and serious misconduct. This is in line with section 102(2) of the Constitution, which also makes provision for the President and other members of cabinet and any deputy ministers to resign if the national assembly, supported by a majority of its members, passes a motion of no confidence in the President.

A catalogue of powers and functions of the President is found in section 84(2) of the Constitutions. In terms of section 84(1) of the Constitution these constitutional executive powers of the President do not preclude powers as may be assigned by legislation, provided such legislation is not inconsistent with the relevant provisions of the Constitution.

It is submitted that so wide are the powers of the President that it makes that section 87 of the Constitution requires that the President at assuming office must swear or affirm faithfulness to the Republic of South Africa and the Constitution as prescribed by section 1 of Schedule 2 of the Constitution. The Schedule, section 1, oppose any thing that may harm the Republic; to promote and protect the rights and freedoms of all south Africans; to devote himself to the well-being of the Republic and all its people; and to do justice to everyone. These are important obligations in the context of a study that looks at the country's legislative and institutional framework that directly and/or indirectly fights corruption. It is for this reason that generally the infamous corrupt relationship between former President Zuma and the Gupta family was regarded as

the former's breach of his constitutional duties to protect the Constitution and uphold his oath of office.

In many occasion, even where there was clear evidence of corruption and/or maladministration linked to former President Zuma and/or his family, the ANC's the parliamentary oversight had made it difficult for ANC members of parliament to criticise the President and other party leaders (Mattes, 2002:24&27). To refer to the observation of Bhorat *et al.,* (2017:15), this could be referred to as "a set of 'kitchen cabinets' comprising selected groups from various networks: for example, the SOE sector, sub-groups of cabinet ministers and deputy ministers, family networks and selected loyalists in the public service." Bhorat *et al.,* (2017:3) assert:

> South Africa has become one typical example of a global trend in the growth of increasingly authoritarian, neo-patrimonial regimes where a symbiotic relationship between the constitutional and shadow states is maintained, but with real power shifting increasingly into the networks that compromise the shadow state.

5.5.3.1 Presidential Commission of Enquiry

Section 84(1)(2)(f) of the Constitution gives the President the powers to make appointments of commissions of enquiry. The most notable commission to date tasked with investigating corruption and corrupt activities is the *Judicial Commission of Inquiry into State Capture, Corruption and Fraud in the Public Sector Including Organs of State* (commonly referred to as the Zondo Commission into State Capture, because it is led by the Deputy Chief Justice Raymond Zondo). It was appointed by the President in terms of section 84(2)(f) of the Constitution by way of Proclamation No. 3 of 2018, published in the Government Gazette of 25 January 2018 (Government Gazette No. 41436). The terms of reference of the commission appear as a schedule to the proclamation.

The Zondo Commission exposed in great detail the growing threat of public- and private-sector corruption. The commission was established following the report of the Public Protector (State Capture, 2016), which relates to an investigation into complaints of alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships with and involvement of the

Gupta family in the removal and appointment of ministers and directors of SOEs, resulting in improper and possibly corrupt awarding of state contracts and benefits to the Gupta family's businesses. The report submitted by academics from various Higher Educational Institutions, *Betrayal of the promise: How South Africa is being stolen* - May 2017 highlighted the problem of corruption in the South African public offices. Other revelations that prompted the setting-up of the commission came from the media. For instance, the *Sunday Times* (28 May 2017), *City Press* (28 May 2017) and *Sunday World* (28 May 2017) released damning allegations of corruption, maladministration and money laundering against the president of the country, senior government officials and the famous Gupta family that was threatening to take over the country.

It is submitted that these commissions play a crucial role as measures designed to address the issues of corruption. Also, as supplementary outlets to assist law enforcement agencies and other agencies to fight corruption.

5.5.2 Parliamentary (portfolio) committees

The functions of the portfolio committees in South Africa, according to Mataure (2003:9), are:

> Oversight of the government on financial matters (public accounts); Internal functions to ease the work of the House (rules and disciplinary committees); Examination of specific areas of public life or matters of current public interest (*ad hoc* and joint committees); Consideration of legislation (portfolio and selected committees); Monitoring and oversight of government affairs and provinces (portfolio and selected committees); Consideration of private members' legislative proposals; Considerations of petitions; and Considerations of international agreements and conventions.

In terms of the Constitution, 1996, ministers and departmental officials are accountable to parliament through portfolio committees to report on their powers and the execution of their duties. According to sections 92(2) and (3) of the Constitution, members of Cabinet are individually and collectively accountable to parliament "by providing full and regular reports to Parliament concerning matters under their control" (Madue,

2012:431). The Oversight Model of the South African Legislative Sector (2012:6) points out that oversight in the South African political context is often "perceived as the purview of opposition politicians." A similar view is held by Madue (2012:46), who argues that the opposition party position is "designed to police and expose maladministration and corruption." It is submitted that regard such view as is limited and deficient. Another view by Nyathela and Makhado (2014:43) is that, the work of an oversight committee must entail "gathering information on the views of customers and clients of departments, constitutional institutions or agencies being reviewed."

Nyathela and Makhado (2014:47) contend that "in order to conduct effective and efficient oversight which is critical for improving the quality of service delivery to the public, it should be noted that:

1) Continuous capacity development of members of Parliament and support staff attached to committees is necessary, ranging from improving skills in information and communication technology, budgeting practices and other skills required to enhance their oversight capacity;
2) Committee support staff should be provided with the necessary resources and upgraded in terms of technologies related to oversight and accountability;
3) Stakeholders should be informed well in advance on issues of interest to avoid oversight stampede;
4) Committees should be well-prepared for oversight with the necessary information for proper phrasing of questions which are directly related to issues of service delivery rather than putting questions reflecting micromanagement of issues.

5.4 SUMMARY

The discussions in Chapter 5 identified some of the relevant anti-corruption agencies in South Africa, with their successes and failures in their fight against corruption. What came through strongly is the question of independence and operational effectiveness of these bodies. It is submitted that this challenge is as a result, in part, of the multi-agency approach the country maintains of having parliament; the Office of the Public Protector; the Office of the Auditor-General; IPID; NPA; SAPS; SCCU; the Hawks,

SIU; the Judiciary; and FIC all working toward the same objective with different intentions and commitment. The constitutional role played by the NPA as the national prosecuting body is important in the fight against corruption. However, it was revealed that the management of the NPA has been plugged with legitimacy and integrity concerns as was the case in *Corruption Watch (RF) NPC and Another V President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others* [2018] 1 All SA 471 (GP) wherein the legality and validity of the appointment of Advocate Shaun Abrahams as the NDPP. The court subsequently ruled that Advocate Abrahams must vacate office as the NDPP. It is submitted, however, what was revealed during the discussions should not be the case of doom. Many of the inefficiencies and gaps identified can be corrected, as will be explained further in the Chapter 7 of this study.

CHAPTER 6

FOREIGN JURISDICTIONS AND THE FIGHT AGAINST CORRUPTION: LESSONS FROM SINGAPORE, HONG KONG AND BOTSWANA

6.1 INTRODUCTION

This chapter draws some significant and comparative lessons from Hong Kong, Singapore and Botswana. In particular, the focus is on the anti-corruption agencies of these countries, and their effectiveness in combatting corruption. These countries are studied because they have a background and history with regard to the fight against corruption. For instance, Botswana is regarded as the best-performing country with regard to combatting corruption and has consistently maintained low levels of corrupt activities (Mbao & Komboni, 2008). On the other hand, Singapore's Corrupt Practices Investigation Bureau (CPIB) and Hong Kong's Independent Commission Against Corruption (ICAC) are regarded as very effective anti-corruption agencies that have influenced the establishment of many anti-corruption agencies in other Asia-Pacific countries (Quah, 2017). Another important factor informing the choice of the countries in this chapter is their Transparency International rankings. According to the 2016 Transparency International Corruption Perceptions Index, which measures the perceived levels of public sector corruption of 176 countries around the world, Singapore is ranked 7th (one place up from 2015, having been ranked 8th with a score of 85) with a score of 84 as one of the least corrupt countries in the world, followed by Hong Kong at 15 (having improved three places compared to 2015, when Hong Kong was ranked 18 with a score of 75), with a score of 77. Our neighbouring country Botswana stands at 35 with a score of 60. Of these countries selected for comparative analysis, South Africa comes last, ranked at 64 with a score of 45, dropping three places from 2015 (coming in at 61 with a score of 44) (Transparency International 2018).

The types of anti-corruption agency may differ according to the ambit of their functions. In the Asia-Pacific countries, for example, they are classified into type A and type B.

The former “focus exclusively on the performance of the anti-corruption functions of investigation, prosecution, education and awareness-raising, prevention and coordination” whist the latter “perform both anti-corruption and non-corruption-related functions” (Quah, 2017:60). According to Quah (2017:6), type A anti-corruption agencies are more specialised and have advantages over other less specialised agencies in combatting corruption in the form of:

> reduced administrative costs; less uncertainty regarding jurisdiction by preventing duplication of powers and work; high degree of specialisation, expertise and autonomy; separation from the agencies and departments that it will be investigating; high public credibility and profile; established security protection; political, legal and public accountability; clarity in the evaluation of its progress, achievements and failures; and swift action can be initiated against corruption with its own resources and specialised personnel.

6.2 Hong Kong

6.1.1 Independent Commission against Corruption

The levels of corruption in Hong Kong were at one point very high and the city was regarded as one of the most corrupt in the world (Man-wai, 2006:196). According to Pelmier (1985:123), corruption was a way of life in Hong Kong because “[t]he Chinese who formed its population had long been accustomed to a system where most of an official’s income depended on what he was able to extort from the public. Not surprisingly, during the first decade of the colony’s history, corruption propelled at all levels of government”.

The proscription of bribery as an offence in Hong Kong is traced to 1898, when the Misdemeanours Punishment Ordinance was enacted. This was replaced in 1948 by the Prevention of Corruption Ordinance (PCO). In May 1971 the PCO was strengthened by the inclusion of “heavier penalties and stronger investigative powers” (ICAC, 2015; Wong, 2003) for the Anti-Corruption Office of the Police Force. On 15 February 1974 ICAC was established following the Independent Commission Against Corruption Ordinance (ICAC 2017). Quah (2017:11) reports that corruption was a serious and wide-spread problem during British colonial rule in Hong Kong because

“the British colonial government relied on the police to combat corruption even though [the force] was notoriously corrupt.” The defining moment was the escape of a corruption suspect, Chief Police Superintendent Peter Godber, in June 1973, to Britain, which led to the appointment of a commission by Governor Murray MacLehose to investigate the circumstances of his escape. Ultimately, the commission’s recommendation to establish an anti-corruption commission independent of the police was accepted in February 1974.

According to the OECD (2008:9), “ICAC is one of the best known specialised anti-corruption institutions in the world which contributed significantly to Hong Kong’s success in reducing corruption”. Interestingly, the anti-corruption approach of the Hong Kong anti-corruption agency has been adopted in other countries. For example, the New South Wales ICAC adopted the Hong Kong approach, except that the New South Wales ICAC “reports to parliament and is independent from the executive and judicial branches of state” (Majila *et al*., 2017).

Whist this commission is independent of the civil service, its commissioner is directly answerable to the Chief Executive of Hong Kong Special Administrative Region. ICAC remains the most successful in Hong Kong dealing with corruption, taking the operational form of type A except that it does not deal with prosecution, which is left to the Department of Justice. Man-wai (2006:196) reports that “[w]ithin three years, the ICAC smashed all corruption syndicates in the government and prosecuted 247 government officials, including 143 police officers”. ICAC adopts a three-pronged approach in fighting corruption, namely: investigation, prevention and education through their functional departments of Operations, Corruption Prevention and Community Relations (Man-wai, 2009:140; Wong, 2003; Audit Commission, Hong Kong, 2013:v). The ICAC has a multi-layered operational set-up and is also subject to strong oversight by other committees. For instance, is closely monitored and scrutinised by four independent committees. One of these committees, the Operations Review Committee, examines and monitors all ICAC investigations in order to ensure best practices and efficiency through enhanced anti-corruption practices and procedures. There is also the Citizens Advisory Committee on Community Relations, which advises on measures “to foster public support in combatting corruption and to educate the public against the evils of corruption. [And] the independent ICAC

Complaints Committee, which examines complaints against the ICAC or its staff, monitors the handling of complaints and advises on follow-up actions" (ICIC, 2015).

6.1.2 ICAC OPERATIONS, COMPLAINTS, INVESTIGATIONS AND CRIME PREVENTION

As noted, the Hong Kong ICAC has three functional departments, namely the Departments of Operations, Corruption Prevention and Community Relations (Man-wai, 2009:140; Wong, 2003; Audit Commission, Hong Kong, 2013:v). The key responsibility of the operations department within ICAC is to receive, consider and investigate reports of alleged offences. The operations department serves as the investigative arm of the ICACA Commission, headed by a deputy commissioner (ICIC, 2015). The investigating officers of ICAC have all the necessary powers needed by law enforcement agencies, including powers of arrest and evidence collection. Any prosecution planned must be reported and consented to by the Secretary for Justice (ICIC, 2015; Wong, 2003).

The ICAC has a 24-hour report centre to receive complaints, and has regional offices in various districts. Not every matter reported by the ICAC will be investigated and addressed. Those complaints outside the jurisdiction of ICAC are referred to the police for further handling, with prior consent of the complainants. Complaints are regarded as outside the jurisdiction of ICAC when they are "found not to involve criminality, but disclose inappropriate conduct or systems considered conducive to corruption. [These] may be referred to the relevant government department for consideration of disciplinary or administrative action or to other relevant organisation for appropriate follow-up action" (ICIC, 2015).

A referral system like this, in my view, can operate seamlessly in a system where the different law enforcement agencies have a good collaborative relationship and governance structure. There must also be a supportive administrative and political environment. According to Camerer (1999:11), ICAC activities are supported by a well-resourced police force and criminal justice system that acts within a "supportive" political environment, and its success has also been attributed to this (Awopeju, Olowu & Jegede, 2018:6). This is different to South Africa, where the institutional capacity to deal with corruption is marred by tension and distrust amongst the agencies. Man-wai (2006:200) notes a number of factors responsible for the rapid success of the agency, which include the political will of the country's leadership to deal decisively with

corruption. Mr Man-wai, a former Deputy Commissioner and Head of Operations at the ICAC, highlights as important for the success of any anti-corruption structure and programme a conducive political, social, economic and legal environment. In particular, political interference must not be allowed. In fact, Hong Kong's ICAC has not shied away from investigating political leaders and senior civil servants for corruption and corrupt activities. A notable investigation and conviction for 20 months in 2017 was that of former chief executive Donald Tsang in 2012 (Quah, 2017:13).

6.1.3 Community relations, and corruption prevention

The involvement of the community, its knowledge and appreciation of corruption and corrupt activities is also very important in the fight against corruption. Community relations forms an integral part of anti-corruption activities in Hong Kong. The Community Relations Department is responsible for educating the public on corruption and its consequences. To this end the Community Relations Department runs different anti-corruption education and advocacy programmes and campaigns. This multi-media anti-corruption education is run alongside the activities of the Hong Kong Business Ethics Development Centre. The centre was "established in 1995 in collaboration with the business community to promote business ethics as the first line of defence against corruption. Its work is steered by the Hong Kong Business Ethics Development Advisory Committee, which comprises 10 major chambers of commerce in Hong Kong" (ICIC, 2015). This ethical dimension of anti-corruption activities in Hong Kong is crucial given the importance of good business ethics in crime prevention.

One important aspect that the ICAC has continued to monitor and discourage is private-sector corruption. The ICAC's Corruption Prevention Department publishes corruption prevention guides, tools, best-practice checklists and training resources to educate private-sector companies and public corporations on how to eliminate enablers and loopholes for corruption in their institutional or organisation structure (Quah, 2017:19).

6.1.4 Office of the Ombudsman

ICAC Hong Kong is supported by other agencies in the fight against corruption. Important in this regard is the Office of the Ombudsman. The Office of the Ombudsman was established as an independent watchdog of public administration.

Notable are the wide investigation powers the office has, which range from investigating matters related to:

> maladministration (actions by Government departments and public bodies for administrative deficiencies and recommend remedial measures) but also limited to security, defence or international relations, legal proceedings or prosecution decisions, exercise of powers to pardon prisoners, contractual or other commercial transactions, personnel matters, actions by the Chief Executive personally and crime prevention and investigation actions by Hong Kong Police Force or the Independent Commission Against Corruption which includes corruption (Annual Report of the Ombudsman, Hong Kong, 2015:16–59).

6.3 Singapore

6.3.1 Corrupt Practices Investigation Bureau

A fishing village first discovered in 1819, Singapore has transformed into a cosmopolitan city today. A melting pot of both commercial and leisure activities, this city-state is a place where visitors get to experience a bit of everything. This city-state plays home to many wildlife species and is zealous in creating more gardens, parks and green spaces. With an estimated 5.61 m total population in June 2016, citizens numbered 3.41 m. With a total of 0.52 m permanent residents, there were 3.93 m residents (the resident population comprises Singapore citizens and permanent residents) and non-residents (foreigners who are working, studying or living in Singapore but not granted permanent residence, excluding tourists and short-term visitors) totalled 1.67m (Singapore Attraction Guidebook 2017:5–9; Singapore Department of Statistics, 2016:3).

Like Hong Kong, Singapore was once a British colony, which also became a settlement under the British East India Company to “became the ‘entrepot’ for economic activity” (Mauzy, 2002:21). As an economic hub, Singapore did not escape the clutches of corruption. According to Quah (2017:11), corruption was “widespread in Singapore during the British colonial period because the government lacked political will and made the serious mistake of relying on the police to combat corruption when police corruption was rampant.” Corruption in Singapore was outlawed in 1871 with

the enactment of the Penal Code of the Straits Settlements of Malacca, Penang and Singapore. During 1879, a commission of enquiry into the causes of inefficiency of the Straits Settlements Police Force found that corruption was prevalent among the European inspectors and the Malay and Indian junior officers. Similarly, another commission of enquiry into the extent of public gambling in the Straits Settlements in 1886 confirmed the existence of systematic corruption in the police forces in Singapore and Penang (Quah, 1979:24–26; Quah, 2007:75–77; Quah, 2017:10).

The October 1951 opium hijacking scandal was apparently the defining moment in the history of anti-corruption efforts in Singapore. The scandal involved the arrest of a notorious gang of robbers and three police members caught stealing 1 800 pounds of opium. This arrest was embarrassing for the police in Singapore, who were expected to fight corruption and not to be party to it. In September 1952 the CPIB was established as a Type A anti-corruption agency to replace the police. However, according to Meagher (2005:72) the CPIB was only truly functional after the inception of the leadership of Lee Kuan Yew in 1959, when it was strengthened and equipped to perform its statutory mandate. According to the CPIB Annual Report (2015:4), “strong political will, leadership, constant vigilance by the CPIB, an independent judiciary and a responsive public service continue to keep corruption in check”. According to Meagher (2005), the CPIB has been criticised for its enormous powers. For instance, its staff have been criticised for being over-zealous in discharging their duties, as they are authorised to arrest, search and prosecute alleged offenders. They have also been criticised for being too secretive in their operations. Nevertheless, the CPIB remains an example of a successful anti-corruption agency, which has informed the establishment of others across the world, including the ICAC of Hong Kong.

6.3.2 CPIB OPERATIONS, COMPLAINTS, INVESTIGATIONS AND CRIME PREVENTION

Quah (2017:13) argues that Singapore’s CPIB success lies in its legal powers to investigate corruption and in the support it has received from successive political leaders who “have ensured its operational impartiality by not interfering in its daily operations.” Obligations to combat corruption in Singapore derive from both national and international instruments. The country was a signatory to the UN Convention against Corruption on 11 November 2005, which it ratified on 6 November 2009, and to the UN Convention against Transnational Organised Crime on 13 December 2000,

which it ratified on 28 August 2007. Furthermore, other relevant institutions that Singapore is party to are the FATF; the Asia-Pacific Group on Money-Laundering: and the OECD's joint Anti-Corruption Initiative for Asia and the Pacific.

Corruption and bribery in Singapore are primarily dealt with under the Prevention of Corruption Act (PCA) (Cap 241, 1993 Rev Ed) and the Penal Code (Cap 224, 2008 Rev Ed). The statutes, for instance the PCA, have provisions similar to those of many other countries. Some provisions are similar to those in South African anti-corruption legislation. Section 5 of the PCA criminalises active and passive bribery by individuals and companies in the public and private sectors. According to section 6 of the PCA, it is an offence for an agent to be corruptly offered gratification in relation to performance of his or her official duties; or to corruptly accept gratification in relation to the performance of his or her official duties or for the purposes of misleading the principal/authority. A case demonstrating this provision is *Ho Kang Peng v Scintronix Corp Ltd* [2014] SGCA 22, where a company successfully sued its former chief executive and director, Ho Kang Peng, for involvement in corrupt activities. In dismissing his appeal against the decision of the High Court, the Court of Appeal held that he had breached his fiduciary duties owed to the company by making and concealing unauthorised payments in the name of the company. The payments made to Mr Ho had the unjustified risk of exposing the company to criminal liability. In terms of the PCA, the contravention of the general anti-corruption provisions under sections 5 and 6 is punishable by a fine not exceeding S$100 000, a custodial sentence exceeding five years, or both. But where the corruption offence involves a government contract or bribery of a member of parliament, the maximum custodial sentence is up to seven years.

The PCA goes further, in sections 11 and 12, to prohibit the bribery of domestic public officials, such as members of parliament and members of a "[A]ny corporation, board, council, commissioners or other body which has power to act under and for the purposes of any written law relating to public health or to undertakings or public utility or otherwise to administer money levied or raised by rates or charges in pursuance of any written law."

Furthermore, sections 161 to 165 of the Singaporean Penal Code deal with the bribery of public officials (or public servants, as they may be called).

An important feature of the PCA is that it provides for extra-territorial prosecution or extraterritorial effect. According to section 37 of the PCA an act of bribery that takes place outside Singapore by a Singaporean citizen is still dealt with as if the bribe had taken place in Singapore. Such an offender will thus be prosecuted according to the applicable legislation. Also, section 4 of the Penal Code allows extraterritorial prosecution of Singaporean public servants. Accordingly, a public servant accepting a bribe overseas by an act or omission is liable under Singaporean law. The anti-corruption efforts of the CPIB are strengthened by the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA) (Cap 65A, 2000 Rev Ed), which provides for the confiscation and forfeiture of benefits derived from corruption and other criminal conduct. The limitation of section 37 to citizens only was challenged in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR 410 as unconstitutional. *In casu* the court upheld the provision and held that it was "rational to draw the line at citizenship and leave out non-citizens".

Like the Hong Kong ICAC, the CPIB has extensive powers of investigation. It can therefore call or subpoena the attendance of witnesses for interview, request disclosure of information or request further information from individuals including investigating financial and other records of suspects. Moreover, the CPIB may be granted special investigative powers by the public prosecutor. While it carries out investigations into complaints of corruption, the CPIB cannot prosecute cases itself. Cases must, where appropriate, be referred to the public prosecutor.

Collaborative efforts to fight corruption are favoured by the CPIB. For instance, on 5 July 2017 the CPIB became a party to the International Anti-Corruption Cooperation Centre (IACCC) that will be hosted by the UK National Crime Agency in London until 2021. Other agencies that are members to IACCC are Australia, Canada, New Zealand, the UK and the US. The IACCC was established to coordinate law enforcement action against global grand corruption.

6.3.3 Public anti-corruption education and private-sector corruption control

The CPIB regards as equally important the need to address the increasing amount of private-sector corruption. For example, in January 2017 the CPIB published a "four-step guide for business owners to develop and implement an anti-corruption system

in their companies" (Quah, 2017:19). This followed the October 2016 collaboration agreement with SPRING Singapore "to develop ISO 37001 on Anti-Bribery Management Systems to help private companies in Singapore implement an anti-bribery compliance programme in April 2017" (Quah, 2017:19). In fact, the Singapore High Court in *Public Prosecutor v Syed Mostafa Romel* [2015] 3 SLR 1166 held that private-sector bribery was as repugnant as public-sector bribery. The court saw the distinction between private- and public-sector bribery as immaterial. *In casu* the jail term of a marine surveyor convicted on corruption charges relating to the receipt of bribes to exclude safety breaches in his reports was increased from two to six months.

6.4 Botswana

6.4.1 Directorate on Corruption and Economic Crime

Unlike Singapore and Hong Kong, according to Sebudubudu (2013:4) Botswana was originally under British colonial administration as a protectorate, "ruled by its traditional chiefs who each with his or her own sphere of influence" with an economy that was highly agrarian. Not much economic development took place in Botswana then. The country, says Sebudubudu (2013:4), gained its independence and its economy was characterised by levels of very low corrupt activities. Importantly, corruption and corrupt practices were "closely controlled through social pressures evoking ethical and moral codes of conduct" and zero tolerance towards corruption (Sebudubudu, 2013:4). Likewise, Mbao and Komboni (2008:49) observe that for some time "Botswana was almost universally praised for its excellent record on political governance, exemplified by a relatively functioning multi-party democracy since independence in 1966." This, they assert, had a positive influence on anti-corruption efforts in Botswana and on its internal acclaim as the least corrupt country in the world and in Africa (Mbao & Komboni, 2008:49). This is supported by Alo (2014:57), who states that the low levels of corruption in Botswana "cannot be separated from the government's resolute effort at combatting corruption, the entrenchment of the institutions of democracy, including the judiciary and the anti-corruption agencies, as well as the long history of zero-authoritarian interference."

The Botswana Penal Code Law No. 2 of 1964 and the Corruption and Economic Crime Act (CECA) No. 13 of 1994 make both active and passive bribery in the public and private sectors a crime.

The Botswana Penal Code, for example, addresses corruption and abuse of public office through different provisions from Article 99 to Article 123. Part IV of CECA, Articles 23 to 38, deals extensively with corruption offences. In terms of Article 36 of CECA the penalties for corruption may be imprisonment for up to 10 years, or a fine of up to BWP 500 000, or both. The significance of this legislation in the fight against corruption in Botswana is that both natural and juristic persons can be held liable. AS in Singapore, the provision of CECA applies extra-territorially to Botswana citizens, thus strengthening the hand of DCEC to deal with corruption offences. The relevant part of section 46 of CECA reads:

> *Liability for offences committed abroad*
>
> The provisions of this Act shall have effect, in relation to citizens of Botswana, outside as well as within Botswana; and where an offence under Part IV is committed by a citizen of Botswana in any place outside Botswana, he may be dealt with in respect of such offence as if it had been committed within Botswana.

The existing legal framework to deal with corruption that seems to have provided the Directorate on Corruption and Economic Crime (DCEC) with the best environment is Botswana's anti-corruption agency. The DCEC was established in September 1994 in terms of section 3 of CECA (DCEC May 2017) as amended by the Corruption and Economic Crime (Amendment) Act No. 6 of 2008 (CECA Amendment). The DCEC is an operationally independent law enforcement agency with the mandate to combat corruption in Botswana. However, Mbao and Komboni (2008:64) lament the reporting arrangements of the DCEC, which in their view "compromises the institutional autonomy of the Directorate, contrary to international best practice which requires anti-corruption agencies to be functionally and institutionally independent". In particular, the authors are concerned about the DCEC Directorate being under the Office of the President and formally and directly responsible to the president. Another shortfall of the DCEC highlighted by Mbao and Komboni (2008:64), which the researcher agrees with, is the fact that the president is empowered under section 4(1) of the CECA Amendment to appoint the Director-General of the DCEC "on such terms and conditions as he sees fit". The possible abuse of this authority by the President is addressed in section 4(3), which states that "any decision, including investigations by

the Director-General, shall not be subject to the direction and control of any person or authority". This, in the researcher's view, provides the Director-General with the legal support to resist any influence and/or interference from political figures including the president and from other persons. Contrary to the assertion by Mbao and Komboni (2008), it is submitted that in light of section 4(3) the Director-General should be expected to carry out his or her functions without fear or favour. Of cause, as happened in South Africa with regard to the IPID, the security of tenure of the DCEC cannot be guaranteed if the president can remove him or her when the president deems it fit.

The statutory mandate of the DCEC is to combat corruption and this is done by implementing a three-dimensional strategy (DCEC, May 2017), namely: investigation of allegations of corruption, economic crime and issues related to suspicious transactions; and prevention of corruption by auditing government and parastatal institutions to detect it. This is done through routine assignment studies. Arguably, this function is more related to the internal audit departments/functions, which, according to Protiviti (2009:9), must have sufficient knowledge to evaluate the risk of fraud and the manner in which it is managed by the organisation. As pointed out by Deloitte (2012:2): "the role of internal audit is to provide independent assurance that an organisation's risk management, governance and internal control processes are operating effectively."

6.4.2 DCEC OPERATIONS, COMPLAINTS, INVESTIGATIONS AND CRIME PREVENTION

Part III, sections 6 to 22, of CECA details the powers and functions of the DCEC. Regarding its functions, the relevant part of section 6 of the Corruption and Economic Crime Act (CECA) provides as follows:

> (a) to receive and investigate any complaints alleging corruption in any public body;
>
> (b) to investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;
>
> (c) to investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of the country;

(d) to investigate any conduct of any person, which in the opinion of the Director, may be connected with or conducive to corruption;

(e) to assist any law enforcement agency of the Government in the investigation of offences involving dishonesty or cheating of the public revenue;

(f) to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures which, in the opinion of the Director, may be conducive to corrupt practices;

(g) to instruct, advise and assist any person, on the latter's request, on ways in which corrupt practices may be eliminated by such person;

(h) to advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such public bodies which the Director thinks necessary to reduce the likelihood of the occurrence of corrupt practices;

(i) to educate the public against the evils of corruption; and

(j) to enlist and foster public support in combatting corruption.

The DCEC has wide functions in relation to combatting corruption, contained in the provisions of other sections of the CECA. Notable powers akin to those exercised by the police are power to arrest with or without a warrant of arrest under section 10(1) of CECA, if there is a reasonable suspicion that the "person has committed or is about to commit an offence under this Act." The DCEC is also empowered by section 11 to search a "person and the premises or place in which he was arrested" and to "seize and detain anything which such officer has reason to believe to be or to contain evidence of any of the offences referred to in Part IV" of the CECA. The efficacy of the operations of the DCEC is bolstered by the presumption of corruption provided by section 42 of CECA. In terms of section 42:

> Where in any proceedings for an offence under Part IV, it is proved that the accused offered or accepted a valuable consideration, the valuable consideration shall be presumed to have been offered and accepted as such inducement or reward, as is alleged in the particulars of offence unless the contrary is proved.

A major limitation of the powers and functions of the DCEC is that is has no prosecuting mandate or authority. In terms of section 39 of CECA the director must refer anyone considered to have committed corruption to the Director of Public Prosecutions for his or her decision. The section 39 referral system is considered counter-productive in the fight against corruption, as it results "in inordinate delays and inefficiencies in the anti-corruption effort" (Mbao & Komboni, 2008:65). It has been proposed that the Attorney-General need empower the directorate with delegated authority to initiate prosecutions of persons the DCEC considers to have engaged in acts of corruption so that prosecutors from that Directorate could initiate prosecution (Mbao & Komboni, 2008:65). It is submitted that the proposal makes sense, considered from the point of ensuring that corrupt practices are handled promptly and that persons are charged and tried within a reasonable time.

Another major concern is that section 6(a) seem to suggest that the directorate has no jurisdiction in private corruption. This is highly problematic because it ignores the role of private persons in the corruption of public institutions and officials, and in manifesting corruption in the country. In this regard Mbao and Komboni (2008:72) call for a change to the law to expressly empower the DCEC to deal with corruption in the private sector in line with article 12(1) of the UN Convention Against Corruption and articles 1 and 2 of the SADC Protocol Against Corruption, which cover corruption by private entities.

6.4.3 Public anti-corruption education and private-sector corruption control

The DCEC uses public education as one of its strategies to prevent corruption, educate the public about corruption and solicit public support, as permitted by section 6(i) of CECA. This the DCEC does through a multi-pronged approach which includes conducting anti-corruption fairs and exhibitions. It can also give presentations on corruption and related issues following invitations (CECA section 6(g)).

6.4.4 Presidential commissions

Botswana unearthed and dealt with some of its corruption scandals through a presidential commission. Mbao and Khumboni (2008:71) report that the earliest reported cases of corruption in Botswana "were exposed through three Presidential Commissions of Inquiry between 1991–1992". Some of the commissions' investigations mirror events in South Africa. For instance, the 1991–1992 Commission dealt with corruption regarding the procurement of school books and materials for primary schools for the 1990 school year (Mbao & Khumboni, 2008:71; Report of the Presidential Commission of Inquiry into the Supply of School Books and Materials, 1991). The textbook tender that resulted in a loss by the government of BWP27 000 000.61 was awarded in this case to a relatively inexperienced company. The commission found the tender to have been awarded fraudulently.

The second commission, also in 1991, investigated fraudulent land deals in Mogoditshane and other peri-urban villages near Gaborone, the capital city. The commission found that the land deals had been made by officials fraudulently under pressure from influential and powerful personalities (Mbao & Khumboni, 2008:71; Report of the Presidential Commission of Inquiry into Land Problem, 1991). The presidential commission of enquiry in 1992 dealt with the operations of the Botswana Housing Corporation, a parastatal company (Report of the Presidential Commission of Inquiry into the Operations of the Botswana Housing Corporation, 1992). According to Mbao and Khumboni (2008:71), this "revealed corrupt tendering practices involving collusion between Board members, a government Minister, top management of the Corporation on the one hand and construction companies on the other."

What all these commissions revealed was that the country's elite was responsible for the perpetuation of corruption. Interestingly, a number of presidential and parliamentary commissions in South Africa on fraud and corruption involved allegations against South Africa's elite, including government ministers and employees of the public service. The explosive revelations at the Zondo Commission exemplify the rot that has set in to the South African elite and the passive and active corruption, including related corrupt activities, South African public office-bearers and public servants have been dabbling in.

6.4.5 OFFICE OF THE OMBUDSMAN

According to Mpabanga (2009: ix, xv–xvi):

> [t]he Office of the Ombudsman in Botswana was conventionally established to protect the people against violations of human rights, abuse of power by public institutions, error, negligence, unfair decisions and maladministration, in order to improve public administration with a view to making governments more responsive to the needs of the people and to making public servants more accountable to members of the public. It is an important avenue for individual complaints against the actions of public authorities.

However, the Office of the Ombudsman is precluded from investigating certain matters including "matter[s] related to security, the defence forces, police, corruption, and crime, the appointment of officers, private contractual and commercial dealings, and matters that are *sub judice*." It is rather startling that issues of corruption may not be investigated by the ombudsman. However, it is submitted that the exclusion is not cast in stone, as an investigation of abuse of power is wide enough to include using a position of influence to engage in corrupt activities. In a situation all too familiar to the Office of the Public Protector (South Africa) before its powers and legal status of its remedial actions were confirmed by courts, the office of the ombudsman may take remedial action but does not have the power to enforce compliance or take further action in cases of non-compliance.

6.5 WHAT LESSONS CAN BE LEARNED BY SOUTH AFRICA?

Unlike Singapore's CPIB, the Hong Kong ICAC has much wider powers and is well resourced in terms of the execution of its mandate, with "very tightly controlled, rule-based administrative sub-systems and networks" (Scott, 2013:79). Its operation is also much larger, with adequate human resources and budget (Meagher, 2005). Furthermore, activities of the ICAC are more open than those of the CPIB, giving the ICAC national and international appeal. Corruption in Hong Kong decreased substantially after the establishment of the ICAC in 1974 (Mao, Wang & Peng, 2013:1116).

Botswana's DCEC has been successful in its anti-corruption activities (Directorate on Corruption and Economic Crime, 2017). But it continues to learn from the ICAC (Camerer, 1999:3). The DCEC has wider investigatory powers in terms of section 6 of the CECA. It is interesting that the South African NDP 2030 (2015:448) has declared that "[a] well-functioning anti-corruption system requires sufficient staff and resources with specific knowledge and skills; special legislative powers; high-level information sharing and co-ordination; specialised resources and operational independence." The NDP 2030 proposes that, to create a resilient and strong anti-corruption system that is well suited to the South African context, South Africa must strengthen the multi-agency anti-corruption system; strengthen the protection of whistle-blowers; create greater oversight over the awarding of large tenders or tenders with long duration; and empower the tender compliance monitoring office to investigate corruption and value-for-money tenders.

While South Africa and many other countries follow a multi-agency approach in the fight against corruption, Hong Kong's ICAC is an exception (Madonsela, 2010:4). For the multi-agency approach to succeed, there must be cordial relations and close cooperation and co-ordination between the relevant stakeholders (Pereira *et al.*, 2012:85; Madonsela, 2010). It is submitted, however, that even though South Africa follows a multi-agency approach in an effort to prevent, fight, eliminate and/or reduce corruption, the challenge is not only in coordinating these agencies; there is also a serious challenge regarding duplication of investigations or functions; waste of human resources; fruitless and wasteful expenditure; lack of independence; political interference and pressure; and inter-agency conflict between the heads of these agencies. This has led the public to lack confidence in these agencies and the judiciary. Some of the agencies have been damaged and deformed by political contestations (Van Vuuren, 2013:20).

According to Pereira *et al.,* (2012:20), a single or centralised agency model is characterised by shifting multiple anti-corruption activities into a single agency with an overarching body governed by strong leadership to oversee a multitude of functions and individual entities. It is the submission of the researcher that South Africa cannot be an exception in this regard, with high-profile cases still depending investigation and others awaiting prosecution.

Having ratified the African Union Convention on Preventing and Combatting Corruption (AUCPCC, 2016) like Botswana, South Africa should perhaps consider having a single anti-corruption agency to execute its obligations under the convention. This will also support its obligations under the UN Anti-Corruption Convention (Low, 2006:4–5). However, Bruce (2014:54) doubts the efficacy of a single-agency approach, claiming that "if the lone anti-corruption body faces political capture, the independence of the entire system is compromised."

It is clear that South Africa, with multi-agencies and a plethora of legal frameworks, has performed very poorly over a period of five years. This could be related to the fact that corruption is a widespread phenomenon in both public and private institutions; particularly, corruption is now exacerbated among top government officials, SOEs and the state's man, the President himself (Jacob Zuma), who has been implicated in a number of lucrative corruption deals in government. Bhorat *et al.*, (2017:14) submit that "fraud and corruption proliferated during the 10 years leading up to 2014, peaking in 2012".

The lack of political will in the country to combat corruption is evident when the independence of these multi-agencies is brought into question. Their findings are questioned every time by top government officials being investigated and there is also too much political pressure and interference from the government. The lack of serious punishment for serious corrupt activities sees individuals accepting corruption as normal and a way of life in South Africa. Even the head of state is untouchable by the very same parliament that appointed him as mandated in section 89(1) and section 102(2) of the Constitution. It is further evident that the multi-agency approach that the country is following is not working as intended; these agencies are headed by former cadres of the governing party with the president having the prerogative to appoint them. With the current status of politics in South Africa, it is clear that the president of the country, having the prerogative to appoint, will and can appoint individuals who are loyal to him to avoid investigation and prosecution – which then opens up opportunities for corrupt behaviour within these institutions. Quah (1999:75) refers to these institutions as "wet and dry agencies – wet agencies being the police for example, and dry agencies being research and administrative departments which have no interaction with the public whatsoever".

It has been observed by the former Public Protector, Advocate Madonsela that good governance, respect for the rule of law and unfettered independence of the anti-corruption agencies are “fundamental pillars of a viable anti-corruption and good governance framework. [So] is anti-corruption agencies not beholden to the government of the day as this undermines their independence, objectivity and, needless to say, effectiveness” (Madonsela, 2010:2). The NDP 2030 (2015:448) also supports the institutional independence of anti-corruption agencies, but holds that in the current system in South Africa their independence is “contentious since they are all accountable to the Executive”, making them vulnerable to political influence and interference. With the majority party being the government of the day in South Africa, the researcher argues that it is highly unlikely that we will see the independence of these institutions, especially when former *umkhonto we sizwe* or political prisoners are appointed by the executive to head these institutions. Are these cadres here to seek revenge, enrich themselves or serve the nation?

The researcher further argues that the appointment of heads of these anti-corruption agencies by the president is questionable and lacks integrity and independence. Although section 84 of the Constitution gives the president the power to make any appointments, the key question is: does the “president and other political leaders want to maintain control over these agencies for fear of prosecution and avoid legal liability for allegations of corruption against them?” (Bruce, 2012:55).

It is further submitted that, with South Africa relying heavily on several pieces of domestic legislation and nine state corruption-fighting bodies, it is evident that the fight against corruption in the country is not being won. Corruption has permeated in all public and private sectors and these legislative prescripts and anti-corruption agencies have become “white elephants”. The South African government is deluged in serious allegations of “state capture”.

Table 5. 2012–2016 CPI rankings and scores of four countries

Country	Rank 2012	Score 2012	Rank 2013	Score 2013	Rank 2014	Score 2014	Rank 2015	Score 2015	Rank 2016	Score 2016
Hong Kong	14	77	15	75	17	74	18	75	15	77
Singapore	5	87	5	86	7	84	8	85	7	84
Botswana	30	65	30	64	31	63	28	63	35	60
South Africa	69	43	72	42	67	44	61	44	64	45
No. of countries	176	176	177	177	175	175	168	168	176	176

Source: http://www.transparency.org (2012, 2013, 2014, 2015, 2016)

Based on Table 5, it is clear that compared with South Africa the three countries have been doing well in terms of rankings and scores over a period of five years. It should further be noted that this could be because the three countries are dealing decisively with corruption based on the Transparency International reports and that they have a single anti-corruption agency dealing with corruption. Between 2012 and 2016, South Africa was ranked more corrupt than Singapore, Hong Kong and Botswana, with rankings ranging between 61–72 and scores of between 42–45. In comparison, Singapore has rankings of between 5–8, scores of between 84–87; and Hong Kong has rankings between 14–18 and scores of between 84–87 over a period of five years. Botswana's rankings are between 28–35, with scores ranging between 60–65.

Majila *et al.,* (2017) recommend that South Africa have an agency like the ICAC, which must be divided into three departments: "the Operations Department; the Corruption Prevention Department and Community Relations". As the name suggests, the operations department would essentially investigate corruption and corrupt activities. The corruption prevention department would work more like a clearing house responsible for examining and maintaining proper systems of procedure. It would examine the systems and procedures "in the public sector, identify corruption

opportunities and make recommendations to eradicate ambiguity and inadequacy in the anti-corruption legislation" (Majila *et al.,* 2017:97–98). The role of the community relations department would be educational and public advocacy, in that it would "focus on educating the public against the immorality of corruption and soliciting their support and partnership in combatting corruption" (Majila *et al.*, 2017:98). But, because it is expensive to run the Singapore ICAC, the recommendation is that South Africa adopt an ICAC that "resemble[s] the New South Wales ICAC which is accountable to parliament" (Majila *et al.,* 2017:99) to avoid interference with how the agency will discharge its mandate. Furthermore, Majila *et al*., propose that like the New South Wales ICAC, which reports to the premier, the South African ICAC must report "informally to the president" (Majila *et al.,* 2017:98).

Admittedly, this is a very enlightening and interesting proposal that combines certain elements of the ICACs of different countries. However, it is submitted that there are a few concerns with this proposal. To begin with, it is quick to throw out the baby with the bathwater. Instead, in the researcher's view, efforts must be made to restructure and strengthen the existing structures first before establishing a single agency. The existing agencies will work as functionaries of such an established single anti-corruption agency. Secondly, subjecting the ICAC to informal reporting to the president will open a Pandora's box of abuse and manipulation. Even its accountability to parliament has some serious and potential risks. How the state capture and Nkandla cases have been dealt with by parliament and the former president makes the proposed approach by the authors doubtful.

Another concern that the researcher agrees with, raised by Heilbronn (2004:15), is the absence of legislation necessary for the success of the proposed ICAC in South Africa.

6.5 SUMMARY

The discussions in Chapter 6 has been important not only of the contribution of the knowledge learnt from comparator jurisdictions, namely Botswana, Hong Kong and Singapore. Also, because the comparative approach to the research enabled a much enlightened and comprehensive review of the issues discussed. In his writing, *Comparative Research in Contemporary African Legal Studies,* Professor Charles Manga Fombad (2018:978) makes reference to Esin Örücü, Maurice Adams, and Guy

Swanson who wrote about the importance of comparative research. Örücü (2007) holds a view that, “the everyday process of thinking involves the making of a series of comparisons . . . the process of contrasting and comparing, juxtaposing the unknown and the known . . . [and] observing the differences and similarities.” According to Swanson (1971), it is unthinkable to think without comparison. Adams (2011) posits that “[a] legal arrangement can only be qualified as satisfactory or good because there is another arrangement by which it can be measured; such arrangement is never good in and of itself.” It was evident that a comparison in chapter 6 helped provide a better view of anti-corruption framework in South Africa as a legal arrangement.

The independent anti-corruption agencies in Botswana, Hong Kong and Singapore have proven relatively successful and can provide valuable lessons for South African. Hong Kong, Singapore, and Botswana have some common and interpretable patterns in combatting corruption. Importantly, their anti-corruption agencies owe their successes to political support, better resources, organisational autonomy and independence. These attributes, unfortunately, are lacking in the current South African anti-corruption machinery. The question that will have to be answered in Chapter 7 is which anti-corruption approach and model should South Africa adopt. It is submitted from the onset that the researcher prefers a single-agency model or a model that fuses the strong characteristics of a multi-agency and a single agency. Also evident from the discussion in Chapter 6 is that PRECCA makes no provision for the establishment of an independent anti-corruption agency in South Africa, and that the country follows a multi-agency approach.

CHAPTER 7

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

7.1 INTRODUCTION

A comparative determination and appraisal of the South African anti-corruption strategies and structures was undertaken in this thesis. In particular, the thesis focused on the efficacy on the anti-corruption agencies and the role they play in combating corruption in South Africa. The study has spun over seven chapters, which provided valuable information and insight into this study. This chapter contains a general conclusion and finding from data obtained from both literature review and the qualitative research. Chapter 7 also makes a number of important submissions and recommendations for consideration by the South African authorities. Provisions for recommended constitutional and legislative reforms will be suggested were possible. The recommendations are intended to address the shortfalls and challenges in the South African anti-corruption environment as identified in the literature and in observed and qualitative research, with the eventual goal of improving the efficacy of the South African anti-corruption agencies and legal instruments. The limitations and contributions of the study, and proposals for future research are covered in this Chapter.

7.2 RECAPITULATION OF PURPOSE AND OBJECTIVES

The purpose statement of this study was manifold, and included identifying the relevant theories of corruption, analyse them, and apply them to determine the causes and effects of corruption and its impact on organisations and society; reviewing the current South African anti-corruption legislative and regulation framework to determine their efficacy; formulating and/or designing a more effective and efficient anti-corruption strategies and action plans to assist in addressing the bane of corruption in South Africa. This was to be influenced by best practices in comparative jurisdictions and the researcher's experiences.

In order to facilitate the execution of this study and to achieve the aim of this thesis a few research questions were set, which dealt with the following critical issues: the fundamental issues, concepts and knowledge in corruption, theories of corruption, its causes and effects and its impact on organisations and society; factors that will have a direct influence on formulating and designing effective and efficient anti-corruption strategies and action plans for South Africa; the nature of and the lessons from anti-corruption structures and strategies in Singapore, Hong Kong and Botswana; the type of technical and operational training in anti-corruption management, corruption investigation and corruption and anti-corruption community education existing in South Africa.

7.3 SUMMARY OF DISCUSSIONS, FINDINGS AND MAIN ARGUMENTS

7.3.1 Extend of the Research Problem

Chapter 1 contextualised the study by demarcating and outlining the research problem, research questions, research objectives and limitations, and research design and methodology. provides an overview of the entire study. Moreover, the chapter clarified certain important terms and concepts in paragraph 1.8 such as *corruption* and *State capture*. Preliminary findings in Chapter 1 were that corruption is a serious problem in South Africa. This has been confirmed by both the 2017 and the 2018 Corruption Perception Index (CPI) of the transparency international. A number of instruments are used to rate and measure country corruptions. The 2018 CPI, for instance, showed no improvement in South Africa's CIP from that of 2017. Like in 2017, South Africa is still ranked at number 73 with a global average score of 43. South Africa's ranking, according to Sibanda (2019 – Daily Maverick), is a far cry from the countries that the study used for comparative purposes. Singapore is ranked position number 3, Hong Kong ranked number 14 and Botswana ranked number 34 with a global average score of 61.

Chapter 1 briefly touches on the key issues addressed from chapters 2 to 5. It was observed, for instance, that over the years South African government and executive members have periodically been involved in corruption scandals.

7.3.2 Previous Research

In Chapter 2, *A Thematic Reflection on Extant Literature on Corruption,* the first question (question 1.4.1) in this study was addressed that sought to understand the prevailing scholarship and discourse on fundamental issues, concepts and knowledge in corruption as a phenomenon. Chapter 2 also covered issues related to the second question of the study (question 1.4.2) that deals with the ills of corruption through specifically looking at the impacts of corruption on the society and governance in general. In particular, the chapter addressed the following sub-questions: What has been written about this topic before, if anything? What are the existing relevant debates? What are the key ideas and findings in the current literature on the topic and the specific problems identified? What are the gaps in the literature that call for further research? Therefore, this section will give a brief overview of the findings of the study and their relationship to previous work in these areas. In Chapter 2 the study also looked specifically at issues of the current and historical prevalence of corruption in South Africa; perceptions and understanding of the meaning and importance of corruption and corrupt practices in South Africa and other jurisdictions; best practices in the combatting of corruption and the appropriate institutional, legislative and regulatory frameworks in the selected comparative jurisdictions; and international and regional anti-corruption instruments.

According to previous study, corruption is a bane in many democracies and its corrosive effect have both macro-economic, macro-political and macro-social impact on the citizenry and on the legitimacy of democratic institutions. Data and findings in Chapter 2 are broadly in line with the researcher's observation and lived experiences in the South Africa context. The prevalence of corruption in South Africa and its effects have been eloquently captured in several reports of the Public Protector including the *In the Extreme*: *Report no.11 of 2011/12 of the Public Protector on an investigation into allegations of a breach of the executive ethics code by the minister of cooperative governance and traditional affairs, Mr Sicelo Shiceka, MP; the Against the rules too, Report of the Public Protector in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996 and section 8(1) of the Public Protector Act, 1994 on an investigation into complaints and allegations of maladministration, improper and unlawful conduct by the department of public works and the South African police service (SAPS) relating to the leasing of SAPS*

accommodation in Durban, 2011, and the infamous *Secure in Comfort:* Report by the Public Protector on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the department of public works at and in respect of the private residence of president Jacob Zuma at Nkandla in the KwaZulu-Natal province, Report no: 25 of 2013/24, March 19 2014; and the *Public Protector State Capture Report of 14 October 2016.*

7.3.3 Importance of Ethics in the Fight Against Corruption

Thus, the study in Chapter 3, Ethical *dimensions of corruption and corrupt practices in governance and public service in South Africa*, a focus was on ethics, ethical leadership and governance, and anti-corruption corporate as antecedent to fighting public sector corruption. It was found in Chapter 3 that public officials and government executives are often entangled in serious acts of misconduct, unethical performance of functions and allegations of involvement in corrupt activities. Notable was the *VBS Mutual Bank – The Great Bank Heist* report, which detailed how certain municipalities violated prohibitions not to invest municipal finances in mutual banks and how some of these municipal officials abused their public office position for private gain. Chapter 3 also considered some theoretical underpinnings including Bundura's *Social Learning Theory* that address learnt standards of behaviour (Agbim, 2018:24); and the those having the *Stakeholder Theory* which proposes that those with governance and oversight responsibility have a duty to always act in the best interest of the stakeholders (Agbim, 2018:24). Furthermore, Chapter 3 addressed several types of leaderships. Particularly relevant to this study was Ethical Leadership in terms of which the ethics and moral character of executive and/or public leaders are regarded as important in promoting good governance and fighting the bad influence of corruption (Naidoo, 2012:26). Discussed also in Chapter 3 was S*ervant Leaders*, the essence of which places leaders as servants of those they lead (Okagbue, 2012:43–47). The important of reference to servant leadership was to highlight the fact that leaders must serve the interest of the people the lead and not be preoccupied with lining their pockets with illicit gains and benefits for themselves and their families.

In terms of the third research question (question 1.4.3) that looked at the role ethics plays in anti-corruption measures, strategies and good governance; and the fourth research question (question 1.4.4) that addressed the issues of an appropriate leadership approaches and characteristics, the findings of Chapter 3 seem to build in particular on the work and sentiments of some researchers reviewed in Chapter 2. Information obtained in Chapter 3 places ethics as an important element of efforts to fight corruption. Likewise, the studies reveal a strong link between ethics and corruptions. Ethics and moral behaviour are important in the understanding of corruption and corrupt practices. Sadly, ethical leadership, good governance and corporate culture was found to be lacking in the government. To recap what Naidoo (2012:26) said, there exists a gap "between ethical leadership, corruption and governance" that affect clean governance and impact negatively on combating corruption. Undoubtedly, ethical conduct and corruption cannot be addressed separately. They are "two sides of the one coin" (Whitton, 2001:13), which needs to be urgently addressed (see Cheteni & Shindika, 2017; Gildenhuys, 2004:6).

7.3.4 Current Anti-Corruption Normative Framework

Chapter 4, *Anti-corruption normative framework,* dealt with the current normative anti-corruption frameworks both nationally and internationally. These are important in guiding how corruption and corrupt practices must be dealt with, and determining if the South African anti-corruption agencies have been successful in implementing the letter and the spirit of these normative frameworks (Van Vuuren, 2016:1). Specifically dealt with in this Chapter included Prevention of Corruption and Corrupt Practices Act together with its 2018 Amendment Bill that criminalises corruption; the Criminal Procedure Act No. 51 of 1977 (CPA); Prevention of Organised Crime Act No. 121 of 1998 (POCA) that deals with the issue of the participation in illicit activities and being party to the laundering or concealment of the nature, source, location, disposition or movement of the property or its ownership; the National Prosecuting Authority Act that deals with the powers of the national prosecuting authority, and the relevant provisions of the Constitution of 1996. Likewise, Chapter 4 covered the United Nations Convention Against Corruption (UN Anti-Corruption Convention); the African Union Convention Against Corruption (AU Anti-Corruption Convention); the OECD Anti-Bribery Convention; and the Southern African Development Community (SADC) Protocol Against Corruption (SADC Anti-Corruption Protocol).

These instruments deals extensively with anti-corruption interventions (Sibanda, 2005; Corr & Lawler, 1999; George, Lacey & Birmele, 2000; Gantz, 1998; Earle, 1998).

Findings in Chapter 4, with regard to the investigation of the fifth research question (question 1.4.5) that focus on the key national legislative or normative framework and South Africa's regional and international obligations to combat corruption, revealed a globally accepted normative foundation for anti-corruption framework in South Africa. Numerous international and regional anti-corruption instruments enjoin state parties to take appropriate measures to find corruption (Pereira *et al*., 2012; Sibanda, 2005). Noted, with regard to the UN Anti-Corruption Convention in particular, is that there is a need for an effective and coordinated anti-corruption policies implemented by independent anti-corruption bodies and the independent judiciary. Both these bodies must have discharged their statutory duties without fear or favour. Likewise, the AU Anti-Corruption Convention 2003 addressed the establishment of an anti-corruption agencies (Pereira *et al*., 2012). It was revealed that the formation of the AU Anti-Corruption Convention was preceded by the SADC Anti-Corruption Protocol of 2001, and that the former covered the areas of concern addressed in the Protocol.

Revealed in Chapter 4 is also the fact that PRECCA, section 23, proposes the possibility of an investigation by the NDPP into the lifestyle of person suspected or alleged to have been involved in illicit enrichment activities. This investigation, commonly known as lifestyle audit, will look into several issues including the standard of living above the person's means; access to, possession or control of pecuniary and non-pecuniary not proportionate to his or her present or past known sources of income or assets; and involvement in corruption and corrupt activities.

Covered in the findings in Chapter 4 is also the 2017 introduction of the Political Party Funding Bill, which is expected to be enacted into law by the end of 2019. This is a very important development because it has been found elsewhere that political party funding is the bedrock of corruption.

With regard to punishment for corruption, it was noted in Chapter 4 that the courts consider corruption a serious offence that merits inhibitive penalties. In *Phillips v The State*, for example, the court highlighted that contravening section 4(1)*(a)*(i)*(aa)* of PRECCA is a serious offence.

And that the seriousness of this offence must be one of the key consideration when deciding on the punishment or sentencing of the wrongdoer. The court arrived at this concluding by referring to the case of *S v Narker & Another* which labelled bribery (corruption) as an "ugly offence striking cancerously at the roots of justice and integrity, and it is calculated to deprive society of a fair administration" that must be treated with the disdain its deserves.

7.3.5 Functional Effectiveness of the South African Anti-corruption Strategies, Structures and Related Institutions

Chapter 5 of this thesis, *South African Anti-corruption Strategies, Structures and Related Institutions*, dealt with the crux of this study. Also, it responded to the sixth research question (question 1.4.6) of this study that questions amongst others the successes and failures of the South African anti-corruption agencies in their fight against corruption. Though some few significant successes can be noted, a number of deficiencies were revealed. It was particularly noted that the operational effectiveness of anti-corruption agencies in South Africa was affected by many issues including the multi-agency approach of the entire system and political interference. Noted and discussed as part of this multi-agency was the parliament; the Office of the Public Protector; the Office of the Auditor-General; the Independent Police Investigative Directorate (IPID), the National Prosecution Authority (NPA); the South African Police Services (SAPS) with its specialised units including the Commercial Crimes Unit (CCU), the Hawks, the Special Investigation Unit (SIU); the Judiciary (Courts); and the Financial Intelligence Centre (FIC).

Central to this study was the revelation in Chapter 5 that in terms of section 179(5) of the Constitution, the NDPP is entrusted with determining prosecution policy and issuing policy directives to drive the prosecution processes. Also that pursuant to section 11 of the NPA Act, DNDPPs are subject to the control, direction and oversight of the NDPP. Accompanying discussions highlighted the fact that the role of the President in appointing DPPs may lead to political interference with the functioning of the NPA. This concern, as discussed in chapter 5, was demonstrated in several cases including *Democratic Alliance v President of the RSA and Others* 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC); the *Corruption Watch (RF) NPC and Another v*

President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others [2018] 1 All SA 471 (GP). The latter case questioned critically the credibility of the NPA and the legality and validity of the appointment of Adv. Shaun Abrahams as the NDPP. The court subsequently ruled that Adv. Abrahams must vacate office as the NDPP.

Also noted in Chapter 5 was political interference and encroachment into the independence of some of these institutions. A case in point was the *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32 (*Glenister III*), which involved the appointment of the Head of IPID.

The analysis of the data in relation to the six research questions, generally seems to support the various assertions in the literature review and case law that anti-corruption measures and initiatives cannot thrive in an environment marred with political interference. Also, that the reluctance sometimes of some of these institution to investigate and prosecute corruption is found to be problematic. One of the main concerns is that ACAs in South Africa are paper tigers (Sibanda, 2019a), who are stifled in the performance of their functions and exercise of their powers are muffled by unwarranted and excessive political interference. Their independence is severely compromised. The concepts of investigatory and prosecutorial independence proved to be a useful one in countries such as Singapore, Botswana and Hong Kong as demonstrated in Chapter 6 of this study.

7.3.6 Best Practices and Lessons for Comparative Jurisdictions

In Chapter 6, *Foreign Jurisdictions and the Fight Against Corruption: Lessons from Singapore, Hong Kong and Botswana,* a comparative enquiry of best practices and successes of foreign jurisdictions was conducted. Chapter 6 addressed the research question raised in question six (question 1.4.6) of the study, which focuses on the anti-corruption structures and strategies that have been adopted in different countries that are known to have effective anti-corruption regime. In terms of the findings, a number of best practices in these jurisdictions are noted and possible lessons for South Africa are identifiable. It was revealed that Hong Kong, Singapore, and Botswana have some common and interpretable patterns in combatting corruption.

In addition, what came out of the discussions in Chapter 6 is that these countries have fairly successful anti-corruption agencies. In Singapore the Corrupt Practices Investigation Bureau (CPIB) leads the fight against corruption. The Independent Commission Against Corruption (ICAC) is responsible for effectively rooting out corruption in Hong Kong (Quah, 2017). So successful has the ICAC been that its model and approach has been adopted in other countries such as New South Wales (Majila *et al*., 2017. See also OECD, 2008:9; Man-wai, 2006).

Botswana' Directorate on Corruption and Economic Crimes (DCEC) has reportedly been very successful in its efforts to combat corruption and corrupt activities (Sebudubudu, 2013; Mbao & Komboni, 2008). Notable about Botswana is that DCEC was established in 1994 under the Corruption and Economic Crime Act to investigate all forms of corruption, taking over from the Police who were then responsible for investigating corruption. However, PRECCA makes no provision for the establishment of an independent anti-corruption agency in South Africa. This, in my view, is a grave omission given the fact that PRECCA is the country's key anti-corruption specific legislation which should have dealt with all relevant issues needed to combat corruption. This omission has contributed to the fragmentation of the country's anti-corruption work. The Act also does not make any provision for the establishment of an Independent Anti-Corruption Commission Against Corruption in South Africa. Comparatively, in the case of the Directorate on Corruption and Economic Crime (In the case of Hong Kong, the Independent Anti-Corruption Commission Against Corruption was established under the Independent Commission Against Corruption Ordinance and in the case of Singapore; the Commission was established under the Prevention of Corruption Act.

7.4 SUBMISSIONS AND RECOMMENDATIONS

The submissions and recommendations in this section are postulated in thematic forms to properly depict and capture the problems identified in this study.

7.4.1 Prosecutorial Independence and the NPA Act

(a) The Constitutional Court in *Democratic Alliance v President of the RSA and Others,* discussed in Chapter 5.4.1, (at para 49) directed the president that when he appoints the NDPPA he must ensure always that the prosecutorial functions will be performed honestly and without fear, favour or prejudice; fairly;

and without any improper interference, hindrance or obstruction by any organ of state. It is submitted that the current provisions of the NPA Act has a number of loopholes, which makes it possible for the executive to thwart the provisions of the Act. Also, which as they stand will make it easy for the circumvention of the Constitutional Court in Democratic Alliance v President of RSA and others. It is therefore recommended that the following provision should be included in the NPA Act:

CHAPTER 4A

20A Independence of National Director of Public Prosecutions

(1) Subject to the Constitution of the Republic of South Africa, the National Director of Prosecutions—

(c) is independent and is not subject to the direction or control of anyone with the required constitutional and legislative authority to exercise such control or direction; and

(d) must exercise his or her functions impartially, honestly, without fear, favour or prejudices.

21A Conduct of officers of National Prosecuting Authority

(1) The National Director of Public Prosecutions and other officers of the National Prosecuting Authority must act in accordance with this Constitution and the law.

(2) No officer of the National Prosecuting Authority may, in the exercise of his or her functions—

(e) act in a partisan manner;

(f) further the interests of any political party or cause;

(g) prejudice the lawful interests of any political party or cause; or

(h) violate the fundamental rights or freedoms of any person.

(3) Officers of the National Prosecuting Authority must not be active members or office bearers of any political party or organisation.

(4) The political neutrality of officers of the National Prosecuting Authority is of paramount importance to the country criminal justice system and the prosecutorial system.

The provisions are also influenced by the provisions of the Ugandan Constitution dealing with the functions and appointment the national prosecuting directorate and the Uganda National Prosecuting Authority Act of 5 of 2014. In particular, the

Constitution of Uganda put it in no uncertain terms that political interference into the powers and functions of the national prosecuting authority is not allowed.

(b) Alternatively, it is suggested that sections in line with the provisions of 179 of the Constitution be amended with the insertion of 179(5A) as follows:

5A Autonomy and Independence of the Prosecuting Authority

(a) Subject to the Constitution of the Republic of South Africa: -

(i) National Director of Prosecutions—is independent and is not subject to the direction or control of anyone with the required constitutional and legislative authority to exercise such control or direction; a

(ii) The National Director of Public Prosecutions and other officers of the National Prosecuting Authority must act in accordance with this Constitution and the law.

(b) No officer of the National Prosecuting Authority may, in the exercise of his or her functions—

(i) act in a partisan manner;

(ii) further the interests of any political party or cause;

(iii) prejudice the lawful interests of any political party or cause;

(iv) violate the fundamental rights or freedoms of any person.

(c) Officers of the National Prosecuting Authority must not be active members or office bearers of any political party or organisation.

(d) The political neutrality of officers of the National Prosecuting Authority is of paramount importance to the country criminal justice system and the prosecutorial system.

7.4.2 Establishment of an Independent Anti-Corruption Directorate

a) It is recommended that South Africa must established an independent anti-corruption directorate (IACD) dedicated to systematically deal with corruption. This proposal is not entirely new. It was first hinted by the Constitutional Court on 17 March 2011, the Constitutional Court in *Glenister II case* (at para [200]) held that "…[on] a common sense approach, our law demands a body outside

executive control to deal effectively with corruption" and further clearly supported by the same court, when the Chief Justice famously stated that "We are in one accord that SA needs an agency dedicated to the containment and eventual eradication of the scourge of corruption. We also agree that that entity must enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate…" The country's need for a dedicated anti-corruption agency was pundit the 2019 State of the Nation Address (SONA). President Ramaphosa hinted to the urgent need to establish an independent anti-corruption directorate (IACD) within the NPA, which was met with mixed reactions (See discussions Chapter 1.2 *infra*). It is also noteworthy that the AU Convention calls for the establishment of an anti-corruption agency pursuant to Article 5(3) of the convention (Pereira *et al*., 2012:15; RSA, 2025:3).

b) The SONA announcement by the President was received with mixed reaction – some applauding it and others calling it the revival of the failed Scorpions. The autonomy of IACD was immediately put into doubt, with some commentators describing it as "no different, no less unconstitutional and no better" than the failed scorpions (Hoffman 2019). In a more pointed attack on the establishment of the of the directorate Hoffman (2019) stated:

> Against this background the decision of the President to announce, during his SONA on 7 February 2019, that he intends to establish a State Capture Investigative Directorate in the National Prosecuting Authority is perplexing. He is a lawyer, he must surely understand that the anti-corruption machinery of state cannot be independent and secure in its tenure if it is within his own executive gift, ahead of the executive branch of government, to create it and to end its existence as well as to determine its terms of reference. The provisions in the NPA Act upon which he will rely in establishing the new unit are clearly inconsistent with the Constitution as it was interpreted in the two cases mentioned above.

These doubts, it is submitted, are justifiable given what has happened before and the caution issued by the courts with regard the independence of anti-corruption agencies. In *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32 (*Glenister III*), at para 32, the Constitutional Court stated that "[t]he overriding consideration is whether the DPCI legislation has inbuilt autonomy-protecting features to enable its members to carry out their duties without any inhibitions or fear of reprisal. It is therefore submitted that the IADC legislation must contain a clear provision which is functionally similar to that recommended in 7.5.1 for insertion in the NPA Act.

c) It is further recommended that South Africa must follow a single agency approach of the multi-agency approach. It is submitted that a single agency approach avoids many challenges including duplication of functions by the different anti-corruption agencies and the resultant operational ineffectiveness, and the lack of proper control and co-operation to mention a few (Van Vuuren, 2013). In chapter 6.5 it was stated that Majila *et al.,* (2017) has recommended a single agency, which must be divided into three departments: "the Operations Department; the Corruption Prevention Department; and Community Relations". Majila *et al.*, (2017) proposal echoes the provision of the ACC Bill, discussed item 7.6.7 below, which puts under the ACC four different units namely: a) the *Special Operations Unit*; (b) the R*esearch, Prevention and Policy Formulation Unit*, (c) *Education and Public Relations Unit*; and the (d) the *Administrative Unit*. It is submitted, in light of the recommendation by Majila *et al.,* (2017), that the Directorate with separate but inter-dependent units is ideal for South Africa. It will also be aligned to the ACC Bill. To this end, the following departments of the IADC are suggested: (a) *Operations Department*; (b) *the Corruption Prevention Department*; (c) *Education and Public Relations Department; and* (d) *Research and Policy Development Department.*

d) Another important issue to address is who will have the power to appoint the heads of the IACD. The current law provides that heads of these agencies are appointed by the President in terms of section 84 of the Constitution. The in-

build safeguard is that the President makes such an appointment after recommendations of appointable person where made by the Judicial Services Commission. Therefore, the position can be maintained. Otherwise the country may require constitutional amendment through revising the provisions of section 84 of the Constitution.

e) On 17 March 2011, the Constitutional Court in *Glenister II case* (at para [200]) held that "…[on] a common sense approach, our law demands a body outside executive control to deal effectively with corruption". This was again followed by the Constitutional Court in 2014 when the Chief Justice famously stated that "We are in one accord that SA needs an agency dedicated to the containment and eventual eradication of the scourge of corruption. We also agree that entity must enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate…" Therefore to guarantee its independence and in line with the observation by the Constitutional Court in the 2011 and the 2014 cases, it is recommended that the IACD must be accountable to parliament under the oversight of the anti-corruption commission proposed in paragraph 7.5.3 infra. It must not be accountable to the executive branch of the state such as the Ministry of Police. The IACD will thus have the characteristics of both the Hong Kong ICAC and the New South Wales ICAC. New South Wales ICAC is accountable only to Parliament and the Hong Kong ICAC is under the oversight of a few committees including the Operations Review Committee. The Operations Review Committee share some similar functions and responsibilities as those assigned to the ACC under the Anti-Corruption Commission Bill (ACC Bill) that is also discussed under the proposal in 7.5.3 infra. Botswana is rather an exception because the DCEC is under the Office of the President and formally and directly responsible to the president. Under normal circumstances, such accountability and oversight line should be a cause for concern. However, perhaps what sets it apart is the political will in Botswana to fight corruption.

f) At the time of submission for examination of this thesis, there was no information on the exact as to the composition and powers and functions of the IACD. It is submitted and recommended that the legislation to be enacted must draw largely from that setting the powers and functions of the Botswana DCEC (see

discussion in Chapter 6.4.7 *infra*), and some of the key provisions of the anti-corruption commission bill (ACC Bill).

7.4.5 Establishment of an Independent Anti-Corruption Court

a) Corruption is so endemic in South Africa. Therefore, it is important that a specialised independent anti-corruption court (IACC) is established with dedicated resources deal with corruption, particularly if the proposed IACD was to succeed. This court will work with the IACD and the ACC. The special commercial crimes court may serve as a model for the possibility of such a court.

7.4.5 Strengthen Sanctions for Corruption

a) It is recommended that policy formulation on specific-minimum sentencing guidelines for corrupt or minimum sentencing legislation for corruption offences modelled on Criminal Law Amendment Act 105 of 1997, section 51 to 53. Alternatively, PRECCA must be amended and inserted to it a substantive provision of sentencing of corruption offender. This recommendation takes into account the discussions in Chapter 2.8 with regard appropriate sentences, particularly with the approach of the sentencing guidelines for corruption in the United States; rejection of the minimum sentencing guidelines in some jurisdictions such as Indonesia; the issues of abuse of public office for corrupt purposes and the fact that the South African court in *Phillips v The State* abhorred the small sentenced imposed by the trial court for corruption as inappropriate for the facts in question.

b) To recap, sections 51 – 57 of the Criminal Law Amendment Act 105 of 1997 used to prescribe certain strict minimum sentences for a variety of crimes including rape and robbery. It is submitted that this legislation was intended to promote reaching appropriate sentences. The enactment of the Act followed the outcry against serious crimes being perpetrated and the perception that courts were imposing very lenient sentences, while on the other hand the legislature did little about the situation. Therefore, any objection against such a minimum sentences legislation for corruption offences would pass muster

the constitutionality test following cases such a *S v Dukaza, Sv Tilly, S v Tshilo* 2000(2) SACR 443(CC) and *S v Dodo* 2001 (5) BCLR 423 (CC) .

7.4.6 Develop an Anti-Corruption Tool Kit

a) The proposal in paragraph 7.5.4 regarding strengthened and minimum sentences for corruption will in my view be bolstered by the creation of a toolkit for corruption offences. The formulation and compilation of the South African anti-corruption tool kit (ACTK) can follow the multi-layered definition of corruption contained in the United Nations' Anti-Corruption Toolkit. Also, it can assist the proposed South African ACC and IACD by providing guidance with integrity management.

b) As highlighted in Chapter 1, the conception of corruption has different manifestations and some of the activities that in essence are corrupt activities may be labelled differently to avoid being regarded as corruption. A typical example is wasteful expenditure, which in South Africa has even been understood to included using state resources for indirect private gain. Also, bribery in South Africa is generally not treated firmly as a corrupt activity – it is in most cases treated as a mere common law offence involving illicit benefits. Although it may not be possible to have an exhaustive list of what constitute corruption and corrupt activities, the ACTK may assist in delineating key elements of what must be considered corruption including state capture in its different forms. The ACTK must not differentiate in seriousness the difference between active corruption and passive corruption. Likewise, the proposed ACC must not differentiate in severity of the sentence to be imposed the difference between passive and active corruption. And between grand corruption and petty corruption. The use of toolkit or toolbox has proven helpful in Namibia, for example. For instance, the Namibian ACA is using Integrity Management Toolbox developed by CEWAS to enhance its corruption prevention activities. The monitoring and evaluation of the implementation of the toolbox is the responsibility of the Directorate Public Education and Corruption Prevention.

7.4.7 Establish Anti-Corruption Commission as a Chapter 9 Institution

a) The establishment of the Anti-Corruption Commission (ACC) as a Chapter 9 institution in South Africa will strengthen the country's fight against corruption. The proposed ACC will have to work co-operatively with the independent anti-corruption directorate (IACD) and the independent anti-corruption court (IACC) proposed in paragraphs 7.5.1 and 7.5.2 respectively. Linking the ACC to these institutions will alleviate integrity and independence concerns that have been raised against establishing the IACD within the NPA.

b) With regard to this proposal there will be no need to re-invent the wheel because already there is a Bill for the establishment of the Anti-Corruption Commission (hereinafter the ACC Bill). The relevant provision of the ACC Bill reads as follows:

> *2. The Commission is hereby established in terms of Chapter 9 of the Constitution and must therefore—*
>
> *(a) be subject only to the Constitution and the law and exercise its power without fear, favour or prejudice in terms of section 181 (2) of the Constitution;*
>
> *(b) be assisted by other organs of state through legislative and other measures to ensure its impartiality, dignity, independence and effectiveness in terms of section 181 (3) of the Constitution;*
>
> *(c) be free from political and any other interference from any person or organ of state in its functioning; and*
>
> *(d) be accountable only to people of the Republic as represented by the National Assembly.*

c) A commendable characteristic of the proposed ACC is that it is clearly to be accountable only to the National Assembly, and will be "free from political and any other interference from any person or organ of state in its functioning." Equally relevant to the anti-corruption framework is the clear division of the ACC into three functionaries of — (a) the *Special Operations Unit*; (b) the R*esearch, Prevention and Policy Formulation Unit*, (c) *Education and Public Relations*

Unit; and the (d) the *Administrative Unit* pursuant to section 4 of the ACC Bill. It is submitted that the ACC may be structured in such a way to work closely and seamlessly with the IACD and the IACC. Section 10(e) of the ACC Bill, for instance, sets as one of the functions of the commissioners of the ACC authorizing corruptions investigations. Therefore, once completed the ACC can forward the outcomes of its investigations to the IACD and the ICC for further investigation and prosecution.

d) In terms of section 11 of the ACC Bill the ACC "is a decision-making body focused on coordinating the investigation, prevention, education and fighting of corruption in the Republic of South Africa". Section 13(1) on the Special Operations Unit states that the Unit "is the law-enforcement branch of the Commission and is concerned with investigation and prosecution of corrupt activities." It is submitted that this may sound like a duplication of efforts in light of the proposed IACD, with possible consequences of blunting the operational and prosecutorial effectiveness of the country's anti-corruption agencies as was discussed in paragraph 7.4.5 *infra*.

e) It is submitted that with the advent of the establishment of the IACD (and the IACC) the lawmakers must revisit the provisions of the ACC Bill to ensure clear synergy with other anti-corruption bodies. Alternatively, the lawmakers must go back to the drawing board to start a comprehensive law making process the outcomes of which should be three legislations on the IACD, IACC and the ACC.

7.4.8 Establish the National Anti-Corruption Strategy

a) Article 5 of the UN Anti-Corruption Convention, to which South Africa is a party, requires State Parties to develop and implement a comprehensive National Anti-Corruption Strategy. To respond to this obligation, the proposed ACC could take lead in establishing the anti-corruption strategy and action plan. Comparatively, for example, in 2006 the Namibia Anti-corruption Commission (ACC) established as an independent and impartial body under section 2 of Anti-Corruption Act 8 of 2003, launched its National Anti-Corruption Strategy

and Action Plan, aimed at consolidating Namibia's commitment to fight corruption (Wyland, 2017).

b) Already the ACC Bill has paved the way for the possible development of the strategy. The South Africa must in the minimum set out a clear matrix and the action plan for fighting corruption. The strategy document must contain a framework with goals and strategic objectives with realistic implementation timelines. It is submitted South Africa must develop a Monitoring and Evaluation Plan as a matter of urgency to operate as a framework or strategic document organisation the strategy.

c) It is recommended that included as part of the key or core part of the strategy must be expression on: Increasing the level of political accountability; Preventing corruption in government offices, ministries, agencies and public enterprises; third objective targets Public Enterprises (formerly known as State-Owned; Conducting extensive anti-corruption education; Engaging civil society and the media in combating corruption; and supporting the role of the media in fighting corruption instead of regarding the media as the enemy of the government executives and politically connected families.

7.4.8 Formation of the National Ethics and Integrity Directorate

a) It is recommended that as part of institutional building and revitalization the South African government must establish the National Ethics and Integrity Directorate (NEID). The Directorate must be responsible for generating and implementing a National Strategy for Mainstreaming Ethics and Integrity in all Sectors and all Institutions in National Governance in South Africa. In particular, NEID must put in place a harmonized, nationally agreed understanding of ethics and integrity and a value system in the three arms of government and public service in general. NEID could also be responsible for conducting integrity assessment on law enforcement agencies involved in anti-corruption activities to determine their suitability and fitness to hold office.

b) It is further submitted that the proposed NEID will better located within the Office of the Public Service Commission, which currently is the custodian of the National Anti-Corruption Hotline. The Parliamentary Committee on Ethics and the proposed ACC must jointly and severally be responsible for the oversight of the ethical operations of law anti-enforcement agencies and related formations.

c) It is further recommended that the provincial and local government of NEID - to be named Provincial Government Ethics and Integrity Directorate (PEID) and the Local Government Ethics and Integrity Directorate (LEID) respectively must be established. Represented in the EID must be the proposed ACC, the NPA, IACD, PEDs and LEIDs, and these individuals must be champions of ethics and integrity values in their units appointed based on their unimpeachable ethical standards and moral compass. This proposed composition of the NEID is borne out of the acknowledgement corruption and corrupt practices permeates all levels of the society and governance. NEID and its provincial and local equivalents will further promote the Minimum Anti-Corruption Capacity (MACC) requirements, which seek to ensure the existence of corruption free systems in government departments.

d) In both his 2018 SONA and the 2019 SONA the President emphasized that Law enforcement integrity and effectiveness is critical to the fight against corruption, and was again buttressed in the SONA. Anti-corruption stance and ethical behavior of law enforcement agencies is, for example, required in the *Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169, annex). A*rticle 7 of the Code puts on notice States Parties that "Law enforcement officials shall not commit any act of corruption. Parties shall also rigorously oppose and combat all such acts." Article 8 of the Code further states that "Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them."

e) Such a directorate will re-inforce the operations of similar focused units or frameworks in the government such as the Public Sector Integrity Management Framework, which has been put in place. The Public Sector Integrity Management Framework was put in place to promote ethical conduct and augment the integrity management methods and standards in the public service (Kekae, 2017:15-16).

7.4.9 Recalibration of Parliamentary Ethics Committee

a) It is suggested that the current institutional set-up of the Parliamentary ethics committee must be recalibrated. A preferred approach would be to follow the United States model where the legislature through a Committee on Standards of Official Conduct (renamed Committee on Ethics in 2011) administer the ethics regime.

In 2008, the US Congressional House created the Office of Congressional Ethics (OCE) whose responsibility is to review allegations of unethical conduct and make recommendations to the Committee on Ethics. The OCE staff is made up primarily of attorneys and other professionals with the necessary expertise in ethics law and investigations. An eight-person Board of Directors has an oversight responsibility over the activities of the OEC (Chêne, 2016:6). An important feature of the system is that private citizens are allowed to lodge complaints directly to OEC (Chêne, 2016:6).

7.4.10 Streamline Anti-Corruption Oversight

a) Streamlining of the current oversight entities for anti-corruption and law enforcement agencies would improve accountability and effectiveness of the South African anti-corruption entity/entities. Experience has shown that the more division or executive officials are bestowed with the oversight responsibility, the more difficult the monitoring and accountability assurances. This was demonstrated clearly as problem with regard the appointment of the Head of IPID. Due to the multiplicity of individuals and departments or government portfolios that should be involved in the decision-making, critical

decisions are often stalled by bargaining and inter-governmental institutions compromise.

7.5.11 Institute General Public Disclosures and Life Style Audits of Government Executives and Public Service Officials

a) As noted in Chapter 4, the PRECCA17 Bill calls for a regime that will permit the NDPP to petition the judge for lifestyle investigation. The proposal in section 23 of the PRECAA17 Bill must be extended to the audits of lifestyles of Government Executives and some key public service officials. Moreover, it is recommended that South Africa must establish a credible, effective and peremptory financial disclosure systems for government executives and other public officials.

b) It is submitted that it must be made clear to those assuming office in the government that mandatory financial disclosures and lifestyle audits are part of accountability regime, and may not be resisted under the defence of the right to privacy. Through such measures, the state will be enabled to further obtain information relevant to combating corruption within its ranks. Such as, for example, information relating to the direct and indirect relationship of the officials with companies doing business with government and information on pecuniary and non-pecuniary benefits obtained by the government executives from third parties.

7.4.12 Strengthen Accountability Institutions

a) The Constitution of the Republic of South Africa, 1996, is established as the supreme law of the country and incorporates the rule of law within its dictates. The supremacy of the Constitution and its integration of the rule of law as a principle of substantive and adjective constitutionalism brings with it certain consequences. One of these is the expectation of accountability of state, and government free of corruption and the malignancy of economic nepotism. It is submitted that measures must be put in place to strengthen accountability institutions in South Africa towards corruption management.

7.4.12.1 Law Enforcement Accountability System

a) It was highlighted in Chapter 5, with specific reference to the demise of the Scorpions and the troubled IPID, that accountability of law enforcement is a serious concern in South Africa. Therefore, it is proposed that a new Comprehensive Law Enforcement Accountability System (CLEAS) must be introduced, to be linked to IPID. This is to avoid duplication of efforts because IPID is already tasked with police accountability responsibility. Like Hong Kong's independent ICAC Complaints Committee (ICIC, 2015), IPID must be bestowed with the autonomous authority to examine complaints against the IACD or its staff, and to monitor how the IACD deals with corruption complaints and referrals for further investigation by the ACC.

b) The model of the National police accountability systems crafted by the Netherlands provide valuable guidance on how to avoid misuse of powers by the police and drawing a balance between executing State directives and concerns of independence and/or integrity. (see generally Handbook on Police Accountability, Oversight and Integrity, 2011).

7.4.13 Adopt the Goal Model as Anti-Corruption Agencies Organisational Effectiveness Model

a) Effectiveness is the degree of congruence between organizational goals and some observed outcome. Effectiveness studies (evaluation research) occur in a political context, and include: The organization, program, and offices are creatures of a political process. The results of the study feed into the political processes that sustain or change the organization. It is recommended that *Goal Model*, as the most common assessment model, be adopted by the South African anti-corruption agencies. The relevance of this model is that it defines effectiveness by the extent to which the organization achieved its goals. The only challenge that these agencies will have to address over time is this model limitations to the rationality of organizations. It cannot differentiate between official and operative goals. The relationship between goal attainment and consequences is not straight forward.

7.4.14 Introduce Public Awareness and Education as Anti-Corruption Strategy

a) It is submitted that South Africa must introduce public education and awareness as a strategy in its broader anti-corruption framework. Education constitutes the basic defence to corruption and corrupt activities. Education should be used to promote and facilitate the environment free from corruption and related corrupt activities. It should be appreciated that already the ACC Bill contains a provision to establish the *Education and Public Relations Unit* whose function is to ensure public education and awareness around corruption. The relevant section reads as follows:

> *18. (1) The Education and Public Relations Unit is responsible for raising public awareness and fostering a culture of corruption fighting and ethical leadership by—*
> *(a) conducting anti-corruption campaigns;*
> *(b) defining and promoting, the ethical leadership in—*
> *(i) Schools;*
> *(ii) Companies;*
> *(iii) Universities;*
> *(iv) Workplaces; and*
> *(v) Governing bodies.*
> *(c) offering workshops to the above sectors on preventative measures against corruption, using the information of which shall be gained from the Research, Prevention and Policy Formation Unit;*
> *(d) creating accessibility to the Commission and its mandate through social media techniques; and*
> *(e) conducting public discussions on the nature, extent and dangerous effects of corruption and what can be done about it within society*.

b) Any efforts to fight corruption and corrupt activities should be underscored by a clear strategy on public education and awareness. Botswana is a typical example of the role and impact that public education in the country's efforts to ferret corruption. It was discussed in Chapter 6.4.3, for example, that in

Botswana DCEC utilises public education and awareness to root out corruption. Public education and awareness responsibilities in Hong Kong are undertaken by the Citizens Advisory Committee on Community Relations.

c) South Africa must consider, where appropriate and in accordance with international and regional anti-corruption conventions, including in the legislative framework of its anti-corruption bodies a provision or provisions on public education and awareness.

7.4.15 Develop Best Practices and Information Sharing Guidelines

a) Co-ordinated efforts are needed in the fight against corruption. It is therefore recommended that South Africa must have a systematic and consolidated approach in the identification of best practices and the pro-active and timely sharing of information to enable the anti-corruption agencies to take appropriate action. Such guidelines or arrangement will discharge the country's obligations under article 56 of the UN Anti-Corruption Convention. Also, this approach will inculcate operations, co-ordination and inter-agencies operational effectiveness. It is submitted that this approach will strengthen the currently doubtful intra-agency coordination and inter-law enforcement cooperation.

7.4.16 Form Public-Private Anti-Corruption Partnerships

a) It is submitted that the formation of public-private anti-corruption partnerships will be central to the fight against corruption. This submission is informed by the fact that civil society and NGOs have been actively involved in unearthing corrupt activities in South Africa. NGOs like the Corruption Watch and the Helen Suzman Foundation, for instance, have been at the forefront of the country's ground-breaking anti-corruption litigation. The Administrative Justice Association of South Africa, launched on 18 June 2018, is also one of the significant developments that must play a role in fighting corruption through public-private anti-corruption partnerships. Notable partnership is that between Department for Public Service and Administration with Business Unity South Africa (BUSA), which seeks to raise awareness on anti-corruption measures implemented in the public service. Other anti-corruption advocacy groups

include the Global Compact Network South Africa, National Business Initiative and the National Anti-Corruption Forum (NACF). NACF guides the public sector, the private sector, and members of the public on corrupt and corrupt activities (Kekae, 2017:89).

b) It is further submitted that private organisation will benefit on the country's anti-corruption strategy by promoting ethical conduct, integrity, transparency and accountability. The proposal for a much formalised public-private sector partnership is belied by the requirements of article 12 of the UN Anti-Corruption Convention, and the Resolution 5/6 of 29 November 2013, entitled "Private sector", and Resolution 5/4 of 29 November 2013, entitled "Follow-up to the Marrakech declaration on the prevention of corruption", both of which highlighted the importance of the participation of the private sector in the prevention of corruption.

The magnitude of the scourge and the need to have multi-stakeholder involvement in anti-corruption initiatives was highlighted in 2006 by Geraldine Fraser-Moleketi, then Minister for the Public Service and Administration, in an address to the Conference of Internal Auditors of South Africa and the Association of Certified Fraud Examiners on 24 April. She stated:

> Given the magnitude of the scourge of corruption the Public Sector cannot act alone but needs to act in concert with other institutions from the civil society and business sectors to protect the public interest. Thus, there is little argument of the need for strategic partnerships to combat corruption. An anti-corruption approach that ignores this will not therefore succeed.

7.4.17 Institutionalize Transnational Collaboration

a) The NDPP concluded a Memorandum of Understanding with the Director of Public Prosecutions of the Republic of Botswana as a means of strengthening relations and enhancing cooperation in the area of the fight against transnational crime (Annual Report National Director of Public Prosecutions

2017/18, at 113). Ideally, the collaboration approach of the NDPP should be spread to other agencies and/or bodies responsible to combat corruption.

b) It is submitted that South Africa can leverage on its membership to CAACC through the SIU, and should use the platform to form formal bilateral coalitions and collaboration towards fighting corruption.

7.4.18 Powers and Functions of Chapter 9 Institutions

a) The Office of the Public Protector has a constitutional mandate to carry certain functions pursuant to section 182 of the Constitution. Additionally, the Public Protector Act bestows upon the Office certain powers and responsibilities, in particular section 64 of the Act. It is submitted that there is a need to clearly define and streamline the operations of the Public Protector and of other anti-corruption agencies such as the SIU and the Hawks to avoid duplication of investigations or fiddling in each other's jurisdiction. Otherwise the operational effectiveness of all these institutions will in the long run be compromised.

It is suggested, however, that the streamlining must not take away the ability of the anti-corruption law enforcement agencies (Blaauw, 2016), or of the proposes IACD and the ACC, to work in tandem with the Public Protector. This is because public sector corruption is still rampant in South Africa and the Public Protector's office under Advocate Mandonsela was instrumental in unearthing corruption and forcing the hand of the government, with the help of the court, the act against allegations of corruption.

b) It is submitted that best practices must be put in place to address any occurrence of what Blaauw (2016:23) calls "vague relationship" between the Office of the Public Protector and law enforcement agencies. To borrow the words of Blaauw (2016:23), these institutions 'complement' and 'reinforce' each other and their relationship must "ensure horizontal accountability".

There have been instance where the Office of the Public Protector and institutions like the SAPS, NPA, the SIU and the Hawks have been pulling to different directions. This was particularly evident around the investigation of the alleged acts of corruption by the former President Mr Jacob Zuma and other government executives.

7.5 FUTURE RESEARCH

Following discussions and findings in this study, the following areas / issues for further research have been identified:-

a) *Conduct studies on what measures must be put in place to avoid the IACD, for example, being another paper tiger:* Critical to this research must be an investigation of the impact of not providing anti-corruption agencies with the necessary legal powers and resources to perform its functions effectively. Elsewhere it has been reported that an ACA "without the necessary budget, personnel and operational autonomy, would mean the perpetuation of the current ineffective anti-corruption strategy and business as usual for the corrupt politicians, civil servants, business people and citizens" (Quah, 2017:17). Also, it must be determined how the IACD and similar agencies will improve the countries standing on the CPI.

b) *Conduct empirical studies to determine how the rivalry amongst the existing anti-corruption agencies have contributed to the sluggish anti-corruption intervention in South Africa*: This investigation must therefore deal in-depth with the tenants of organizational effectiveness and intra-agencies power relations.

c) *Investigate the link between anti-corruption and ethical leadership*: The relationship between ethical leadership and corruption must be determined. According to Cheteni and Shindika (2017:3), a great deal of research has particularly focused on ethics and neglected to pay attention to ethical leadership. It is for this reason that a number of African countries have witnessed severe maladministration of funds and corruption.

d) *Determine the level of political willingness to prosecute corrupt activities:* It is hoped that South Africa will investigate and prosecute corruption no matter how big or small the activity. Also, that high profile cases involving senior government officials will receive a consistent and decisive action with no fear or favour. Example should be taken from Hong Kong and Botswana that have prosecuted some of their senior government officials; this reflects the seriousness of the Country to deal with corruption. Botswana has "the long history of zero-authoritarian interference." (Alo, 2014:57).

e) *Investigate why the current system and frameworks are failing to combat corruption and to consider how to best strengthen democratic anti-corruption institutions and the associated legislative frameworks:* As priority to the investigation should be the determination if the Constitution have not placed the law enforcement agencies with the executive having great "influence on the creation, finance as well as the operation of the anti-corruption agencies" (see study by Sebudubudu, 2014:12).

f) *Investigate the pronounced and residual powers of the president with regard to the appointment of anti-corruption agencies and promulgation of laws that support such agencies:* As provided for in section 84(2) (f) of the Constitution, which gives the President the powers to appoint commissions of inquiry, which was not established as a Chapter 9 institution or an Independent Anti-Corruption Commission Against Corruption, because no provisions have been made in Chapter 9 (State Institutions Supporting Constitutional Democracy) for the establishment of such a commission, which according to section 181(2) and section 181(4) respectively, should be independent and subject only to the Constitution and the law of the country. These commissions must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice and that no person or organ of state may interfere with the functioning of these institutions.

BIBLIOGRAPHY

BOOKS, AND CHAPTERS IN BOOKS

A

Adams, M. 2011.

Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law, in Van Hoecke ed. *Methodologies of legal research: Which kind of method for what kind of research*? European Academy of Legal Theory. Hart Publishing: Oxford.

Ahmed, B. *et al.,* 1992.

Government malpractices, in *Report of the Task Forces on Bangladesh Development Strategies for 1990s*. Vol. 2. Dhaka: University Press.

Armstrong, E. 2005.

Integrity, transparency and accountability in public administration. Economic & Social Affairs. United Nations.

B

Bandura, A. 1986.

Social foundations of thought and action. Englewood Cliffs, NJ: Prentice-Hall.

Bennett, W.W. & Hess, K.M. 2004.

Criminal investigation. 7th edition. Belmont, CA: Wadsworth/Thomson.

Belling, A and Fenne E. 2016.

Reporting malpractices in the Dutch Public Sector in Huberts L & Hoekstra A. (eds.) Integrity management in the public sector. The Dutch approach. BIOS: The Hague.

Berg, B.L. 2004.

Qualitative research methods for the social sciences. 5th edition, Pearson Education, Boston.

Berg, B.L. 2007.

Qualitative research methods for the social sciences. 6th edition. Boston: Pearson.

Booysen, S. 2013.

Twenty years of South African democracy: Citizens' views of human rights, governance and the political system. South Africa. Freedom House.

Blaauw, L. 2009.

Promoting the effectiveness of democracy protection institutions in Southern Africa: the Case of the office of the Ombudsman in Namibia. EISA: Johannesburg.

Brytting, T. Minogue, R. & Morino, V. 2011.

The Anatomy of Fraud and Corruption. Organisational Causes and Remedies. Farnham: Gower Publishing Limited.

C

Cohen, L., Manion, L & Morrison, K. 2007.

Research methods in Education. 6th edition. Oxon, Routledge.

Currie, I. & Klaaren, J. 2002.

The Promotion of Access to Information Act commentary.
Claremont: Siber Ink.

Creswell, J.W. 2009.

Research design: Qualitative, quantitative, and mixed methods approaches. 3rd edition. Los Angeles, CA: SAGE.

Creswell, J. W. & Plano Clark, V, L. 2011.

Designing and conducting mixed methods research. 2nd ed. Thousand Oaks, California: Sage Publications.

Creswell, J.W. 2013.

Qualitative inquiry and research design. 3rd edition. London: SAGE.

Creswell, J.W. 2014.

Research design. 4th edition. London: SAGE.

D

Davies, E. 2006.

Best practice in corporate governance building reputation and sustainable success. Aldershot: Gower.

De Vos, A.S., Strydom, H., Fouché, C.B. & Delport, C.S.L. 2011.

Research at grass roots: For the social sciences and human service professions. 4th edition. Pretoria: Van Schaik.

De Vos, A.S., Strydom, H., Schulze, S. & Patel, L. 2011.

The sciences and the professions. Pretoria: JL Van Schaik Publishers.

Denscombe, M. 2002.

Ground rules for good research: A 10-point guide for social researchers. Philadelphia, PA: Open University Press.

Denscombe, M. 2010.

The good research guide for small-scale social research projects. 4th edition. England: McGraw-Hill.

Disch, A., Vigeland, E., Sundet, G. and Gibson, S. 2009.

Joint Evaluation. Anti-Corruption approaches: A literature review. Norway. Norwegian Agency for Development Cooperation. ISBN 978-82-7548-362-9

Du Toit, F. 2014.

Roman-Dutch Law in modern South African Succession Law. Publisher: Ars Aequi, 278-285.

F

Fouché, C.B. & De Vos, A.S. 2011.

Formal formulations interpretation. In De Vos, A.S., Strydom, H., Fouché, C.B. & Delport, C.S.L. (eds). Research at grass roots: For the social sciences and human service professions. 4th edition. Pretoria: Van Schaik.

Fouché, C.B. & Delport, C.S.L. 2011.

In-depth review of literature. In De Vos, A.S., Strydom, H., Fouché, C.B. & Delport, C.S.L. (eds). Research at grass roots: For the social sciences and human service professions. 4th edition. Pretoria: Van Schaik.

Frankfort-Nachmias, C. & Nachmias, D. 1992.

Research methods in the social sciences. 4th edition. New York, NY: St. Martin's.

G

Gildenhuys, J.S.H. 2004.

Ethics and professionalism: The battle against public corruption. Stellenbosch: Stellenbosch University Press.

Goddard, W. & Melville, S. 2001.

Research methodology: An introduction. 2nd edition. Cape Town: Juta.

Groot, J.M. 2016.

Integrity investigations in the Netherlands Quality and credibility, in Huberts L and Hoekstra A (eds.) Integrity management in the public sector The Dutch approach in Huberts L and Hoekstra A (eds.)

Integrity management in the public sector The Dutch approach. 2016. BIOS: The Hague

H

Handbook on Police Accountability, Oversight and Integrity, 2011.

Handbook on Police Accountability, Oversight and Integrity.

Hanekom, S.X. *et al*., 1990.

Key aspects of public administration. Johannesburg, South Africa: Southern Book Publishers.

Hoenderkamp, E. 2016.

Criminal Investigation First aid for administrative mishaps?

Hoffman, P. 2012.

An Integrity Commission for South Africa. Cape Town. Institute for Accountability in Southern Africa.

Hoekstra, A. & Zweegers, M. 2016.

The Dutch National Integrity Office Supporting public integrity in Huberts L and Hoekstra A (eds.) Integrity management in the public sector The Dutch approach. BIOS: The Hague

Hoekstra, A., Huberts, L & Gaisbauer, I. 2016.

Integrity and integrity management in the Netherlands Describing the scene, definitions, strategies and developments in Huberts L and Hoekstra A (eds.) Integrity management in the public sector The Dutch approach. BIOS: The Hague.

I

Institute for Accountability in Southern Africa. 2016.

Accountability now. An Integrity Commission for South Africa. Cape Town, South Africa.

J

Joubert, C. 2015.

Applied law for police officials. 4th edition. Claremont: Juta.

K

Kinnes, I. & Newham, G. 2012.

Freeing the Hawks: Why an anti-corruption agency should not be in the SAPS. SA Crime Quarterly 39:23–39.

L

Leedy, P.D. & Ormrod, J.E. 2005.

Practical research: Planning and design. 8th edition. Upper Saddle River, NJ: Merrill Prentice-Hall.

Leedy, P.D. & Ormrod, J.E. 2010.

Practical research: Planning and design. 9th edition. Upper Saddle River, NJ: Merrill Prentice-Hall.

Leedy, P.D. & Ormrod, J.E. 2013.

Practical research: Planning and design. 10th edition. Upper Saddle River, NJ: Merrill Prentice-Hall.

Locke, L.F., Spirduso, W.W. & Silverman, S.J. 2014.

Proposals that work: A guide for planning dissertations and grand proposals. California: SAGE.

M

Mason, J. 1998.

Qualitative researching. London: SAGE.

Mason, J. 2002.

Qualitative researching. London: SAGE.

Maxfield, M.G. & Babbie, E. 2005.

Research methods for criminal justice and criminology. Belmont: Wadsworth Thomson Learning.

McMillan, J.H. & Schumacher, S. 2001.

Research in education. A conceptual introduction. 5th edition. New York, NY: Longman.

Myburgh, P.L. 2017.

The Republic of Gupta: A story of state capture. South Africa. Penguin Books.

N

Nanabhay, Y. 2014.

Non-compliance with external control measures in selected case studies within the national sphere of the public sector. MTech dissertation. Cape Town: Cape Peninsula University of Technology, Department of Public Management.

Newburn, T. 2015.

Literature review – Police integrity and corruption. Inspecting policing in the public interest. London, UK. HMIC.

O

Örücü, E. 2007.

Developing Comparative Law, in Örücü & Nelken. Comparative law: a Handbook. Hart Publishing.

P

Pelmier, L. 1985.

The control of bureaucratic corruption: Case studies from Asia, New Delhi. Allied Publishers.

Punch, K.F. 2012.

Developing effective research proposals. 2nd edition. London: SAGE.

S

Sibanda, O. 2007.

The prohibition of bribery of foreign public officials under the South African legislation and the African Union Convention: An examination of strengths and weaknesses, in Kierkegaard, (ed.) *International law and trade – Bridging the east-west divide.* Ankara Bar Association Press. International Association of IT Lawyers (IAITL).

Smith, M. 2014.

Ten steps to establishing yourself as a thought leader using social media and beyond. 2nd edition. Mari Smith International.

Stojkovic, S., Kalinich, D. & Klofas, J. 2015.

Criminal Justice organizations: Administration and management. 6th edition. London: Sengage Learning.

V

Van Halderen, M., Kettler-Paddock, K., & Badings, C. 2013.

Thought leadership: How to differentiate your company and stand out from the crowd. Amsterdam: Adformatie Groep B.V.

Van Hoecke, M. (ed.) 2011.

Methodologies of Legal Research – Which Kind of Method for What Kind of Discipline? Oxford and Portland, OR: Hart Publishing.

Van Rooyen, H.J.N. 2008.

The practitioner's guide to forensic investigation in South Africa. Wierda Park: Henmar.

Vibhute, K. & Aynalem, F. 2009.

Legal Research Methods: Teaching Material. Ethiopia.

Vigoda-Gadot, E. 2000.

Are you being served? The responsiveness of public administration to citizens' demand: An empirical examination in Israel, in Vigoda-Gadot, E. & Cohen, A. (eds) Citizenship and management in public administration: Integrating behavioural theories and managing thinking. Northampton: Edward Elgar.

W

Welman, J.C., Kruger, S.J., & Mitchell, B. 2005.

Research methodology. 3rd Edition. Cape Town: Oxford University Press.

White, P. 2009.

Developing research questions: A guide for social scientists. New York, NY: Palgrave.

ACADEMIC ARTICLES AND PERIODICALS

A

Agbim, K.C. 2018.

Effect of ethical leadership on corporate governance, performance and social responsibility: A study of selected deposit money banks on Benue State, Nigeria. *Informing Science: International Journal of Community Development & Management Studies*, 2:19.

Ades, A. & Tella, R.D. 1996.

The causes and consequences of corruption: A review of recent empirical contributions, in B. Harris-White & G. White (eds) *Liberalization and the New Corruption*. *IDS Bulletin*, 27(2):6.

Alfiler, M.C.P. 1979.

Administrative measures against bureaucratic corruption: The Philippine experience. *Philippine Journal of Public Administration,* 23(3 & 4):321.

Alo, E.N. 2014.

Independent Commission in anti-corruption fights: The Nigeria, Uganda and Botswana examples, 2000–2007. *Journal of Sustainable Development in Africa* 16(2):23

Asghar, J. 2013.

Critical Paradigm: A Preamble for Novice Researchers. *Life Science Journal*, 10(4): 3121.

Awopeju, A., Olowu, S. & Jegede, I. 2018.

Significance of funding the Nigerian anti-corruption agencies: Lessons from Singapore and Hong Kong. *Africa's Public Service Delivery and Performance Review,* 6(1):1.

B

Basdeo, V. 2014.

The Law and Practice of Criminal Asset Forfeiture in South African Criminal Procedure: A Constitutional Dilemma. *PER,* 17(3):1048-1070

Berg, J. 2013.

Civilian oversight of police in South Africa: From the ICD to the IPID. *Police Practice and Research,* 14(2):144.

Bruce, D. 2014.

Control, discipline and punish? Addressing corruption in South Africa. Institute of Security Studies. *S.A. Crime Quarterly*, 48:49.

C

Caldwell, C, Karri, R & Vollmar, P. 2006.

Principal theory and principle theory: Ethical governance from the follower's perspective. *Journal of Business Ethics,* 66(2/3):207.

Corr, F. & Lawler, J. 1999.

Damned if you do, damned if you don't? The OECD Convention and the globalization of anti-bribery measures, *Vand J Transnat'l L* 32:1249

D

Dassah, M.O. 2018.

Theoretical analysis of state capture and its manifestation as a governance problem in South Africa. *Journal for Transdisciplinary Research in Southern Africa,* 14(1):473.

De Kadt, R. & Cupido, E. 2016.

South Africa's democracy in a global context. *Journal of the Helen Suzman Foundation* ,79:14.

Doig, A. 2014.

Roadworks ahead? Addressing fraud, corruption and conflict of interest in English local government. *Local Government Studies,* 40(5):670.

E

Earle, B. 1996.

The United States Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When moral suasion won't work, follow the money argument. *Dickinson J Int'l L, 14:*207.

F

Faul, A. 2008.

Managing corruption in SAPS and metro police departments. *South African Crime Quarterly,* 23:21.

Fazekas, M. & Toth, I. J. 2017.

From corruption to state capture: A new analytical framework with empirical applications from Hungary. *Political Research Quarterly,* 69(2):320.

Fombad, C.M. 2017.

Comparative Research in Contemporary African Legal. *Journal of Legal Education*, Volume, 67(4):984.

G

Gantz, D. 1998.

Globalizing sanctions against foreign bribery: The emergence of a new international legal consensus. *Nw J Int'l L & Bus,* 18:457.

George, B.C., Lacey, K.A. & Birmele, J. 2000.

The 1998 OECD Convention: An impetus for worldwide changes in attitudes toward corruption in business transactions. *Am Bus L J,* 37:485.

Goga, K. 2014.

Taking stock of the last 20 years. *SA Crime Quarterly*, 48:63.

Gumede, V. 2017.

Leadership for Africa's development: Revisiting indigenous African leadership and setting the agenda for political leadership. *Journal of Black Studies,* 48(1):74.

H

Hannman and Keon. 2017.

Ecuna Non Olet Dirty Money as Legal Fees. J*ournal of Anti-Corruption Law*, (1):107.

Hellman, J. & Kaufmann, D. 2001.

Confronting the challenge of state capture in transition economies. *Finance and Development Magazine,* 38(3):5.

Hellman, J.S., Jones, G. & Kaufmann, D. 2002.

Seize the state, seize the day: State capture and influence in transition economies. *Journal of Comparative Economics,* 31:751.

I

Innes, Abby. 2013.

The political economy of state capture in central Europe. JCMS: Journal of Common Market Studies, 52 (1). pp. 88-104.

K

Kebede, G. 2013.

Political corruption: Political and economic state capture in Ethiopia. *European Scientific Journal,* 9(35):250.

Khan, M.T., Khan, N.A. & Ahmed, S. 2012.

Connotation of corruption: Causes and effects. *Universal Journal of Management and Social Sciences,* 2(6):36.

L

Labuschagne, P. 2017.

Patronage, state capture and oligopolistic monopoly in South Africa: The slide from a weak to a dysfunctional state? *Acta Academia,*49(2):51.

Lascoumes, P. & Tomescu-Hatto, O. 2008.

French ambiguities in understanding of corruption: Concurrent definitions. *Perspectives on European Politics and Society,* 9(1):24.

M

Madue, S.M. 2012.

Complexities of the oversight role of legislature. J*ournal of Public Administration,* 47(2):431.

Majila, T., Taylor, J.D. and Raga, K. 2017.

Normative model to alleviate corruption: A synoptic case study of South Africa. *African Journal of Public Affairs,* 9(6):881.

Manyaka, R.K. & Sebola, M.P. 2013.

Ethical Training for Effective Anti-Corruption Systems in the South African Public Service. *Journal of Public Administration,* 48(1):75.

Mao, Y., Wang, C. & Peng, K.Z. 2013.

Breaking institutionalized corruption: Is the experience of the Hong Kong Independent Commission Against Corruption generalizable? *Asia PAC J Management,* 30:1115–1124.

Masiloane, D. & Dintwe, S. 2014.

Developing an anti-corruption strategy for the South African public sector. *Journal of Public Administration,* 49(1):180.

Matsiliza, N. 2013.

Creating a new ethical culture in the South African local government. *Journal of African & Asian Local Government Studies,* 2(3):107.

Mathebula, N. 2014.

Public sector financial management, morality, culture and law. *Journal of Public Administration*, 49(3):936.

Mattes, R. 2002.

South Africa: Democracy without the people? *Journal of Democracy* 13(1): 22.

Mbao, M.L.M. & Komboni, G.G. 2008.

Promotion of good governance and combating corruption and maladministration: The case of Botswana. *Law, Democracy and Development,* 49:71.

Meyer, M.E., Steyn, J. & Gopal, N. 2013.

Exploring the public parameter of police integrity. Policing: An International. *Journal of Police Strategies & Management.* 36(1):14.

N

Naidoo, G. 2012.

A critical need for ethical leadership to curb corruption and promote good governance in the public sector of South Africa. *African Journal of Public Affairs* 5(2):25.

Napal, G. 2006.

An assessment of the ethical dimensions of corruption. *EJBO Electronic Journal of Business Ethics and Organization Studies* 11(1):5.

Nel, J. 2003.

The constitutional rights of children and the Prevention of Organised Crime Act 121 of 1998. 28(1):97.

O

Olaniyan, K. 2004.

Introductory note to African Union (AU): Convention on preventing and combating corruption. *International Legal Materials* 43(1):1.

Othman, Z. & Rahman, R.A. 2014.

Attributes of ethical leadership in leading good governance. *International Journal of Business and Society* 15(2):359.

P

Parman, L. Adi. K, Rodliyah, Djatmika, P.

Penal Individualization Principles of Specific-Minimum Criminal System within Corrupt Criminal Offense in Indonesia. Journal of Law, Policy and Globalization, 24:23.

Peekhaus, W. 2014.

South Africa's Promotion of Access to Information Act: An Analysis of Relevant Jurisprudence. *Journal of Information Policy,* 4:570.

Peter, C.M. & Masabo, J. 2009.

Confronting grand corruption in the public and private sector: A spirited new initiative from Tanzania. *Namibia Law Journal* 1(2):49.

Pienaar, G. 2012.

The methodology used to interpret customary land tenure. *PER/PEL* J, 15(3):152.

Pillay, S. 2004.

Corruption – the challenge to good governance: A South African perspective. *International Journal of Public Sector Management,* 17(7):586.

Pillay, P. 2016.

Ethics and accountability in South African municipalities: The struggle against corruption. *African Journal of Public Affairs*, 9(2): 115.

Puiu, S. 2015.

Ethics management in the public sector – Background and tools. *Procedia Economics and Finance,* 23:604.

Q

Quah, J.S.T. 2009b.

Defying institutional failure: Learning from the experiences of anti-corruption agencies in four Asian countries. *Crime Law Soc Change,* 53 (1):23.

Quah, J.S.T. 2015.

Singapore's Corrupt Practices Investigation Bureau: Four suggestions for enhancing its effectiveness. *Asian Education and Development Studies,* 4(1):76.

S

Schoeman-Malan, M.C. 2007.

Recent developments regarding South African common and customary law of succession. *PER/PEL J,* (10)1:107.

Schroth, P.W. 2005.

The African Union Convention on preventing and combating corruption. *Journal of African Law,* 49(1): 24.

Scott, I. 2013.

Institutional design and corruption Prevention in Hong Kong. Journal of Contemporary China, 22(79):77.

Sebola, M.P. 2014.

Ethics in the South African Public Service: A paradox of culture, politics and ethics in the world of work. *J Soc Sci*, 40(3):295.

Serfontein, E. 2015.

The corruption bogey in South Africa: Is public education safe? *South African Journal of Education,* 35(1):1.

Shai, K.B. 2017.

South African state capture: A symbiotic affair between business and state going bad *Insight on Africa,* 9(1):62.

Sibanda, O. 2003.

Unplug your ears and speak out: Protected Disclosures Act 26 of 2000. *The Judicial Officer,* 5:149.

Sibanda, O. 2005.

The South African corruption law and bribery of foreign public officials in international business transactions: A comparative analysis. *South African Journal of Criminal Justice,* 18(1):1.

Sibanda, O. 2006. Aantekeninge: Die uitwerking van Suid-Afrika se wetgewing teen korrupsie op internasionale besigheid en handel. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg,* 69:146.

Sibanda, O. 2008.

Jurisdictional arrest of a foreign Peregrinus now unconstitutional In South Africa: Bid Industrial Holdings v Strang. *Journal of Private International Law,* 4(2):329.

Snider, T. R. & Kidane, W. 2007.

Combating corruption through international law in Africa: A comparative analysis. *Cornell International Law Journal,* 40(3):692.

T

Thonzhe, N. & Vyas-Doorgapersad, S. 2017.

The Roles of Organisational Ethics with the South African Public Service. 2017. *International Journal of Business and Management Studies,* 9(2):137.

Thornhill, C. 2015.

Accountability a Constitutional Imperative. *Administratio Publica*, 23(1):77.

Tudoroiu, T. 2013.

Democracy and state capture in Moldova. *Democratization,* 22(4):655.

V

Van Tankeren, M., & Van Montfort, A. 2012.

Schieten we er ook wat mee op? De effectiviteit van het integriteitsbeleid van de Nederlandse politie. (Does it get us anywhere? The effectiveness of the integrity policy of the Dutch police force) *Cahiers Politiestudies*, 3(24):131.

Vettori, S. 2009.

The role of the Protected Disclosures Act as an indirect means of monitoring employer obligations. *SA Mercantile Law Journal*, 21:291.

W

Walton, G. 2015.

Defining corruption where the state is weak: The case study of Papua New Guinea. *Journal of Development Studies*, 51(1):15.

Wolf, L. 2017.

The remedial action of the State of Capture Report in perspective. *PER / PEL J,* 20:2.

INTERNET SOURCES

A

Audit Commission, Hong Kong. 2013.

Preventative education and enlisting public support against corruption. ICAC. http://www.aud.gov.hk (Accessed 02/12/2014).

C

Chabalala, J. 2018.

Court rules in favour of IPID in case against North West police officials. https://www.news24.com/SouthAfrica/News/court-rules-in-favour-of-ipid-in-case-against-north-west-police-officials-20180628 (2018.06.28) (Accessed 30/05/2017).

Cheteni, P. & Shindika, E.S. 2017.

Ethical leadership in South Africa and Botswana. Brazilian Administration Review 14(2). http://dx.doi.org/10.1590/1807-7692bar2017160077 (Accessed 27/08/2018).

Condrey M. 2008

A Comparative review of sentencing practices and norms for crimes of corruption: France, Germany, Hungary, Ireland, United Kingdom, and United States. ABA-CEELI, http://old.csm1909.ro/csm/linkuri/28_01_2008__13797_en.pdf (accessed 20/12/2018)

H.

Hoffman, P. 2017.

An Anti-Corruption Court and TRC for the corrupt – really? Daily Maverick. https//www.dailymaverick.co.za/opinioninsta/2017-10-19-a (Accessed 06/11/2017).

Hoffman, P. 2019.

Poplak is quite wrong about the State Capture Investigative Directorate. Daily Maverick. 11 February 2019. https://www.dailymaverick.co.za/opinionista/2019-02-11-poplak-is-quite-wrong-about-the-state-capture-investigative-directorate/ (Accessed 12/02/2019).

Hong Kong. 2015.

Annual Report of the Ombudsman, Hong Kong. https://tradingeconomics.com/south-africa/corruption-index (Accessed 25/01/2019).

I

ICIC. 2015.

Hong Kong: The facts. http://www.ICAC.gov.hk (Accessed 19/04/2016).

Institute of Company of Secretaries of India. 2018.

Thought Leadership. Chandu Press/ 200/January 2018

J

Janse van Rensburg, A. 2018. PID vs SAPS: Stepping over the thin blue line. https://www.news24.com/Columnists/AletJvRensburg/the-ipidsaps-legal-conundrum-20170526. (Accessed 2017/05/26).

L

Liu, X.Z. 2016.

A literature review on the definition of corruption and factors affecting the risk of corruption. *Open Journal of Social Sciences* 4:171–177.

M

Maharaj, B. 2017.

South Africa: A mafia shadow state? Daily Maverick. Dailymaverick.co.za/Opinioninsta/2017-05-21-south-africa-a-mafia-shadow-state/WW4JioVOLIU (Accessed 18/07/2017).

Malunga, K. 2015.

Whistle-blowing in South Africa, https://www.outa.co.za/wp-content/uploads/2016/08/Whistle-blowing-in-South-Africa27-Jan-2015.pdf (Accessed 4/6/2018).

Man-wai, T. 2006.

Formulating an effective anti-corruption strategy – the experience of Hong Kong ICAC. Resource Material Series No. 69. http://www.unafei.or.jp/_lean-u/pages/PublicationsRMS.htm (Accessed 23/06/2014).

Mau, K. 2015.

The role of forensic investigation professionals in the prevention of fraud and corruption in developing countries. https://ssrn.com/abstract=2605811 or http://dx.doi.org/10.2139/ssrn.2605811 (Accessed 30/05/2017).

Q

Quah, J.S.T. 2009a.

Combatting corruption in Asia-Pacific countries: What do we know and what needs to be done? International Public Management Review 10(1). International Public Management Network http://www.ipmr.net (Accessed 30/05/2017).

R

Reddy, J. 2017.

South Africa urgently needs ethical leaders. Mail & Guardian, 04 May, https://mg.co.za/article/2017-05-04-00-south-africa-urgently-needs-ethical-leaders (Accessed 30/05/2017).

Republic of South Africa (RSA). 2016.

State capture. Office of the Public Protector, http://www.pprotect.org/?q=content/public-protector-welcomes-appointment-commission-inquiry-state-capture. (Accessed 03/11/2016).

S

Sibanda OS. 2019a

SA needs to reverse its shockingly low score on Corruption Perceptions Index. Daily Maverick 3 February 2019a, https://www.dailymaverick.co.za/opinionista/2019-02-03-sa-needs-to-reverse-its-shockingly-low-score-on-corruption-perceptions-index/ (Accessed 07/02/2019).

South Africa. ANC. 943.

Constitution, http://www.ANC Constitution.org (Accessed 18/07/2017). South Africa

South Africa History Online. 2018.

https://www.sahistory.org.za/ (Accessed 30/11/2018).

T

South Africa. 2017.

The National Development Plan 2030: Our future - make it work, https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf. (Accessed 22/10/2017).

Z

Zulu, M. 2019.

The Citizen: Agrizzi and others arrested by the Hawks granted R20k bail. https://citizen.co.za/news/south-africa/crime/2077927/update-agrizzi-and-others-arrested-by-the-hawks-granted-r20k-bail/ (Accessed 18/02/2019).

DISSERTATIONS AND MONOGRAPHS

A

Ahlers, C. 2013.

South African Money-laundering Regulatory Framework Relevant to Politically Exposed Persons. MPhil: University of Pretoria.

B

Basdeo, M. 2013.

Search, Seizure and Asset Forfeiture in the South African Criminal Justice System: Drawing a Balance between Public Utility and Constitutional Rights. LLD Thesis, University of South Africa

D

De Jager, N.L. 2009.

Voice and accountability in a one-party dominant system: A comparative case study of Mexico and South Africa. LLD Thesis, University of Pretoria.

K

Kanyane, M.H. 2005.

Conflict of interest in South Africa: A comparative case study. Doctor of Administration thesis. Pretoria: University of Pretoria.

Kekae, T. 2017.
An evaluation of the public service anti-corruption strategy in the Department of Arts and Culture. MPhil Thesis, UP.

L

Lebeya, G. 2012.
Defining organised crime: a Comparative analysis, LLD Thesis, University of South Africa.

Lekubu, B.K. 2015.
Manifestations of Corruption in the City of Tshwane Municipality. MTech. University of South Africa.

M

Montesh, M. 2007.
A Critical Analysis of Crime Investigative System within the South African Criminal Justice System: a comparative study. DLitt. University of South Africa.

O

Ogundokun, O.A. 2005.
A human rights approach to combating corruption in Africa: Appraising the AU Convention using Nigeria and South Africa. LLM Mini-Dissertation. Centre for Human Rights. University of Pretoria.

Okechukwu, B.O. 2012.
Ethical leadership and good governance in Nigerian local governments. PhD thesis. Nigeria. Walden University, Department of Public Policy and Administration.

R

Rajin, R.G.D. 2017.
A model for the prevention of corruption and corruption-related offences at Gauteng police stations. 2017. DLitt Philosophy: University of South Africa.

S

Selabe, B.C. 2015.

The independence of the National Prosecuting Authority of South Africa: Fact or fiction? MPhil thesis. Bellville: University of Western Cape, Department of Criminal Justice and Procedure, Faculty of Law.

Sibanda, G.M. 2015.

Student teachers' perceptions and expectations of the teaching profession in a South African University. M Ed: University of Pretoria.

X

Xhati, N. 2016.

The impact of Public Finance Management Act in advancing the organisational objectives of the North-West Department of Education. MBA Thesis: North-West University.

OTHERS: REPORTS, OCCASSIONAL PAPERS, DISCUSSION PAPERS, CONFERENCE PAPERS, SEMINARS, MONOGRAPHS

B

Badet, G., Damiba, L., Engueléguélé, S.B., Gaima, E., Lwuamadi, C.K., Ndiaye, S. & Williams, S. 2016.

Effectiveness of anti-corruption agencies in West Africa: Benin, Liberia, Niger, Nigeria, Senegal and Sierra Leone. A review by the Open Society Initiative for West Africa (OSIWA). New York, NY. Open Society Foundation.

Bhorat, H., Buthelezi, M., Chipkin, I., Duma, S., Mondi, L., Peter, C., Qobo, M., Swilling, M., & Friedenstein, H. [independent journalist – pseudonym]. 2017.

Betrayal of the promise: How South Africa is being stolen. South Africa. State Capacity Research Project.

C

Camerer, L. 1999.

Tackling the multi-head dragon: Evaluating prospects for a single anti-corruption agency in South Africa. Occasional paper No. 38, March. South Africa. Institute for Security Studies.

D

Davie, E. 2013.

Comment on the Mineral and Petroleum Resources Development Amendment Bill: Amendments to the Mineral and Petroleum Resources Development Act, 2002, as amended by the Mineral and Petroleum Resources Development Act, 2008 (Act No. 49 of 2008). Cramerview: The Free Market Foundation.

DPSA. 2013.

Presentation by Minister for Public Service and Administration to the Portfolio Committee on Public Service and Administration. 05 June. Government Printers.

F

Funke, N. & Solomon, H. 2002.

The shadow state in Africa: A discussion. DPMF Occasional Paper No. 5. Development Policy Management Forum, Addis Ababa. Ethiopia

H

Hanna, R., Bishop, R., Nadel, S., Scheffler, G. & Durlacher, K. 2011.

The effectiveness of anti-corruption policy: What has worked, what hasn't, and what we don't know. Technical report. London: EPPI Centre, Social Science Research Unit, Institute of Education, University of London.

K

KPMG. 2016.

The impact of corruption: Tackling corruption could reap significant benefits for the South African economy. South Africa. KPMG South Africa.

Kututwa, N. 2005.

African anti-corruption commitments: A review of eight NEPAD countries. South Africa. African Human Security Initiative. Paper 7. Publisher: The African Human Security Initiative.

L

Landsberg, C., Mackay, S., Madonsela, T., Louw, R., Makgetla, N., Autry, R., Lehman, K., de Vos, P., Ngwena, C., Brand, D., Mosdell, T., de Villiers, N., Varieva, F., Gutto, S., Feris, L., Fernandez, L., February, J., Motala, A., Klaaren, J., Thipanyane, T. and Albertyn, C. 2006.

Reflections on democracy and human rights: A decade of the South African Constitution (Act 108 of 1996). Parktown, Johannesburg: South African Human Rights Commission.

Lewis, C. 2005.

A mixed legal system with a constitution on top: South African law in the era of democracy. *Amicus Curiae* 57: January/February.

Liberati, E.B. 2000.

“Inquires, prosecutions and penalties in corruption cases,” 5th European Conference of specialized services in the fight against corruption, 15-17 November 2000, Istanbul (Turkey).

M

Madonsela, T. 2010.

Corruption and governance challenges: The South African experience. Paper address to the National Conference on Corruption

and Governance Challenges, Nigeria, 21 January. Pretoria: Government Printer.

Maharaj, M. 2008.

The ANC and South Africa's negotiated transition to democracy and peace. Berghof Transitions Series No. 2. Berlin: Berghof Research Center for Constructive Conflict Management.

Mireku, O. N.D. 2007.

Three most important features of the South African legal system that others should understand. Paper addressed at the IALS Conference. Learning from each other: Enriching the Law School curriculum in an interrelated world. Thohoyandou: University of Venda.

Mlungwana, P. & Ukwazi, N. 2016.

Social Justice Coalition and Ndifuna Ukwazi. If we allow state capture, the fight against inequality will be lost. Social Justice Coalition and Ndifuna Ukwazi. South Africa.

Motau, T. 2018.

VBS Mutual Bank – The Great Bank Heist Report.

Mpabanga, D. 2009.

Promoting the effectiveness of Democracy Protection institutions in Southern Africa. EISA Research Report no. 44. Botswana: Office of the Ombudsman.

N

Naidoo, V. 2012.

The politics of anti-corruption enforcement in South Africa. Paper addressed at the XXII IPSA World Congress of Political Science. Madrid, Spain.

Nwokorie, E.C. & Viinamaki, O. 2017.

Legitimacy building of anti-corruption agencies in five countries. OECD Global Anti-Corruption & Integrity Forum. Vaasa, Finland: University of Vaasa.

O

Okpokwu, T. 2016.

Leadership and corruption in governance: A case study of Liberia. Capstone collection. Paper 2897. SIT Graduate Institute.

P

Pereira, P.G., Lehmann, S., Roth, A & Attisso, K. 2012.

South African anti-corruption architecture. International Centre for Asset Recovery (ICAR). Basel, Switzerland: Basel Institute of Governance.

Q

Quah, J.S.T. 2017.

Anti-Corruption agencies in Asia-Pacific countries: An evaluation of their performance and challenges. Transparency International.

R

Republic of Botswana. 1991.

Botswana: Presidential Commission of Inquiry into Land Problems in Mogoditshane and other Peri-urban Villages. 1991. Report of the Presidential Commission of Inquiry into land problems in Mogoditsane and other peri-urban villages near Gaborone. Gaborone,Botswana. Government Printer.

Republic of Botswana. 1992.

Report of the Presidential Commission of Inquiry into the operations of the Botswana Housing Corporation. Gaborone: Government Printer.

Republic of Botswana. 1991.

Report of the Presidential Commission of Inquiry into the supply of school books and materials in primary schools for the 1990 school year. Gaborone: Government Printer.

Republic of South Africa (RSA). 2007.

Report of the Ad-hoc Committee on the Review of Chapter 9 and Associated Institutions. Cape Town, South Africa: National Assembly of the Parliament of South Africa.

Republic of South Africa (RSA). 2009.

Gauteng Anti-Corruption Campaign 2009. Gauteng, South Africa.

Republic of South Africa (RSA). 2015.

Corruption Watch 2015 Annual Report. Amp up the Volume: Bua Mzansi. South Africa.

Republic of South Africa (RSA). 2013.

South Africa's position in BRICS. Pretoria: Gauteng Province: Provincial Treasury.

S

Saba, S. & Smit, S. 2019.

McBride on Crime cluster capture, Mail and Guardian 15 – 21 February 2019.

Sebudubudu, D. 2013.

The Evolving State of Corruption and Anti-Corruption Debates in Botswana: Issues in Good Governance. University of Botswana, GIGA, German Institute of Global and Area Studies.

Seedat, S. 2015. The South African Parliament in 2015. A paper commissioned by the Council for the Advancement of the South African Constitution (CASAC). South Africa. Open Society Foundation of South Africa.

South Africa. ANC. 2014.

Election Manifesto: Together we move South Africa Forward. African National Congress, Marshalltown.

South Africa. ANC. 2017.

5th National Policy Conference. Legislature and Governance Discussion Document. The year of Oliver Reginald Tambo: Let us deepen unity. 30 June–5 July, Gallagher Convention Centre, Midrand.

Stapenhurst, R., Johnston, N. & Pelizzo, R. 2006.

The role of parliament in curbing corruption. Washington, DC: The World Bank.

T

The Institute of Directors in Southern Africa NPC. King IV: 2016.

Report on corporate governance for South Africa 2016. South Africa.

Transparency International. 2018.

Corruption Perceptions Index 2017. Berlin. Transparency International.

U

UNDP. 2009.

Methodology for assessing the capacities of anti-corruption agencies to perform preventative functions. Bratislava: UNDP Regional Centre.

United Nations. 1997.

Professionalism and ethics in the public service: Issues and practices in selected regions. New York, NY: ST/ESA/PAD/SER.E/5

V

Van Vuuren, H. 2006.

Apartheid Grand Corruption: Assessing the scale of crimes of profit in South Africa from 1976–1994. Cape Town: Institute for Security Studies.

Van Vuuren, H. 2014.

South Africa: Democracy, corruption and conflict management. Paper delivered at the Democracy Works Conference. South Africa. Centre for Development and Enterprise.

W

Wei, D.T.W. 2016.

The Practitioner's Guide for Assets Forfeiture in Singapore. Attorney General Chamber Singapore.

Weylandt, M. 2017.

Institute for Public Policy Research: Briefing paper. Namibian Anti-Corruption Strategy 2016-2019: An Overview and Analysis.

Whitton, H. 2001.

Implementing effective ethics standards in government and the civil service. Transparency International.

Wong, A.H.Y. 2003.

Anti-corruption strategy of the Hong Kong Special Administrative Region of the People's Republic of China. Paper delivered at the 4th Regional Anti-Corruption Conference in Kuala Lumpur, Malaysia, 3–5 December.

World Bank. 2017.

World Development Report, 2017: Governance and the law. NW, Washington, DC. World Bank Group.

TABLE OF CASES

A

Apprendi v. New Jersey, 530 U.S. 466 (2000)

B

Boucher v The Queen (1955) 110 CCC 263

Brümmer v Minister for Social Development and Others 2009 (6) SA 323 (CC).

C

Carmichele v Minister of Safety and Security and Others 2002 (1) SACR 79 (CC) at 82H-I

Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others [2018] 1 All SA 471 (GP)

D

Democratic Alliance v The President of the RSA & Others (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2013 (3) BCLR 291 (SCA) (1 December 2011)

Director of Public Prosecutions: Cape of Good Hope v Bathgate [2000] JOL 5890 C

E

Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC)

F

Famanda v State (930/2017) [2018] ZASCA 139 (SCA),

Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae) 2007 (3) BCLR 219 (CC)

G

Glenister v the President of the Republic of South Africa and Others (Glenister II)

H

Helen Suzman Foundation v President of the Republic of South Africa and Others

Ho Kang Peng v Scintronix Corp Ltd [2014] SGCA 22

I

Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC); [2001] ZACC

K

Kaplan v Incorporated Law Society, Transvaal 1981 (2) SA762 (T)

L

Libretti V United States 516 U.S. 29 [1995]

Lameck & another v President of the Republic of Namibia & others 2012 (1) NR 255 (HC)

M

Mofomme v State Case No: A812/2016 (9/11/2017)

Mohamed v President of RSA 2001 (3) SA 893 CC

McBride v Minister of Police and Another [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP)

Minister of Home Affairs v The Public Protector (308/2017) [2018] ZASCA 15 (15 March 2018)

N

Nakedi v S (A173/2016) [2018] ZAFSHC 36

NDPP v Byriacou 2003 (2) SACR 524 (SAC)

NDPP v Geyser 2008 ZASCA 15 [25 March 2008]

NDPP v Rautenbach 2005 (1) SACR 530 (SCA)

National Director of Public Prosecutions and Another v Mohamed NO and Others 2003 (5) BCLR 476 (CC)

O

Olmstead et al., v United States

P

Phillips v The State (370/2016) [2016] ZASCA 187

Phillips and Others v National Director of Public Prosecutions 2006 (2) BCLR 274 (CC)

President of the Republic of South Africa and Others v M & G Media Limited 2011 (2) SA 1 (SCA)

Prophet v National Director of Public Prosecutions 2007 (2) BCLR 140 (CC)

Public Protector v Mail and Guardian Ltd & others 2011 (4) SA 420 (SCA); [2011] ZASCA 108

Public Prosecutor v Syed Mostafa Romel [2015] 3 SLR 1166

Public Prosecutor v Taw Cheng Kong [1998] 2 SLR 410

R

R v De Kock 1914 EDL 348

R. v. Gonsalves-Barriero, [2012] O.J. No. 4369 (Ct. J.)

R v Gyles, [2003] OJ No 6249

R. v. Macaluso, 2006 QCCS 2301

R. v. MacInnis (1991), 95 Nfld. & P.E.I.R. 332 (S.C.)

R v Murray, 2010 NLTD 44

Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others [2018] 1 All SA 471 (GP)

S

S v Bothma 1971 (1) SA 332 (C) at 344F

S v Chogugudza 1996 (1) SACR 477 (ZS)

S v Dodo 2001 (5) BCLR 423 (CC)

S v Dukaza, Sv Tilly, S v Tshilo 2000(2) SACR 443(CC)

S v Jansen 1999 (2) SACR 368 (C)

S v Langa 1996 (2) SACR 153 (N)

S v Majavu 1994 (2) SACR 265 (CK)

S v Marx and Another 1996 (2) SACR 140 (W) at 148f – i)

S v Melani 1996 (1) SACR 335 (E) at 348 (i)

S v Mofokeg 1990 (1) SACR 502 (W)

S v Mthethwa 2004 (1) SACR 449 (E)

S v Narker & Another 1975 (1) SA 583 (A)

S v Ndlovu 1997 (12) BCLR 1785 (N)

S v Orrie and Another 2005 (1) SACR 63 (C)

S v Sadler 2000 (1) SACR 331 (SCA)

S v Sebejan 1997 (1) SACR 626 (W)

S v Selebi (25/2009) [2010] ZAGPJHC 58

S v Shaik and Others [2006] ZASCA 105; 2007 (1) SA 240 (SCA)

S v Shaik and Others 2007 (1) SA 248 (SCA)

S v Shaik and Others 2008 (8) BCLR 834 (CC)

S v Takaendesa 1972 (4) SA 72 (R.,A.D.)

S v Tilly, S v Tshilo 2000(2) SACR 443(CC)

S v Tshopo and Others (29/12) [2012] ZASCA 193

S v Van der Merwe 1998 (1) SACR 194 (O)

S v Yengeni [2005] ZAGPHC 117; 2006 (1) SACR 405 (T)

State v Johannes Hermanus Engelbrecht

State v Samuel Mzukisi Banzana

Savoi and Others v National Director of Public Prosecutions and Another [2014] ZACC 5

Southern Union Co. v. United States, 132 S. Ct. 2344 (2012),

Swifambo Rail Leasing v PRASA (1030/2017) [2018] ZASCA 167

U

United States of America v Bridget McCafferty, 2012 US Lexis 11247 (6th Cir 2012)

United States v Bajakajian 524 U.S 321 [1998)

US v Booker

United States of America v Richard G Renzi, 769 F (3d) 731

Z

Zuma v National Director of Public Prosecutions (2009] 1 All SA 54 (N); (8652/08) (2008] ZAKZHC 71; 2009 (1) BCLR 62 (N)

STATUTES AND OTHER LEGAL INSTRUMENTS

SOUTH AFRICA

C

Constitution of the Republic of South Africa of 1996

Corruption Watch South Africa

Commonwealth Africa Anti-Corruption Centre

Comprehensive Law Enforcement Accountability System

Criminal Law Amendment Act 105 of 1997

D

Drugs and Drug Trafficking Act 140 of 1992

I

Independent Police Investigative Directorate

L

Local Government Ethics and Integrity Directorate

M

Municipal Financial Management Act

Mutual Assistance in Criminal Matters Act

N

National Ethics and Integrity Directorate

O

Office of the Auditor General South Africa

Office of the Public Protector

P

Proceeds of Crime Act 76 of 1996

Provincial Financial Management Act

Provincial Government Ethics and Integrity Directorate

S

South African Human Rights Commission

South African Police Service

Special Anti-Corruption Unit

Special Investigating Unit

Special Investigating Units and Special Tribunals Act No 74 of 1996

INTERNATIONAL

A

African Union Convention against Corruption

F

Federal Rules of Criminal Procedure

I

Independent Civilian Body

International Anti-Corruption Cooperation Centre

O

OECD Anti-Bribery Convention

OECD Anti-Corruption Convention

P

Proceeds of Serious Crime Act 19 of 1990 (Botswana)

S

SADC Protocol against Corruption

U

United Nations Convention against Corruption

United States Code 18 U.S.C.

REGIONAL / CONTINENTAL

A

African Charter on Values, Principles of Public Service, and Administration, AVAILABLE AT https://au.int/en/treaties/african-charter-values-and-principles-public-service-and-administration. (Accessed 20/06/2018)

C

Constitution of the Republic of South Africa of 1996

Prevention and Combatting of Corruption Activities Act

FOREIGN LEGISLATION

P

Prevention of Corruption Ordinance

ANNEXURE A: EDITORIAL CONFIRMATION

JILL BISHOP LANGUAGE PRACTITIONER

12 WESTBROOKE
VOORTREKKER ROAD
BRIDGEWATER
SOMERSET WEST
7130

e-mail: jill.bishop@absamail.co.za
Full member: Professional Editors' Group
Cell: 083 989 4655
LinkedIn: http://lnkdn/zJhF2Z

CERTIFICATE

25 February 2019

TO WHOM IT MAY CONCERN

PhD Thesis: *A critique of South African anti-corruption strategies and structures: A comparative analysis*

Author: Bernard Khotso Lekubu

I certify that I copy-edited the above document for layout, grammar, spelling and punctuation. Citations in the text were reconciled with the accompanying Reference List. The writer was provided with corrections/amendments/suggestions which required action.

It is the author's prerogative to accept or reject the suggested changes. The final copy submitted for examination purposes is the responsibility of the author.

JM Bishop MA

Full member of the Professional Editors' Guild

ANNEXURE B: TURN-IT-IN REPORT

ANNEXURE 3: UNISA ETHICS APPROVAL