A CRITICAL ANALYSIS OF CRIME INVESTIGATIVE SYSTEM WITHIN THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM: A COMPARATIVE STUDY

by

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DEDICATION

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ABSTRACT

With the establishment of the Directorate of Special Operations (Scorpions), the Asset Forfeiture Unit (AFU), the Special Investigating Unit (SIU) and the Departmental Investigating Unit (DIU), questions were asked as to whether this is a creation of new units of the Police Service. These questions were exaggerated by the fact that the media uses the term “Scorpions” whenever the Scorpions, the AFU, SIU and the DIU perform their functions.

South African legislation that governs organised crime does not demarcate activities to be dealt with by the SAPS, AFU, DIU, Scorpions and the SIU. The Constitution of South Africa lays down the objects of the police, but it is silent about the objectives of the Scorpions, AFU, SIU, DIU and other investigative institutions except that it only mentions the creation of a single National Prosecuting Authority (NPA).

A literature study was used as the basis for this study. In addition, unstructured interviews and observation were used to gather evidence from the relevant stakeholders. An analysis of the SAPS Detective Service, the Special Investigating Unit (SIU), the Scorpions, the Departmental Investigating Unit (DIU) of the Department of Correctional Services and the Asset Forfeiture Unit (AFU), was done in order to establish the overlapping of functions.

Indeed, overlapping was discovered between the Scorpions and the SAPS Detective Service, the AFU and the SIU, as well as between the SAPS and the DIU. In order to make a proper finding, an analysis was done of anti-corruption agencies in Botswana, Nigeria, Malawi and Hong Kong. The findings indicate that the better way of fighting corruption, fraud, economic and financial crimes, is through the establishment of a single agency that will work independently from the police, with a proper jurisdiction.

OPSOMMING

Met die totstandkoming van die Direktoraat vir Spesiale Operasies (Skerpioene) en die Batebeslagleggingseenheid (BBE), die Eenheid vir Spesiale Ondersoeke (ESO) en die Eenheid vir Departementele Ondersoeke (EDO) is vrae gevra oor of hierdie skeppings nuwe eenhede vir die polisiediens is. Hierdie vrae is versterk vanweë die feit dat die media die term “Skerpioene” gebruik wanneer die Skerpioene, die BBE, die ESO en die EDO hulle funksies verrig.

Die Suid Afrikaanse wetgewing wat georganiseerde misdaad beheer, baken nie die aktiwiteite af wat die SAPD, die BBE, die ESO, die Skerpioene en die EDO aandag aan moet gee nie. Die grondwet van hierdie land bepaal die doelwitte van die polisie, maar rep geen word oor die doelwitte van die Skerpioene, die BBE, die ESO en ander ondersoekinstansies nie, behalwe dat daar slegs melding gemaak word van ‘n enkele Nasionale Vervolgingsgesag.

‘n Literatuurstudie is gebruik as basis vir hierdie studie. Saam daarmee is ongestruktureerde onderhoude en waarnemings gebruik om bewyse van die betrokke rolspelers te verkry. ‘n Analise is gemaak van die SAPD Speurdienseenheid, die Eenheid vir Spesiale Ondersoeke (ESO), die Skerpioene, die Eenheid vir Departementele Ondersoke (EDO) van die Departement Korrektiewe Dienste en die Batebeslagleggingseenheid (BBE) om sodoende die oorvleueling van funksies te bepaal.

Oorvleueling tussen die Skerpioene en die SAPD Speurdienseenheid, die BBE en die ESO sowel as tussen die SAPD en die EDO is inderdaad vasgestel. Ten einde ‘n behoorlike bevinding te maak, is ‘n analise van die antikorrupsie-agente in Botswana, Nigerië, Malawi en Hong Kong gemaak. Uit die bevindings blyk duidelik dat die beste manier om korrupsie, bedrog, ekonomiese en finansiële misdade te bekamp, die daarstelling van ‘n enkele agentskap is wat onafhanklik van die polisie werk en oor sy eie jurisduksie beskik.

KEY CONCEPTS

- Criminal Justice System
- Investigative model
- Accusatorial investigative system
- Inquisitorial system
- Prosecution-led investigation
- Anti-corruption agency
- Crime investigation
- Intelligence-driven investigation
- Federal state
- Unitary state
- Troika system

ABBREVIATIONS

ACB: Anti Corruption Bureau (Malawi)
ACA: Anti-Corruption Agency (Malaysia)
ACC: Anti-Corruption Commission (Swaziland)
ACC: Anti-Corruption Commission (Zambia)
ACC: Anti-Corruption Commission (Zimbabwe)
ACS: Anti-Corruption Squad (Tanzania)
ANC: African National Congress
AFU: Asset Forfeiture Unit
AZANLA: Azanian People's Liberation Army
AZAPO: Azanian People's Organization
BPP: Best Practice Packages
BAC: Business Against Crime
CEO: Chief Executive Officer
CODESA: Congress for Democratic South Africa
CIA: Central Intelligence Agency

CPF: Community Police Forum

CPAC: Corruption Prevention Advisory Committee

CPB: Community Police Board

CTB: Central Tender Board and the Ombudsman

DCS: Department of Correctional Service

DCEC: Directorate on Corruption and Economic Crimes

DCEO: Directorate on Corruption and Economic Offences

DSO: Directorate of Special Operations

EFCC: Economic and Financial Crimes Commission

FBI: Federal Bureau of Investigation

FIC: Financial Intelligence Centre

HAAC: High Authority Against Corruption

ICAC: Independent Commission Against Corruption

ICD: Independent Complaints Directorate

MK: uMkhonto we Sizwe

MI: Military Intelligence

NDPP: National Director of Public Prosecution

NGO: Non-Government Organization

NIA: National Intelligence Agency

NICOC: National Intelligence Coordinating Committee

NPA: National Prosecuting Authority

NPA: National Peace Accord

NQF: National Qualification Authority

OIC: Office of the Interception Centre

OLP: Operations Liaison Group

ORC: Operations Review Committee

OSEO: Office of the Serious Economic Offences

PAC: Pan African Congress

PCB: Prevention of Corruption Bureau

POCA: Prevention of Organized Crime Act

PSIRA: Private Security Industry Regulating Authority

PSC: Public Service Commission

QRT: Quick Response Team

SADC: Southern African Development Community

SANDF: South African National Defense Force

SAPS: South African Police Service

SARPCO: Southern African Police Chiefs Organisation

SARS: South African Revenue Services

SASS: South African Secret Services

SASSETA: Safety and Security Sectoral Education and Training Authority

SIU: Special Investigating Unit

TBVC: Transkei, Bophuthatswana, Venda and Ciskei

TEC: Transitional Executive Council

UDF: United Democratic Front

UN: United Nations

USA: United States of America

USSR: Union of Soviet Socialist Republic

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1.1 INTRODUCTION

Before 1994, the three legs of the criminal justice system consisted of the Department of Prisons, Department of Law and Order and the Department of Justice. In terms of this arrangement, the office of the Attorney General (AG) did not have investigative powers, as opposed to post-1999 when the National Prosecuting Authority (NPA) was established. The same applies to the Department of Prisons as opposed to the Department of Correctional Services (DCS).

As a result of the promulgation of the Interim Constitution Act on the 27th of April 1994, a lot of changes were introduced within the South African Criminal Justice System. Some of the radical changes included the adoption of the Bill of Rights, which had an impact on the admissibility of confessions and admissions by the courts, and the move from reactive policing to proactive policing which had an impact on the functioning of the Criminal Justice System (CJS). It is of primary importance to indicate that before 1994 most of the government's resources were used to fight the so-called terrorists or freedom fighters.

All these approaches changed after 1994. With the introduction of the Bill of Rights and the abolition of the death penalty, a perception was created in the public that the government had become too soft on criminals. (One should remember that in **S *v* Makwanyane 1995 (3) SA 391 (CC)** the Constitutional Court held that the death penalty was unconstitutional because it infringed section 33 of the Interim Constitution Act which safeguarded the right to life).

This view regards the introduction of the Bill of Rights as the reason for the rise in crime in South Africa. However, another view of the same problem is that people started to accept the police, due to its legitimacy, and started reporting crimes without fear. This can be illustrated by the increase in population of inmates from 111 798 in 1993 to 181 944 in 2002 (http://www.dcs.gov.za). The continued public confidence in the police resulted in a number of crimes being reported, and has been interpreted in many quarters of South African society as the escalation of crime. For the first time in South Africa, the police's authority has been included in the Constitution, down to the South African Police Act 68 of 1995.

This arrangement also culminated in a shift in policing, from police force to police service (Cawthra, 1993:204). As a major focus of maritime trade and air traffic between Asia, Europe and the Western Hemisphere, South Africa also emerged as a significant hub of criminal activity.

The lifting of international trade sanctions with the end of apartheid has made South Africa readily accessible to international criminals whose operations take place within the framework of legitimate commercial business activities. South Africa's modern airports and harbours, including the container ports at Durban, Cape Town, Port Elizabeth and East London, are attractive to criminals smuggling narcotics and other contraband. For criminal organisations South Africa also has the advantage of a modern financial system linked to financial markets worldwide, which facilitates money laundering (Redpath, 2004:12).

And, as happened in Russia, criminals recruit professionals with skills well suited to competing in the modern business environment, who were pushed aside or sidelined by the political and economic changes taking place in South Africa.

Foreign organised groups, primarily Nigerians, Russians, Italians and Chinese syndicates, have established bases of operations since the mid-1990s for a variety of illegal activities, including drug trafficking, poaching, arms smuggling, trafficking in endangered species, human trafficking, vehicle theft, money-laundering and other financial crimes (http://www.saps.gov.za).

Due to all these problems, the government also initiated a number of crime combating initiatives including the National Crime Prevention Strategy of 1996, the National Crime Combating Strategy of 1998, the White Paper on Safety and Security of 1998-2003, the Integrated Justice System (IJS), the adoption of the Prevention of Organised Crime Act (POCA) 121 of 1998, the adoption of the National Prosecuting Authority Act 32 of 1998, and the National Prosecuting Authority Amendment Act 61 of 2000, as well as other initiatives. All these transformational arrangements have resulted in changes in the investigation of crime.

Before 1994, the investigation of crime was the sole responsibility of the South African Police Service (SAPS), but with the introduction of various initiatives, a number of institutions within the Criminal Justice System (CJS) have joined the investigative fraternity. The concern in this arrangement is the lack of uniformity with regard to different mandates.

There seems to be a lot of confusion as to who does what, because various legislative arrangements are silent about specific functions for a specific institution, including the guidelines on cooperation and communication among various institutions. The investigative powers of the investigators were also affected, and changed as a result of these transformational initiatives which in turn affected the crime rate in South Africa.

Now the challenge facing the government is whether all these institutions are legally authorised by the Constitution, since the Constitution is the supreme law of the land. Furthermore, one needs to highlight the inconsistencies between sections 205 (3) and 179 of the Constitution. Section 205 (3) prescribes the duties or objects of the police as: to protect and secure the inhabitants of the Republic and their property, maintain public order, uphold and enforce the law, combat and investigate crime, as well as the prevention of crime.

These functions filter down to the South African Police Service Act, especially section 16 which is about the investigation of organised crime. On the other hand, section 179 focuses on the institution of criminal proceedings as the function of the National Prosecuting Authority (NPA). Instituting criminal proceedings is not the same as investigating an alleged crime.

These functions are also contained in the National Prosecuting Authority Act as well as the National Prosecuting Authority Amendment Act. Surprisingly, the National Prosecuting Authority Amendment Act makes provision for the establishment of an Investigative Directorate known as the Directorate of Special Operations (DSO), or Scorpions, which is entrusted with the investigation of organised crime. This directorate is not covered in section 179 of the Constitution.

In addition to this confusion, the Prevention of Organised Crime Act (POCA) makes no provision for the establishment of a Directorate within the NPA to deal with the investigation and seizure of assets obtained through organised crime. Surprisingly, the SAPS, the DSO and the Asset Forfeiture Unit (AFU) all use the same Act to conduct investigations on organised crime. Neither the AFU nor the Scorpions are covered by section 179 of the Constitution which governs the workings of the NPA.

The establishment of another institution known as the Special Investigating Unit (SIU) which does not form part of the NPA but provides services to the SAPS, NPA as well as the Departmental Investigation Unit (DIU) of the Department of Correctional Services (DCS), adds to the current confusion. The SIU and the DIU are not covered in the Constitution nor in the National Prosecuting Authority Act or the National Prosecuting Authority Amendment Act.

From the above assessment an impression can be formed that since the investigation of crime, particularly organised crime, is covered by section 205 (3) of the Constitution and the South African Police Service Act, there is no need to create other institutions which are not 'blessed' by the Constitution to duplicate the functions of the SAPS.

1.2 RATIONALE OF RESEARCH

Leedy (1993:5,47-49) explains a research problem in the following way: Research demands a clear statement of the problem. Successful research begins with a clear, simple statement of the problem. The perplexing and unanswered questions that the researcher finds indigenous to the research situation, must crystallise at the very beginning of the research endeavour in a precise and grammatically complete statement setting forth exactly what he seeks to discover. The reason for this is obvious: before we begin we must understand the problem and look at it objectively. We must see clearly what it is we are attempting to research.

Many students have difficulty understanding the nature of a problem which qualifies it to be considered as suitable for research. This is partly because they do not understand the nature of research itself. They feel that merely 'doing something' that terminates in a written 'paper' is research.

They are thinking primarily of activity as a prime ingredient. As long as they are doing something - for instance, finding a correlation, gathering data, or matching groups and comparing their achievement - that is research. None of these is, in fact, research, and a problem built entirely around such activities is not a researchable problem. Research as a refined aspect of the scientific method is more than motion. It is inseparable from the individual engaged in it. It requires an inquiring mind which seeks facts and, after finding them, synthesises the meaning of such facts into accurate conclusions.

Each word should be expressive, sharp, and definitive. A problem should be stated so well, in fact, that anyone anywhere could read it and react to it without the benefit of researchers' presence. Since the establishment of the Scorpions, the AFU and the SIU, a perception exists in the community that the three form part of the SAPS. This perception is created inter alia, by, the Constitution, the media, and other pieces of legislation.

In various instances the Scorpions are reported as the police, whereas in some other instances the AFU and the SIU are referred to as the Scorpions. On the other hand, the DIU is also referred to as the SIU, due to the fact that most of their operations are conducted jointly. The following issues are the reasons why this research has been undertaken.

1.2.1 Legislative ambiguities

1.2.1.1 The Constitution

Section 179 of the Constitution stipulates that "there shall be a single National Prosecuting Authority in the Republic, structured in terms of an Act of Parliament".

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. In plain language, the NPA is the AG's office. The functions of the NPA are the same as those of the former AG, even though this is governed by a different Act.

However, section 179 of the Constitution makes no mention of the functions of the Directorate of Special Operations. On the other hand, section 205 (3) of the same Act makes provision for the objects of the police as "to prevent, combat and investigate crime, maintain public order, protect and secure the inhabitants of the Republic and their property, uphold and enforce the law". This section clearly outlines what the functions of the police are and what is expected from them.

It is understood that the DSO is a component of the NPA. The NPA as a prosecuting agency in South Africa is covered by section 179 of the Constitution. On the other hand, the same section does not mention any investigative authority or directorate which may be called the DSO. As a result of this confusion, one can deduce that the DSO is unconstitutional.

1.2.1.2 The South African Police Service Act

This Act is an enabling legislation in terms of section 205 of the Constitution. Furthermore, section 16 of the South African Police Service Act explains clearly what the functions of the police are with regard to organised crime, as well as various classes of what may be regarded as organised crime.

On the other hand, section 20-29 of the National Prosecuting Authority Act does not explicitly specify crimes that need to be investigated by the DSO, except to use the word ”organised fashion”. This is not even covered by the National Prosecuting Authority Amendment Act.

1.2.1.3 Prevention of Organised Crime Act (POCA)

This legislation deals with the classification of offences which fall under the definition of organised crime and the proposed penalties. The Act covers offences relating to racketeering activities, offences relating to proceeds of unlawful activities, civil recovery of property, and criminal assets recovery account. What is surprising in this Act is that there is no demarcation of functions between the SAPS and the DSO.

What makes matters worse is the fact that it is alleged that both organisations use the same Act. If that is the case, there is excessive duplication of functions. As a result of these uncertainties, one can ask the following questions: Is the DSO an extension of the SAPS? Is the DSO a unit of the SAPS? Who owns the clients or the playing field between the two organisations? It is also not clear how the functions of AFU differ from the SIU, because both use civil and criminal forfeiture of assets.

1.2.1.4 The Criminal Procedure Act

The Criminal Procedure Act 51 of 1977 has a great impact on the topic under discussion. Sections 20 to 59 clearly outline the functions and procedures to be followed by the SAPS with regard to the following:

seizure of certain articles by the state, article to be seized under search warrant, circumstances in which article may be seized without search warrant, search of arrested persons and seizure of article, search of premises, power of police to enter premises in connection with state security or any offence, entering of premises for purposes of obtaining evidence, resistance against entry or search, wrongful search an offence, and award of damages, disposal by police official of article after seizure, forfeiture of article to the state, powers in respect of prints and bodily appearance of accused, powers of arrest, use of force after arrest, procedure after arrest, fingerprinting of suspects and the keeping of fingerprint records as prima facie evidence of previous conviction.

1.2.1.5 The National Prosecuting Authority Act and the National Prosecuting Authority Amendment Act

These two Acts do give powers to the DSO to investigate, prosecute, detain and search with or without warrant. However, the Acts do not give direction to the DSO as to what happens during arrest and after arrest.

The fact that the DSO has no detention centres - which might create problems for detention of suspects by the DSO - is not outlined by the two Acts. In addition, the Acts do not outline what the functions of the AFU and the SIU are.

The Acts also fail to give guidance as to what the DSO must do after conviction of the accused, as far as the criminal record of the accused is concerned. This is a matter of concern.

1.2.2 Media reporting

When the activities of the DSO are reported by the print and electronic media, the use of expressions such as the “elite police unit”, “Scorpion's crime busting police unit”, and “Scorpion's crime fighting police unit” for example, are prevalent. The media is meant to be the medium through which the public is educated.

At this stage it is not known whether the media is confused, due to the reasons already given above. It is then the duty of the media to conduct proper research so that the public can be provided with the right information. As it is now, the media is very confused and the public is becoming more confused by the way the media reports the activities of the DSO, AFU, DIU, SIU and the SAPS.

This research is intended to critically analyse the investigative functions of the five institutions within the Criminal Justice System that are mandated to investigate crime, in order to come with proposed models for South Africa.

1.2.3 Standards

There are various discrepancies between the different investigative institutions as far as standards are concerned. In South Africa, every crime that is committed is reported to the SAPS. On the other hand, other institutions have an opportunity to pick and choose cases for the purpose of investigation.

The DSO in particular, is located within the NPA, which makes it easier for them to pick cases which are sent by the police for prosecution and guidance (http://www.news24.com).

This means that the police normally do the ‘dirty work’, and once the NPA realises that, the case may attract media attention, they ‘highjack’ it for the DSO. As a result of being able to pick and choose, the DSO is in a better position to secure a conviction and they may therefore be seen by the public as effective and efficient in solving crimes. This process raises a question of doubt regarding the ability of the DSO to investigate cases.

The use of the *troika* system by the DSO where the investigator sits with the prosecutor and the intelligence/analyst right from the beginning of the investigation, puts them in an advantageous position. This means that the prosecutor has inside knowledge of the case, making it easy to secure a conviction; hence the so-called high conviction rate is achieved.

This is different from what the SAPS do. The police receive the case from the complainant and then they start gathering evidence. After the completion of the investigation, the case is taken to NPA for guidance and prosecution. On the other hand, the DIU of the DCS conducts investigations within the DCS concerning alleged corruption and other offences, with the purpose of taking the case either to the SAPS, the DSO or the SIU.

This kind of investigation done by the DIU may raise questions of objectivity in the investigation process, because the unit is meant to investigate its own members. The fact that the investigative functions of the DIU are sanctioned by the Correctional Services, may create an impression that the DCS is usurping the functions of the SAPS because such authority does not come from the Constitution. It is also of concern to see that the SIU, which perform functions almost similar to those performed by the AFU, reports to the Standing Committee on Justice and not to the NPA. This kind of arrangement creates a lot of independence which may result in abuse of power.

According to the Public Service Commission (PSC), August (2001:69) the statistics of the five institutions were as follows:

Units	**Cases reported**	**Amount involved**	**Cases finalised**	**Convictions /Amount recovered**
AFU	81	R225million	Not supplied	R 200million
SIU	67	R168million	Not supplied	R 112million
DSO	87	R4 970 97million	25	7
SAPS	1102	R44888 55million	750	R480123 000 millions
DIU	400	Not supplied	270	200

Table 1.1: Statistics of work done by the five agencies as provided by the Public Service Commission, August 2001

As for the amount recovered, such recovery is done by AFU and SIU. This means that the amounts shown under AFU and SIU also include amounts resulting from the investigations undertaken by the SAPS and the DIU.

Judging from Table 1.1, it looks as if the AFU and the SIU seem to be doing the same thing while the SAPS seem to have the same functions as the DSO. If this is a true reflection of the work done by these institutions, there is no reason to have them as separate and independent entities.

1.2.4 Privilege between the client and legal advisor

Privilege is the personal right to refuse to disclose admissible evidence (Hoffman & Zeffertt, 1997:236). This definition is in line with section 14 of the Constitution, which outlines four categories of rights, namely: the person and home, property, possessions and privacy of communications. This means that any confidential communication made directly between a client and their legal advisor, or made by means of an agent, is privileged, and a person cannot be compelled to disclose such communication (Joubert, 1999:403). Neither are they compelled to disclose any communication that was obtained with a view to litigation.

The relationship between legal practitioner and client is deemed so important by the South African legal system, that section 201 of the Criminal Procedure Act specifically prohibits disclosure to the court of any communications between the accused and their legal representative. The leading case is **S v Safatsa 1988 (1) SA 868 (A)** where the court ruled that legal professional privilege is a fundamental right that is essential to the proper functioning of the legal system (Joubert, 1999:405). It has come to the researcher's attention that this rule was respected even during the apartheid era in South Africa.

Recently, the DSO raided the offices of the legal advisor of Mr. Jacob Zuma, where documents were seized for the purpose of an investigation into alleged corruption charges (http//:www.news24.com). Subsequent to these events, the courts ruled in favour of the legal advisor. This was a direct violation of section 201 of the Criminal Procedure Act. This shows that the DSO have now become a 'law unto themselves'. The manner which the Zuma case has been handled by the DSO creates a suspicion that there could be other cases where individuals' rights have been violated.

1.2.5 Training

Training in South Africa is governed by the Skills Development Act 97 of 1998, the South African Qualifications Authority Act 58 of 1995, and the National Qualification Framework (NQF). This means that whatever training is provided by any service provider must be in line with these Acts. In the SAPS it is compulsory for all entry level recruits to attend the twelve months' basic police training which is at NQF Level five (5). After the completion of basic training, recruits are posted to various units where they receive further training under the supervision of Field Training Officers (FTO).

For detectives, it is compulsory to attend a fourteen weeks' basic detective course for any new recruit or a member who has been transferred from another unit. In addition to this course, recruits also attend specialised training in line with their functions. Those who are attached to the Organised Crime Unit also attend five weeks' intensive training (http://www.saps.gov.za). With regards to the DSO, the first batch of recruits - when the DSO was established - attended a four months' course in the United States of America (USA) (FBI Academy). This group was followed by another which was trained by Scotland Yard in England. The length of their course was two months.

Subsequent to these groups, there had been various intakes where training took place in the Boot Camp Military Camp north of Pretoria, where training was offered by various training providers, including retired detectives from the SAPS, as well as from Tshwane University of Technology (NPA Annual Report 2005/2006:36). As for the AFU, SIU and the DIU, qualified and experienced investigators and lawyers are recruited from, inter alia, the SAPS. Regular training does take place – this is provided by various service providers.

Surprisingly, a substantial number of the investigators within the DSO and SIU are from the SAPS. Most of the newly recruited DSO members are mentored by their senior investigators of whom the majority happen to come from the SAPS. Therefore, the fact that there is a difference in the level of training for institutions within the Criminal Justice System, poses a serious problem. The fact that the SAPS spends a great deal of money training its members, only to lose them to other institutions, hampers progress in the fight against crime, let alone organised crime.

1.2.6 Cooperation

According to the Public Service Commission (PSC) Report of August (2001:4), "there are serious problems with regards to cooperation between the DSO and the SAPS". These problems stem from fight over territory, glory, as well as mandates. Although section 31 (1) of the National Prosecuting Authority Amendment Act makes provision for the establishment of a Ministerial Coordinating Committee (MCC) to determine policy guidelines, procedures to coordinate activities of the DSO, communication and transfer of information, and referring and assigning of any investigation to the DSO, this committee has never met (Public Service Commission (PSC) Report of August 2001:4).

This problem was confirmed during the sitting of the Khampepe Commission of Enquiry (2005). If this is the case, then the fight against crime will fail. In general, the cooperation between the SAPS, AFU and the SIU is fine. However, according to Malatjie (2006), whenever a criminal case is reported by the DIU to the SAPS, it takes some time before such a case can be properly investigated by the police. This tends to hamper many investigations by the DIU. One of the commonest problems in this regard is that the SAPS priorities are not in line with those of the DIU.

As a result of this, the DIU feels that it is being overlooked by the SAPS. This is one the reasons why the DIU prefers to complete the investigation and then hand over the docket to the SAPS for prosecution. As for the DSO, there is good cooperation with the DIU, AFU and SIU.

1.2.7 Communication

The level of communication between the SAPS and the DSO does not seem to be good at all. There seems to be an over-sensationalisation of the work of the DSO, as opposed to the work done by the SAPS and other agencies. This kind of reporting creates an impression that the DSO is better than the other agencies.

It is clear that the fact that each and every arrest or raid by the DSO is covered by both the print and electronic media has created a perception that the DSO is better than the police. This kind of reporting may be seen as a way of discrediting the work done by the police. As a result of this popularity by the 'new kid on the block', relations with the SAPS seem to be tenuous.

This may be seen as a way of trying to win the support of the politicians and the public at large. However, there seem to be fairly good relations between the SAPS and the DIU, SIU and AFU. Such a rift among law enforcement agencies poses a serious problem which South Africa does not need at this stage.

1.2.8 Intelligence gathering

In terms of Chapter 11 of the Constitution, security institutions are identified as the SAPS, the South African National Defence Force (SANDF), the National Intelligence Agency (NIA), and the South African Secret Service (SASS).

In this instance, the DSO, AFU, SIU and DIU are excluded. The reality is that the DIU plays a vital role with regard to security matters, and there seems that there is no justification to this exclusion. On the other hand, the DSO does perform intelligence functions in the execution of their duties.

This is contrary to the fact that the DSO is not included in Chapter 11 of the Constitution, nor the Intelligence Services Act or the National Strategic Intelligence Act. This arrangement of the intelligence community is also in line with the White Paper on Intelligence of 1995. Both the White Paper and the legislation created control structures which are used to ensure that power is not abused by the institutions.

Such oversight institutions include the National Intelligence Coordinating Committee (NICOC), Joint Standing Committee on Intelligence, Cabinet Committee for Security and Intelligence Affairs and the Inspector General of Intelligence. The fact that the DSO is not covered by these oversight institutions creates a vacuum and a possibility of abuse of power.

This is true, because in terms of the legal mandate, the DSO have no intelligence functions. As it stands, South Africa has an institution which is performing functions that do not fall within its mandate, thereby usurping the functions of other institutions.

This not only poses a serious risk to the security of the State, but also a possible abuse of human rights. There is no concern with regard to the functions of the AFU, SIU and the DIU, because their investigations do not involve covert and overt operations.

1.2.9 Accountability and civilian oversight

In terms of section 50 of the South African Police Service Act, the Independent Complaints Directorate (ICD) has the power to investigate alleged deaths in police (SAPS) custody, including the Metropolitan Police Services/Municipal Police Services. This was done to ensure that these agencies do not misuse their powers of carrying/using firearms indiscriminately.

On the other hand, the DSO do carry firearms in terms of section 7 (4) (a) and chapter 5 of the National Prosecuting Authority Act, section 5 of the National Prosecuting Authority Amendment Act and section 45 (1) of the Arms and Ammunition Act. Therefore, the likelihood of causing death to suspects by members of the Scorpions is great. As it stands at the moment, neither the ICD nor any institution has any oversight functions over the DSO.

This can be seen as either a way of giving too much power to the DSO or merely a miscarriage of justice and democracy. South Africa cannot afford to have institutions that have too much power, especially where lives of people are at stake. According to Malatjie (2006), if there is a problem of misuse of power by a member of the DIU, such a case is referred to the Public Service Commission for investigation.

The researcher is of the opinion that this explanation is not convincing, because such an arrangement is not covered by the Correctional Services Act or by any other formal agreement. As for the AFU and the SIU, there is no mechanism available to deal with abuse of power except that if there are such cases, members are either dealt with in terms of internal discipline regulations, or charged criminally.

This is of great concern because it is clear that there is no uniformity in ensuring accountability and oversight over the five institutions within the South African Criminal Justice System.

1.2.10 Excessive use of consultants

All five institutions do make use of consultants. However, the DSO with a staff complement of less than one thousand personnel, have exhibited excessive use of the services of consultants. Most of their auditing investigations are done by KPMG, Deloite and Touche, PricewaterhouseCoopers and others. In addition to these institutions, the Council for Scientific and Industrial Research (CSIR) is one of the beneficiaries. According to the NPA Annual Report (2003/2004:60), about R120 million was spent on consultancy functions, as opposed to R8.374 482 allocated to the Commercial Crime Unit of the SAPS. This amount includes the 500 pages of testimony which was presented by KPMG on behalf of the DSO which cost the taxpayer R1.2 million (http://www.news24.com). This in itself may create an impression that the DSO may not possess the kind of skills they think they do. If this is the case, then the DSO is not doing their job as they profess to, and are mere post offices who simply collect information and pass it to another institution for analysis.

According to the PSC (August 2001:73), the budget for consultancy work for the SIU and the AFU was R35 million. Although this figure might have risen in 2004/2005, the fact is that the DSO's budget is far higher than that of the other two institutions. According to Malatjie (2006), the DIU does not use consultants because they prefer to hire experienced investigators. The only way they come across consultants is when the case has been handed over to the SIU. If the DSO can use so much money for consultancy work, surely public funds are not being used fruitfully, as prescribed by the Public Finance Management Act.

1.2.11 The doctrine of separation of powers

The doctrine of the separation of powers was expounded by Montesquieu, a French philosopher who believed that government power should not be concentrated in one body (Devenish, 1999:13). The central thesis of this celebrated doctrine is that a constitution must provide effective checks and balances in relation to the exercise of power.

In South Africa the Constitution prescribes the separation of power into legislative authority, executive authority and judicial authority. According to Du Toit and Van der Waldt (1997:208) the legislative authority formulates and adopts policy, while the executive authority is responsible for the execution of policy. The judicial authority passes judgment in all cases before the courts.

An excessive concentration of power in a single organ or person is an invitation for abuse or maladministration. The investigation of crime by prosecutors in South Africa is a violation of tripartite doctrine, as prosecutors are expected to be impartial in the prosecution of crime.

In France, where an inquisitorial approach is used, the judge, who actively conducts and even controls the search for the truth by dominating the questioning of the witness and accused, clearly violates the separation of powers. The inquisitorial system is broadly centered in Europe. In this system the judge is a much more active participant in the proceedings. After arrest, the accused is questioned primarily by the investigating judge and not by the police. In the trial, the presiding judge primarily does the questioning and not the counsel for the prosecution or the defence. In this way, the judges have the task of determining the truth of the matter by whatever means they feel necessary to use.

The judges are not bound by the evidence which the parties have provided, but are instead free to utilise their own enterprise to locate appropriate information which could assist them in ascertaining the veracity of the matter and thus do real justice to the parties concerned.

In doing so, the judges are seeking the truth in a much more objective way. Indeed, judges may look behind the specific facts and issues of the case if they feel that the information they find may help to discover the truth of the matter. The only ostensible circumscription is that the evidence which the judges seek must be relevant, although relevance is given a much broader definition than might be obtained in the adversarial system (Geldenhuys & Joubert, 1996:14).

In terms of an accusatorial approach, the judge is in the role of detached umpire, who should not enter the arena of the fight between the prosecution and the defence for the fear of becoming partial or losing focus as a result of all the dust caused by the fray (Geldenhuys & Joubert, 1996:14). The police are the primary investigative force in the sense that that they pass the collected evidence on to the prosecution in a dossier or docket format, which then becomes *dominis litis.* The prosecution decides on the appropriate charges, the appropriate court, and etc.

In court the trial takes the form of a contest between two theoretically equal parties, namely, the prosecution and the defence, who do the questioning, in turn leading their own witnesses and cross-examining the opposition's witnesses. As has been pointed out, no real life system conforms exactly to a specific model. South African criminal procedure has basically been accusatorial, but in certain circumstances judges may call witnesses of their own. The procedure of questioning that may take place under section 115 of the Criminal Procedure Act contains inquisitorial elements, in the same way as part of section 112 of the same Act.

On the other hand, the fact that an accused can be found guilty of an offence solely on his plea of guilty without the judge doing any questioning to investigate the truth is a strong accusatorial element, even though it can happen only in the case of relatively minor offences.

In South Africa the DSO, AFU and the SIU are inclined to a more inquisitorial approach because the three role players - the investigator, an analyst and prosecutors - are involved from the beginning to the end of the case. As it stands, the actions of the three institutions amounts to 'player and referee', thereby compromising the doctrine of separation of powers. An impression is created that the so-called high conviction rate is a result of having prosecution and investigation in the same team. This amounts to a player and a referee playing/performing the same functions.

1.3 OBJECTIVES OF THIS RESEARCH

The objectives of doing this research are to alert the politicians to the legislative ambiguities with regard to the investigation of crime within the Criminal Justice System. The researcher has been a police official for eleven years and has first hand experience with the stated problems, such as cooperation, communication, standards, training, accountability and others.

By means of this research, the researcher intends coming up with solutions to the stated problems. In addition, the researcher wants to:

- Do a comparative study between South Africa and other countries (Botswana, Hong Kong, Malawi and Nigeria);
- Develop a model for South Africa to fight corruption, fraud, organised crime, and economic and financial crimes;

- Make a contribution to crime investigative systems that will assist the community of South Africa; and
- Make a contribution to the study field of Criminal Justice System.

The last objective of the research is to contribute to the criminal justice field of study, especially the investigation of crime, in order to contribute to development of skillful investigators within the Criminal Justice System. This contribution will assist the legislators/managers to remedy the stated problems.

1.4 HYPOTHESES

A hypothesis is a non-obvious statement that makes an assertion (Guy, Edgley, Arafat & Allen, 1987:116). The assertion may simply describe some phenomenon or specify a relationship between two or more phenomena. Such a statement becomes the basis for research that is designed to prove the truth of the statement. However, hypothesis implies that the true statement is not certainly known, or is hidden beneath appearances.

The aim of a hypothesis, then, is to establish a testable base about a doubtful or unknown statement. A test of this statement discloses whether the hypothesis is tenable. According to Guy et al. (1987:121), a hypothesis should be objectively worded.

This means that the researcher should constantly strive to exclude personal values, hopes, and wishes from the wording of a hypothesis. Hypotheses must be specific and precise. This means that the elements in research hypotheses should be as exact as possible. Ambiguity must be avoided at all times. Hypotheses must be testable.

This is a way for researchers to measure the variables, and demonstrate hypothesised relationships. Hypotheses should provide an answer to the research question. The test of a hypothesis should provide a direct answer to the research question. This does not mean that the hypothesis is supported. The following are the hypotheses of this research:

Hypothesis no.1: The structure of the South African Criminal Justice System could be described as an emerging Federated System.

Hypothesis no.2: The processes involved in the South African Criminal Justice System are both inquisitorial and accusatorial in nature.

Hypothesis no.3: Divisions within the Criminal Justice System are the consequences of differing investigative mandates.

Hypothesis no.4: The investigation of organised crime and collective corruption requires a unitary approach.

1.5 DEMARCATION OF THE STUDY

1.5.1 Time

The research is focused from December 1996 when the final Constitution was signed into law, until 2006. The reason for choosing this time frame is that the current Criminal Justice System was established after the Constitution came into effect. The DSO, SIU, AFU and the DIU were all established after 1996.

1.5.2 Geographic demarcation

This study is a national study, because the affected departments are at national level and the legislation that governs the operation of the affected departments is national legislation. The affected departments in this study are: the South African Police Service, the Special Investigating Unit, the Department of Correctional Services and the Department of Justice and Constitutional Development.

Reference will be made to the Detective Service of the SAPS, the Departmental Investigation Unit of the DCS, the DSO and the Asset Forfeiture Unit of the National Prosecuting Authority which falls within the Department of Justice and Constitutional Development, the Anti-Corruption Bureau of Malawi, the Directorate on Economic Crimes Commission of Botswana, the Economic and Financial Crimes Commission of Nigeria and the Independent Commission Against Corruption of Hong Kong. As for the EFCC, ACB, and DCEC, no specific individual was interviewed. Information was obtained via the Internet and e-mails, through the intervention of the offices of the South African High Commission.

1.5.3 Conceptual demarcation

South African Criminal Justice System: In this study, the South African Criminal Justice System refers to the following three departments: the South African Police Service, the Department of Correctional Services and the Department of Justice and Constitutional Development. Currently, the demarcation of the South African Criminal Justice System is problematic. The researcher chose the SAPS, SIU, DSO (Scorpions), AFU and DIU because they are manageable and they are key role players within the Criminal Justice System.

Investigative systems: The study will focus on the different investigative systems used by the investigative institutions within the Criminal Justice System (Attention is paid to the SAPS Detective Service, NPA's Directorate of Special Operations or Scorpions and the Asset Forfeiture Unit, the Departmental Investigating Unit of the DCS, as well as the Special Investigating Unit).

Criminal investigation: Dowling (1992:4) defines criminal investigation as a systematic process of identification, collection, preservation and evaluation of information for the purpose of bringing the criminal to justice. In this research the focus is on the approaches used by the five identified institutions which use different approaches.

The DSO, AFU and the SIU use a project-based approach which is more inquisitorial in nature, while the DIU combines both the accusatorial and inquisitorial approaches (Malatjie, 2006). As for the SAPS, their approach is more accusatorial in nature. Here the researcher is of the opinion that the lack of uniformity within the Criminal Justice institutions is problematic.

According to Davids (2006), the SIU does not have powers to arrest suspects, but if it becomes clear that criminal acts are discovered during their investigations, such investigations will either be completed by the SIU before being referred to the SAPS.

The DIU completes the investigation and then hands over the docket to the SAPS for prosecution. As for the SAPS and the DSO, each institution follows its own procedures and approaches until the case is finalised. The researcher finds the use of these different procedures and approaches to be unacceptable.

1.5.4 Investigative powers

The study will focus on the Constitutional mandate of the investigative institutions within the South African Criminal Justice System, with regard to crime investigation. For the purpose of this research, the study will focus on the following investigative authorities: the Constitution, the South African Police Service Act, the Criminal Procedure Act, the National Prosecution Authority Act, the National Prosecution Authority Amendment Act, the Prevention of Organised Crime Act, the Special Investigations Unit and Tribunals Act, the Drugs and Drug Trafficking Act and the Correctional Services Act. The purpose of this demarcation is to show that there is no uniformity in the investigative mandates within the Criminal Justice System.

Due to the fact that there is no proper definition and demarcation of the Criminal Justice System in South Africa, the research will exclude institutions such as the Metro/Municipal Police, the Auditor General, the Traffic Department, the Public Service Commission, the Office of the Public Protector and the Local Government Security Departments. The ICD will feature almost throughout the discussion on the role of a civilian oversight.

1.6 PROBLEMS ENCOUNTERED DURING RESEARCH

The inaccessibility of certain documents from the SAPS, which are considered to be classified, had been a major problem. Securing appointments for interviews with relevant stakeholders had also been difficult. The lack of documented information on the Directorate of Special Operations had been problematic to obtain, because the organisation was still young.

The available literature on the DSO is based on secondary sources. Information on the functioning of the Departmental Investigation Unit of the Department of Correctional Services was not made available because it is regarded as confidential.

Generally, people who could shed more light on the subject within the three departments, have not been helpful. One of the most unpleasant experiences that the researcher had was the arrogance from the office of the National Director of Public Prosecution (NDPP). Documentary proof of such arrogance is available.

1.7 ORGANISATION OF THE THESIS

Chapter 1: General Orientation

Chapter 2: The Qualitative Approach to this Research

Chapter 3: The Evolution of the South African Criminal Justice System

Chapter 4: Crime Investigation in South Africa

Chapter 5: Processes in the Investigation Functions

Chapter 6: International Experience

Chapter 7: An Investigation Model for the South African Criminal Justice System

Chapter 8: Findings and Recommendations

1.8 DEFINITION OF CONCEPTS

1.8.1 Accusatorial system

In terms of an accusatorial approach, “the judge is in the role of detached umpire, who should not enter the arena of the fight between the prosecution and the defence for the fear of his becoming partial or losing focus as a result of all the dust caused by the fray” (Geldenhuys & Joubert, 1996:14). The police are the primary investigative force in the sense that they pass the collected evidence on to the prosecution, who then becomes *dominis litis.*

The prosecution decides on the appropriate charges, the appropriate court, and others. In court the trial takes the form of a contest between two theoretically equal parties, namely, the prosecution and the defence who do the questioning, in turn leading their own witnesses and cross-examining the opposition’s witnesses.

1.8.2 Inquisitorial system

The inquisitorial system is broadly centered in Europe. In this system the judge is a much more active participant in the proceedings. This means that the judge actively conducts and even controls the truth by dominating the questioning of the witnesses and the accused (http://www.members.ozemail.com).

1.8.3 Troika system

This is the investigative methodology used by the DSO which integrates analysis/intelligence, investigation and prosecution, which is based on the FBI model (NPA Annual Report, 2005/2006:50).

1.8.4 Case determination

This is the process used by the DSO to determine whether the DSO or the SAPS can investigate the case (http://www.npa.gov.za).

1.8.5 Criminal Justice System

According to Cilliers, Smit and Van Vuuren (1999:2-30) Criminal Justice System refers to the police, the courts and the correctional services. The National Crime Prevention Strategy (NCPS) describes the Criminal Justice System as the police, the courts, the prosecution authority and the social development.

Because of this lack of a clear definition of the South African Criminal Justice System, the researcher decided to choose and focus on the Detective Service of the South African Police Service, the Directorate of Special Operations (DSO) and the Asset Forfeiture Unit of the National Prosecuting Authority, the Special Investigating Unit and the Departmental Investigating Unit of the Department of Correctional Services.

CHAPTER 2: THE QUALITATIVE APPROACH TO THIS RESEARCH

2.1 INTRODUCTION

Qualitative research is research that involves analysing and interpreting text and interviews in order to discover meaningful patterns descriptive of a particular phenomenon. The qualitative approach to research leads to studies that are quite different from those designed using the more traditional approach.

Research follows a particular line, and the approach that the researcher adopts determines the **method** and the method determines the **technique**. A method is a procedure or way of doing something in an orderly manner (Oxford English Dictionary, 1981:324), whereas a technique is a method of doing something. The literature study formed the basis of this research. Unstructured interviews were conducted with a few individuals, but the majority of this research was done by means of a literature study.

2.2 METHODOLOGICAL APPROACH

In this study the researcher followed a qualitative approach. A literature study and interviews were used as data collection techniques. Qualitative methodology refers to research which produces descriptive data, generally people's own written or spoken words (Brynard & Hanekom, 1997:29). Qualitative research entails discovering novel or unanticipated findings and the possibility of altering research plans in response to accidental discoveries. Qualitative research takes an interpretive and naturalistic approach to its subject matter.

Qualitative researchers study things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meanings that people bring to them (De Vos, 1998:240). Qualitative methodologies allow the researcher to know people personally and to see them as they are and to experience their daily struggles when confronted with real-life situations

Qualitative research begins by accepting that there is a range of different ways of making sense of the world, and is concerned with discovering the meanings seen by those who are being researched, and with understanding their view of the world rather than that of the researcher's (http://www.bmj.bmjjournals.com).

2.2.1 Advantages of qualitative research

Qualitative research provides people with a means of attempting to understand a world that cannot be understood in terms of numbers and objectivity. Qualitative approaches provide ways of transcribing and analysing the discursive construction of everyday events and of exploring the historical nature of life within a social group or local setting (De Vos, 1998:240).

In theory, it seems that qualitative research is the best route to take in every research situation, because it provides people with an understanding that takes into account the fact that each person is an individual with a different perspective on the world (De Vos, 1998:240). Qualitative research is flexible and inexpensive to administer (http://www.mapnp.org).

2.2.2 Disadvantages of qualitative research

In terms of qualitative research, it is largely impossible to escape the subjective experience, even for the most seasoned researchers. If a researcher is working with one person, or even a small group, the results are likely to be valid for that particular person or focus group (http://www.wilderdom.com). Therefore, one could not make a generalisation from the results as one could with the results of a quantitative research study.

Another disadvantage of qualitative research is the accuracy of the interpretations of the researcher (http://www.okstate.edu). Because the researcher is a person, like the participants, it is possible that the researcher has personal biases to overcome or consider when carrying out inductive reasoning processes.

2.3 RESEARCH METHODS

2.3.1 Literature study

The basis of this research is going to be the literature study. A thorough literature study is an indispensable component of all research. It familiarises the researchers with research which has already been done in their field, as well as with current research.

According to Leedy (1993:87) a literature study provides background to the new research, justifies the need to conduct new research and seeks to do one or more of the following: interpret, clarify and integrate another's research.

A literature study makes the researcher aware of what the current train of thought is, as well as the focus of existing and acceptable thought regarding a specific topic. It also helps them to demarcate the boundaries of their research themes.

According to Leedy (1993:87), a literature study has the following benefits: it can reveal investigations similar to your own, and it can show you the collateral researchers handled in these situations; it can reveal to you sources of data that you may not have known existed; it can provide you with new ideas and approaches that may not have occurred to you and it can help you evaluate your own research efforts by comparing them with the similar efforts of others.

2.3.1.1 The role of a literature study

A literature study helps the researcher to select a research problem or theme. Relevant literature enables the researcher to discover where inconsistencies, wrong designs and incorrect statistical conclusions occur.

According to Hoepfl (1997:16), research reports are concluded with recommendations regarding research which still needs to be done. The researcher's thinking can be shaped in this way, which in turn will enable him to establish the size and extent of the research, to consider the procedures and instruments which are to be used in the research and to avoid unnecessary repetition of research already undertaken (http://www.petech.ac.za/robert/data.htm).

2.3.1.2 Types of literature

According to Hoepfl (1997:16) there are two types of literature sources, namely, comprehension literature and research literature.

Comprehension literature refers to books and articles by experts in which they state their opinions, experiences, theories and ideas on concepts and constructs within a specific problem area, as well as their opinions on what is good or bad, desirable or undesirable, valuable or worthless regarding insight into specific concepts or constructs (www.petech.ac.za/robert/data/htm).

Research literature includes reporting in respect of research already undertaken in the field, and gives the researcher a good indication of successes and problems in respect of research procedures, design, hypotheses, techniques and instruments. The results of studying these two types of literature lead the researcher to a greater awareness of those matters within the field which have already sufficiently been demonstrated and proved, as well as those matters still requiring more in-depth research.

2.3.1.3 Primary and secondary sources

Sources of information are generally categorised as primary, secondary or tertiary, depending on their originality and their proximity to the source or origin. Primary sources of a specific type of information are the original works, books, magazines, articles, films and sound recordings which reflect the information first hand (http://www.bergen.cc.nj.us). Primary sources are usually the first formal appearance of results in print or electronic literature. The information contained in primary sources is presented in its original form, neither interpreted nor condensed or evaluated by other writers.

Common examples of primary sources also include proceedings of meetings, conferences and symposia, technical reports, dissertations and theses, works of literature, diaries, autobiographies, interviews, newspaper articles, government documents, Internet communications, letters and CD-ROMs (Leedy, 1993:94).

In this research the researcher used literature, interviews, newspapers, articles, government documents such as Acts of Parliament and policies, and Internet communication. Government policies, annual reports, government legislation and different types of Internet communication will play a major role in this research. These primary sources are available and accessible to the researcher, and are reliable (http://www.petech.ac.za.robert/data/.htm).

However, there are a few problems which can be experienced by researchers when primary sources are consulted, including the following: the source may be out of print, destroyed or unobtainable, or the source may be in a foreign language, rendering it inaccessible to the researcher.

However, this should not discourage researchers from using primary sources, because they provide valuable practice in examining information carefully, reasoning inductively, and developing a claim. Secondary sources are accounts written after the fact, with the benefit of hindsight, or they are accounts written by people who were not at the scene. They are interpretations and evaluations of primary sources. Secondary sources comment on and discuss the evidence provided by primary sources. Examples of secondary sources include biographical works, monographs and commentaries.

Secondary sources are prepared based on the information contained in primary sources, and often explain or comment on the primary source material (http://www.bergen.cc.nj.us). Besides the primary and secondary sources, there are also tertiary sources which refer to the works which list primary and secondary sources in a specific subject area. For the purpose of this research, the researcher used monographs and journals. The reason for using these sources is that the majority of the chosen institutions are new establishments, and primary sources are not readily available.

2.4 RESEARCH TECHNIQUES

The most frequently used techniques of data collection within qualitative and quantitative research methods are: review of relevant literature, interviews, questionnaires and observation. In this study, the researcher will make use of unstructured interviews.

2.4.1 Interviews

Face-to-face interviews are a direct communication and primary research collection technique. If relatively unstructured, but in-depth, they tend to be considered as part of qualitative research. The opportunity for feedback to the respondent is a distinct advantage in personal interviews. Not only is there the opportunity to reassure respondents, should they be reluctant to participate, but the interviewer can also clarify certain instructions or questions. The interviewer also has the opportunity to probe answers by asking the respondent to clarify or expand on a specific response. According to Brynard and Hanekom (1997:32), interviewers can also supplement answers by recording their own observations.

2.4.1.1 Unstructured interviews

The unstructured or nondirective interview is less structured than the life history interview or the focused interview. The chief feature of the nondirective interview is its almost total reliance upon neutral probes that are designed to be as neutral as possible (Bailey, 1994:194). These interviews amount to an informal conversation about the subject.

The advantage of unstructured interviews is that the respondents are encouraged to talk freely about the subject, but are kept to the point on issues of interest to the researcher. Respondents are encouraged to reveal everything that they feel about the subject. This method also allows the respondents to tell their own stories in their own words, with prompting from the interviewer. Properly conducted informal interviews can give the researcher an accurate feel for the subject to be researched (http://www.onevision.co.uk). In general, the unstructured interview may be able to provide a relaxed and unhurried atmosphere that is not stressful to the respondent.

There may be just a single question that the interviewer asks and the interviewee is then allowed to respond freely, with the interviewer simply responding to points that seem worthy of being followed up. Bailey (1994:194) is of the opinion that unstructured interviews can sometimes be more valid than highly structured interviews, even though the latter are more commonly used and probably thought to be more valid. More complex issues can be probed.

The disadvantage of unstructured interview is that the gathering of data is time consuming and difficult to collect and analyse. There are greater opportunities for interviewer bias to intervene, and, because it is a time consuming method, it is expensive and only feasible with small samples (Hoepfl, 1997:6).

2.4.2 Observation

Observation means that a researcher studies or observes a specific situation. This is a primary technique for collection of data on non-verbal behaviour. Although observation most commonly involves sight or visual data collection, it could also include data collection via the other senses such as hearing, touch or smell (Bailey, 1994:242).

The use of observational methods does not preclude simultaneous use of other data-gathering techniques. Observations are often conducted as a preliminary to surveys, and may also be conducted jointly with document study or experimentation.

2.4.2.1 Advantages of observation

Observation is decidedly superior to survey research, experimentation, or document study for collecting data on nonverbal behaviour. Another advantage of observation is that behaviour takes place in its natural environment.

Unlike the interviewer, who must compete with the respondent's everyday activities and obligations for a valuable hour of their time for the interview, or the experimenter who must constrain their subjects for the duration of the experiment in an alien and sometimes hostile or uncomfortable laboratory environment, the observer is able to conduct their study in the subject's natural environment, and is thus usually able to study over a much longer time period than with either the survey or experiment (Bailey, 1994:244). In this study, observation was used by the researcher while conducting the interviews.

This technique was used to observe things like the office setup, resources available to the five institutions in South Africa - and one in Hong Kong, atmosphere in the workplace as well as the behavioural response when a particular question was asked. In some instances, the researcher observed that certain respondents were uncomfortable with certain questions. A classical example was observed when a question was posed to the deputy head of the SIU about the duplication of functions and the oversight accountability. Instead of giving straight answers, the respondense was slow and unconvincing.

2.4.2.2 Disadvantages of observation

According to Bailey (1994:245) there are five disadvantages when observation is used as a research technique, namely, lack of control, difficulties of quantification, small sample size, gaining entry and lack of anonymity. Lack of control means that in a natural environment the researcher often has little control over extraneous variables that may affect the data. Measurement in observational studies generally takes the form of the observer's unquantified perceptions, rather than the quantitative measures often used in surveys and experimentation.

Rather than specifying a characteristic in advance and preparing a scale to measure it, the observer is much more likely to simply observe and record events as they occur. In theory, observational studies could use thousands or millions of subjects if there were enough observers. However, because observational studies are generally conducted in depth, with data that are often subjective and difficult to quantify, the data gathered by two or more observers may not be readily comparable, and there are no easy checks and balances on reliability in unstructured observations (Bailey, 1994: 2460).

Many times the observer has had difficulty in receiving approval for the study. In some instances the study can be conducted without the knowledge of the management of an institution, which may result in the researcher using their memory, instead of taking notes during the course of the daily activities.

In this instance, researchers are forced to trust their memory, or write field notes at night, or use some secret recording device such as a hidden tape recorder. In sensitive studies, the interview becomes less reliable than the survey because it is difficult to maintain a respondent's anonymity in observational study.

2.5 RESEARCH SAMPLE

A research sample is a portion or group of population selected for the purpose of a particular research project (Brynard & Hanekom, 1997:43). A sample of population is used to simplify the research, save time and cut costs. In this project the following individuals were chosen as the research sample: Divisional Commissioner Johan De Beer; the head of the SAPS Detective Service, Mr Sipho Ngwema; the former spokesperson for the National Prosecuting Authority, Dr Ruben Richards; the former divisional head of the Directorate of Special Operations, Mr Matome Malatjie; a director and deputy head of the Departmental Investigating Unit of the DCS, Advocate Richard Chinner; Senior State Advocate within the Asset Forfeiture Unit, Mr Mike Chen; Independent Commission Against Corruption Liaison Officer, and Mr. Faek Davids, the deputy head of the Special Investigating Unit.

The reason for choosing these people as the research sample is because they have been involved directly or indirectly in the establishment of their agencies. By selecting these respondents, the researcher exhausted the analytical potential of information. The respondents were selected because of their positions within their respective organisations. These people were involved in the policy making and policy formulation within their respective institutions.

2.6 CONCLUSION

Due to a lack of information, especially on the DSO, the AFU, SIU and the DIU, the researcher decided to conduct qualitative research so that available literature could be supplemented by the results of the unstructured interviews. The researcher also visited the ICAC in Hong Kong to interview the liaison officer, and observe how things are done in that institution.

CHAPTER 3: THE EVOLUTION OF THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

3.1 INTRODUCTION

This chapter pays attention to the distinction between federal and unitary states. The purpose of this distinction is to indicate whether South Africa is a federal or unitary state and whether these systems have an influence on the criminal justice system. An overview of the chronology of South African history is given. Attention is also paid to the development of the South African legal system which is derived from Roman-Dutch law and English law.

3.2 DEFINITIONS

3.2.1 Federalism

The term “federal” is derived from the Latin word *foedus*, which means, “covenant” or “pact” and is related to *fides* which means “trust” or “faith” (Elazar, 1997:5).

Taken together, therefore, *foedus* and fides represent an agreement that has been freely entered into or consented to, whereby each party to the agreement or contact gives up some degree of autonomy in return for some advantage.

Federalism is an ideology that combines shared rule with self-rule (Sindani, 1999:18). Examples of federal states or countries are the United States of America (USA), Canada, India, Ethiopia and Nigeria.

3.2.2 Confederation

In a confederation, several pre-existing polities join together to form a common government for strictly limited purposes, usually foreign affairs and defence, and, more recently, economics, which remains dependent upon its constituent polities in critical ways, and must work through them (Elazar, 1997: XVI).

According to Sindani (1999:24) confederations are an arrangement of separate countries that form a common government for certain limited purposes such as trade. The common government is dependent on the constituent government that retains a large measure of sovereignty. Examples of a confederation include the European Union and the Association of the South East Asian Nations.

3.2.3 Unions

A union is a polity compounded in such a way that its constituent entities preserve their respective integrities primarily or exclusively through the common organs of the general government rather than through dual government structures (Elazar, 1997:XIV).

An example of a union is the United Kingdom, which is a legislative union with Scotland, Wales, England and Northern Ireland (Ulster). The autonomy of such countries can always be withdrawn by the central government. A union is also referred as a group of countries or states with the same central government.

3.2.4 Unitary

The Oxford Dictionary (1989:78) defines “unitary” in generic terms as “of or pertaining to, characterised by, based upon, or directed towards unity”. Unity must be distinguished from union which is a condition for the establishment of a federation. As a political application, although not frequently used, the word “unitary” may refer to the form of state (government), (Napier, 1997:32). Some examples of unitary states include Botswana, Zimbabwe, Namibia, Mozambique and Mauritius.

3.3 ANALYSING FEDERAL SYSTEMS

3.3.1 Written Constitution

Every existing federal system possessing a written constitution should by itself demonstrate the importance of written constitutions in federal systems (Sindani, 1999:26). Most federal scholars regard written constitutions as the first requirement of a federal system, even though this idea is vague, because there are various unitary states which believe that a written constitution is a vital step towards the establishment of a unitary state.

However, Elazar (1997:157) is of the opinion that a written constitution is a product of federalism. This is linked with the fact that the relationship that must be established or confirmed in a federal system must be established through a perpetual compact of a union, usually, if not inevitably, embodied in a written constitution. The importance of a written constitution is to specify the division of authority between the central government and its constituent units.

A written constitution is necessitated by the need to outline the terms of power division and power sharing and the need to ensure that the relevant terms will not be unilaterally altered by any of the established spheres of government (Sindani, 1999: 27). The supremacy of a constitution means that the constitution, and not legislation by parliament, is the supreme law. In some instances this view is confusing.

3.3.2 Judicial arbitration

Judicial arbitration is another element to which many proponents of federalism attach great importance. It derives its importance from the necessity to have a guardian of the constitutional division of power and an independent interpretation of the supreme constitution, in the event of a dispute over the constitutionality of constituent units within a federal government (Napier, 1997:18). Furthermore, all countries with federal systems have chosen the option of judicial arbitration. Institutions of judicial arbitration vary from country to country.

For instance, the ‘last word’ in Canada regarding constitutional disputes, lies with the Supreme Court, in Australia with the High Court, in the USA with the Supreme Court, in Switzerland with the Federal Tribunal, and in India, Latin America and Malaysia with the Constitutional Court (Sindani, 1999:28). In South Africa the latter is applicable, although the Constitution does not describe South Africa as a federal state.

Several federal countries allow their constituent units to write their own constitutions. This arrangement is similar to what exists in South Africa, although South Africa is not a federal state. These include countries such as the USA, Switzerland and Germany. The only condition is that the constituent units adhere to a republican form of government (Sindani, 1999:30).

According to De Villiers (1996:14), in countries such as India, Canada, Belgium and Nigeria, the constituent units do not have a right to write their own constitution. In South Africa, provinces have the right to write their own constitutions as long as they do not infringe the National Constitution. Federalists generally argue that federation function is a form of empowerment.

In effect, it creates the opportunity for regional voices to be heard, and within multi-ethnic federations enables ethno-regional groupings more opportunities for negotiating the territorial distribution of power and more representative institutions. Canada, for example, has a single legal system jointly administered by the Federal Government and the provinces. The Canadian Constitution of 1982 grants the provinces the power to establish courts in civil and criminal matters.

The administration of justice, in the first instance, is also a provincial responsibility, giving the office of the provincial Attorney-General the power to prosecute criminal behaviour under the Canadian Criminal Code of 1982, and the overall responsibility for the administration of the judicial hierarchy within the province, with a provincial supreme court on top (Elazar, 1997:62).

As for law enforcement machinery, only the provinces of Ontario and Quebec have their own separate police forces. All other provinces and territories engage the service of the Royal Canadian Mounted Police. Local law enforcement is in the hands of the local police. Quebec narrowly lost the vote to secede from Canada, and the prospects of an independent French province were shattered. Yet, the target of Quebec's nationalists is not the United States, but rather Canadian federalism or its symbolic equivalent; the so-called “English-Canada” (De Villiers, 1996:144).

This idea of trying to establish an independent *"Volkstaat*" (an independent state within a state) is one of the problems facing federal countries of the world. Other examples include: the Biafran in Nigeria, the Kashmir in India and more recently KwaZulu-Natal just before the April 1994 elections (Holiday, 1996:5).

3.3.3 Prerequisites for federal associations

When separate states or communities want to unite on a federal basis, there are two basic considerations, apart from the particular circumstances which prompt this desire that must be present. According to Kriek (1992:16), there must firstly be a strong need and desire to shoulder common interests jointly. Secondly, there must be an equally strong need and desire to shoulder domestic interests separately.

These two factors are so basic that if the first one does not exist, an association will not arise, and if the second one does not exist, something other than a federation will emerge. However, various writers express different views in this connection. The most significant views are those of Wheare (1963:35-52), such as: a feeling of military uncertainty with a consequent need for common defence; a common need to act independently of foreign powers; the expectation of greater economic advantages from such an association; the existence of one or other joint political associations in the past; geographical proximity; and, the existence of similar political institutions.

It is clear that federalism or unitarism have nothing to do with the type of criminal justice system. Each country is at liberty to implement what is deemed to be good for that particular country.

3.4 UNITARY OR CENTRALISED STATES

The word ‘unitary’ is used in conjunction with the word ‘state’. A state is defined as having a geographic territory extending over a large or small area, a large or small population, and having sovereignty - that is, having a political organisation and the capacity to make, change and enforce laws (Napier, 1997:32).

‘Unitary’ on the other hand, refers to the constitutional form within the geographic state, and it may also be used in conjunction with the constitution when it is taken to refer to the actual document establishing institutions and regulating relationships (Napier, 1997:32). In terms of this understanding, there are two essential qualities of a unitary state and unitary constitution.

The central government or authority must be supreme and there must be an absence of subsidiary sovereign bodies. Unitary states should not be equated with unitarists. The word unitarist can similarly refer to one advocating, promoting or directed towards national unity, union, or centralisation in government and administration (Oxford English Dictionary, 1989:77).

In order to make and enforce laws, the state has a supreme authority which is referred to as government. Government is that organisation in which authority is vested, and which has the right to exercise sovereign powers (Napier, 1997:38). A government must also have military power or control over the armed forces, legislative power, and the power to tax and spend revenue.

Central authorities or governments can consist of a number of different structures, each performing different functions (Napier, 1997:38). Power can be highly centralised or decentralised for a state to qualify as unitary.

3.5 IS SOUTH AFRICA A FEDERAL OR UNITARY STATE?

3.5.1 The period 1854-1890

The question whether unitarism or federalism is good for African governments is a difficult one. In South Africa a federation was regarded by the British Government or its representatives as the best possible solution for the region. In 1854 Sir George Grey, who had come from New Zealand, was appointed Governor of the Cape Colony.

He struggled for eight years to establish a federal constitution, although his ideas failed as a result of a combination of several factors, including the policy of the British Government and the absence of a central driving force (Kriek, 1992:122).

3.5.2 Rhodes' and Milner's ideas

The discovery of gold in the Transvaal and the resultant economic boom led Rhodes to believe that the Transvaal should be entrusted to more docile hands and should be incorporated in a federation under the Union Jack. The plot which became known as the Jameson Raid was a failure.

The attempt to coerce the Transvaal by force of arms to enter into a federation therefore failed (Kriek, 1992:28). In 1905 Lord Milner also tried to establish a closer cooperation among the different regions, including the Boer Republics, but this came to naught as well.

3.5.3 The National Convention of 1908-1909

Before the National Convention started, proposals in favour of a federation and those in favour of a strong unitary state were circulated among various Republics. By the time the National Convention finally 'kicked off', the argument in favour of a union gained momentum and it became clear that South Africa needed a strong and supreme parliament to draw together and unite the Whites (Holiday, 1991:7).

At the end of the Convention there was no winner, because the idea of a pure union and the idea of a pure federation were never achieved. This led to a compromise among the delegates, and many regarded the constitutional system established in South Africa by the National Convention as a worthless exercise.

3.5.4 Race Federation in South Africa

The period 1934 to 1939 marked the birth of the United Party. When General Hertzog came to power, he began implementing his racial segregation policy when he introduced the so-called "native laws". These laws made the social, political and economic segregation of races the official government policy (Kriek, 1992:150).

This was interpreted by many as the United Party's race federation. Between 1961 and 1991, political parties such as the Progressive Party, the Progressive Reform Party, the Labour Party, the Federal Party, the Democratic Party, the National Party as well as the Inkatha Freedom Party advocated federalism as the best option for South Africa (Kriek , 1992:150).

3.5.5 The new South Africa: why South Africa is not a federal state

When the then state president F W De Klerk released Nelson Mandela and other political prisoners in 1990, South Africa took a new political direction. This was followed by the unbanning of political parties such as the ANC, PAC, AZAPO as well as the UDF (Kriek, 1992:272). This new political dispensation paved the way for negotiations for the future of South Africa.

When negotiations started, two aspects came to the picture, namely, a federal state and a unitary state. The then ruling National Party pushed for a federal state whilst the ANC and its partners pushed for a strong unitary state which could unify South Africa by incorporating the bantustans (self-governing states and the so-called independent states).

The events in the Union of Soviet Socialist Republics (USSR) and the former Yugoslavia added more value to the ANC's argument not to favour a federation. The debates continued until a compromise was reached where a system was adopted which consisted of federal characters and unitary characters.

This compromise led to the establishment of the Transitional Executive Council (TEC) and the passing of the Interim Constitution which was adopted on 27 April 1994. Since 1994, after the first democratic elections, South Africa has been a country which has strong federal and unitary characteristics.

3.5.6 South Africa today

Since the adoption of the Interim Constitution as well as the final Constitution, South Africa subscribes to the *Tres Politica* concept. The Constitution divides the government institutions into the legislative authority, the executive authority and the judiciary. Each of these institutions has clear functions as stipulated by the Constitution.

In terms of sections 165 and 166 of the Constitution, parliament is the legislative authority entrusted with the law-making function, whereas the executive executes the laws and the judiciary adjudicates the disputes. The sovereignty of Parliament has been abolished, and now the Constitution is the supreme law of the land. The judicial authority of the Republic is vested in the courts.

The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, acceptability and effectiveness of the courts.

3.6 THE CONFUSION ABOUT THE PROPER DEFINITION OF THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

Criminal Justice System is a system of law enforcement, the bar, the judiciary, corrections and probation that is directly involved in the apprehension, prosecution; defence, sentencing, incarceration, and supervision of those suspected of or charged with criminal offences (http://www.answers.com).

According to Chamelin, Fox and Whisenand (1999:1),

> *the criminal justice system is, in reality if not in appearance, a system. A system is a series of component parts that possess common interrelationships. You are most likely to accept the criminal justice system as a system if you recognize that society is in a process of imposing the system concept on an existing criminal justice apparatus that for years has been loosely tied together.*

This definition is in line with the notion that statutes are enforced by various government agencies including the police, prosecution, court and post-adjudication process (which refers to imprisonment). This means that the state has a legal obligation to prevent criminal behaviour, reduce crime, apprehend and arrest offenders, protect life and property and regulate criminal conduct. These are functions of the law enforcement agencies.

In South Africa these functions are almost similar to those that are listed in section 205 (3) of the Constitution, namely, “to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law”. Cilliers et al. (1999:3) indicate that in addition to the law enforcement agencies, the components of the criminal justice system include the courts and the correctional services.

They add that the functions of the courts are to protect the rights of the accused, to determine by all available legal means whether a person is guilty of a crime, to dispose properly of those convicted of crimes, to protect society and to prevent and reduce criminal behaviour. In addition to this, the functions of the correctional services are to maintain institutions, to protect law abiding members of society, to reform offenders and to deter crimes (Cilliers et al., 1999:5).

However, these authors do not mention the role of the prosecution which is an integral part of the Criminal Justice System. In reality it is practically impossible to have the police, the courts and the correctional services without the prosecution agency. On the other hand, Cilliers et al. (1999:41), list the components of the South African Criminal Justice System as the law enforcement component, prosecution component, court component, and correctional component. If the views raised by Cilliers et al. (1999:3), and those outlined by the authors on page 41, are compared, conflicting explanations of the meaning and functions of the Criminal Justice System arise.

To add to the confusion, Nesser, Van der Hoven and Maree and Swart (2001:118), outline role-players in the Criminal Justice System as: the courts, the director of public prosecution, the state prosecutor and the presiding officer. The researcher is of the opinion that this explanation/outline is that these institutions should have been referred to as role-players in the prosecution of crime and not role-players in the Criminal Justice System.

Although, this is also not complete, because one cannot prosecute crime without the presence of the police. Maree and Swart (in Nesser et al., 2001:146) focus on the police and the correctional services as role-players in the Criminal Justice System. The National Crime Prevention Strategy of 1996 lists institutions within the South African Criminal Justice System as police, courts, justice, prosecution, correctional services and the Department of Social Welfare.

Therefore, with all these various explanations of the Criminal Justice Systems, it has become clearer to the researcher why South Africa does not have a proper definition of the Criminal Justice System. This is a recipe for confusion and disaster.

3.7 THE TRANSFORMATION OF THE SOUTH AFRICAN POLICE SERVICE

In 1910 the Union Constitution (an Act of the Imperial Parliament) was passed by the British Parliament, and proclaimed the Union of South Africa. Section 59 (1) of the South Africa Act prescribed that the parliament was the sovereign legislative authority in South Africa. In terms of this arrangement, the police, the prosecution, the courts and the correctional services (prisons) reported to one minister, namely, the Minister of Justice.

According to section 1 of the Police Act and section 1 of the Prisons Service Act, the "Minister" referred to is the Minister of Justice, and the powers of the police were located in section 7 of the Police Act. At that stage the criminal justice institutions, namely the police, the prison services and the prosecutions were directorates of the Department of Justice. During this time the parliament was still supreme (htt://www.answers.com).

Parliamentary sovereignty contrasts with most notions of judicial review, where a court may overturn legislation deemed unconstitutional. Parliamentary supremacy continued to exist even after until South Africa became a democratic state in April 1994.

3.7.1 The De Witt Commission

The South African Police has undergone various forms of transformation since its formation in 1914. From being a British Union Police to a Republican Police force. All these changes had an impact in the total transformation from a police force to a police service respected and accepted by the people of South Africa.

However, in the mid-1980s the South African Police realised that it was necessary to undergo transformation. In 1988 the De Witt Commission was established to conduct an investigation into the restructuring of the police. The major recommendations of the De Witt Commission centered on the decentralisation programme of the police. This restructuring was also motivated by changes to the political environment which followed the then State President FW de Klerk's landmark speech on 2 February 1990 (Rauch, 1991:18).

These changes, which took place in August 1991, were aimed at improving police community relations by improving the SAPS' image, service and organisational efficiency. The changes brought by the Commission need to be understood as responses to the profound crisis of legitimacy which the police continued to experience. One landmark recommendation of the Commission was the merging of the Security Branch with the Detective Service to form the Crime Combating and Investigation Division (De Witt Commission, 1988:50).

However, a major stumbling block to these recommendations was the rigid hierarchies and militaristic style of policing which continued to 'derail' real improvements in the service delivery. Therefore, changes in police or any government department is not something new in South Africa. However, it is important that change or restructuring has a purpose and a goal to be achieved.

3.7.2 The National Peace Accord

The National Peace Accord was a multiparty agreement created in September 1991 to address high levels of political violence in the early transition period. The Peace Accord introduced a range of structures and procedures to prevent and deal with inter-group conflict. Many of these structures and procedures focused on policing.

It was suggested that a “police board”, made up of equal numbers of police generals and civilian experts on policing matters, nominated by the signatory parties to the Peace Accord, be established. The board was to advise the Minister of Law and Order on policy matters (http://www.answers.com).

A code of conduct for the police was drafted in order to reduce police misconduct. This led the parties to engage in further negotiations, which led to the proposal to establish a statutory body to be called the “Independent Complaints Directorate.” This was realised when the Interim Constitution and the new South African Police Service Act were promulgated. These changes had a great effect on crime investigation, especially the use of torture as an investigation method.

3.7.3 The Interim Constitution Act 200 of 1993

On 27 April 1994 (Election Day) the Interim Constitution was adopted, and its main purpose was to introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto. The most important chapters of this Constitution, for the purpose of this discussion, were: Chapters 3, 7 and 14. Chapter 3 dealt with human rights, especially the rights of the accused, the arrested and the detained.

This chapter played a major role in the functioning of the police. One needs to highlight that the issue of human rights was one of the burning issues during the signing of the National Peace Accord in September 1991, hence sections dealing with the rights of the accused, the arrested and the detained were taken from the National Peace Accord (http://www.answers.com).

Chapter 7 dealt with the administration of justice, including the roles of various courts and the establishment of the Constitutional Court which would then become the highest court of the land. Chapter 14 dealt with matters relating to the police and the Defence Force. The most important milestone in policing in South Africa was brought about by section 221 which provided that:

> *(1) the Act in section 214 (1) shall provide for the establishment of community-police forums in respect of police stations; (2) The functions of community-police forums referred to in subsection (1) may include the promotion of accountability of the Service to local communities and co-operation of communities with the Service; the monitoring of the effectiveness and efficiency of the Service; advising the Service regarding local policing priorities; the evaluation of the provision of visible police services, including the provision, sitting and staffing of police stations; the reception and processing of complaints and charges; the provision of protective services at gatherings; the patrolling of residential and business areas; the prosecution of offenders; and requesting enquiries into policing matters in the locality concerned.*

3.7.4 Structural amalgamation of different policing agencies

Prior to 1995, South Africa was divided into the so-called TBVC States (Transkei, Bophuthatswana, Venda and Ciskei), Self-Governing Territories (homelands) and Development Regions or “old” South Africa. The TBVC States had independent status but were not widely recognised by the international community. The Self-Governing Territories were also referred to as Homelands and included: Gazankulu, Kangwane, Kwandebele, Kwazulu, Lebowa and Qwaqwa.

Every homeland had its own policing agency, bringing the total number of policing agencies in the country to eleven (six homelands, four TBVC states and the old South African Police). All eleven policing agencies had different uniforms, rank structures and conditions of service, and were established under different pieces of legislation (http://www.answers.com). With the adoption of the Interim Constitution in 1994, the Homelands, TBVC states and old development regions were abolished and integrated into a united South Africa with nine provinces.

The new Constitution established a single National Police Service for South Africa under the executive command and control of a National Commissioner appointed by the President (http://www.en.wikepedia.org). On 1 December 1995, the South African Police Service Act was promulgated. The Act paved the way for the amalgamation of the eleven police agencies and non-statutory forces from uMkhonto we Sizwe (MK), the armed wing of the ANC and the Azanian People's Liberation Army (APLA)-the Pan African Congress (PAC) armed wing (http://www.saps.gov.za).

In addition to the above innovations, Chapter 10 of the Act made provision for the establishment of a Civilian Oversight with a mandate to investigate deaths in police custody and police ill-treatment of suspects. Furthermore, the SAPS Act also made provision in section 16 with regard to the investigation of organised crime activities, including: circumstances amounting to criminal conduct or an endeavour thereto, as set out in subsection (2), shall be regarded as organised crime, crime which requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof. Circumstances contemplated in subsection (1) comprise criminal conduct or endeavour thereto by any enterprise or group of persons who have a common goal in committing crimes in an organised manner.

3.7.5 Independent control of the police

During the drafting of the National Peace Accord, one of the most significant contributions that was made in terms of policing was to “create new procedures for the handling of actual or potential political violence, and to introduce the notions of independent monitoring of police action and of multi-agency problem-solving”. This proposal was carried and inserted into the Interim Constitution as well as into Chapter 10 of the South African Police Service Act.

The Independent Complaints Directorate (ICD) was established in April 1996. In terms of section 53 of the South African Police Service Act, the functions of directorate are: [The principal function of the directorate shall be the achievement of the object contemplated in section 222 of the Constitution. The Executive Director shall be responsible for the performance of the functions of the directorate and the management and administration of the directorate].

In order to achieve its objects, the directorate may *mero-motu* or upon receipt of a complaint, investigate any misconduct or offence allegedly committed by any member, and may, where appropriate, refer such investigation to the police action; and shall *mero-motu* or upon receipt of a complaint, investigate any death in police custody or as a result of police action; and may investigate any matter referred to the directorate by the Minister or the member of the Executive Council (http://www.icd.org.za). As it stands at the moment, the ICD’s mandate covers the Police and the Metro Police/Municipal Police agencies. Therefore, institutions such as the DSO, the Asset Forfeiture Unit, the Special Investigating Unit and the Departmental Investigation Unit of the Department of Correctional Services are excluded. The danger is that these institutions that are not covered by the ICD may abuse their powers and there is no one who can police them.

3.7.6 The Constitutional mandate of the South African Police Service

Section 205 (1) (2) (3) of the Constitution deals with the establishment of the police and provides the functions or objects of the police as follows: “to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and uphold and enforce the law”. From section 205 (3) it is clear that the police have an inherent Constitutional function or responsibility to fight crime.

Furthermore, the Constitution places a safety valve where, if the police fail to discharge their duties, they will be subject to public scrutiny. However, the Constitution fails to indicate that the police have the “exclusive rights” to fight crime.

On the other hand, the Constitution does not mention that here shall be other agencies or law enforcement agencies that will investigate, combat and enforce the law. This gap might be the reason the government has established various law enforcement agencies such as the DSO, SIU, DIU and AFU which do not conform to the Constitutional prescripts.

From a former police official’s point of view, it is the researcher’s submission that the police are recognised by the Constitution, which is the supreme law of the land. This is an indication that the SAPS is the only recognised institution which has constitutional powers to fight crime, because none of the above institutions are covered anywhere in the Constitution (Bukurura, 1995:5).

3.7.7 The Bill of Rights

The Bill of Rights contains detailed provisions concerning civil, political, social and economic rights. These rights are subject to limitations set out in section 36, which stipulates that limits on rights must be reasonable and must have an important objective.

Limits should also be "less restrictive." Security of the person and a "right to freedom" in section 12 are defined broadly as including a right to trial, freedom from cruel and unusual punishment, psychological security, reproductive control, and rights against forced scientific experiments (De Waal, Currie, & Erasmus, 2001:6).

Before 1994, effective protection of human rights through the courts was virtually impossible. Constitutional law was dominated by the doctrine of parliamentary sovereignty. According to this doctrine, Parliament could make any law it wished and no person or institution, including the courts, could challenge the laws of Parliament.

This doctrine came from Britain where parliamentary sovereignty can be justified by the fact that the parliament is the representative of the branch of the State and it derives its power from the electorate (De Waal et al., 2001:6).

South Africa had been an undemocratic state since the Union Constitution was established in 1909, which excluded the Black majority from their right to vote. This has been the opposite of what was practised in Britain where parliamentary sovereignty originated (De Waal et al., 2001:6).

3.7.7.1 Constitutionalism

Constitutionalism is the idea that the government should derive its powers from a written constitution and that its powers should be limited to those set out in the constitution (De Waal et al., 2001:7). The fundamental problem that is addressed by the writing of a constitution is to establish a government with enough power to govern but where that power is structured and controlled in such a way as to prevent it being used oppressively.

Furthermore, constitutional supremacy dictates that the rules of the Constitution are binding on all branches of the government and have priority over any other rules made by the government. “Any law or conduct that is in conflict or is not in line with the Constitution will therefore not have force of the law” (De Waal et al., 2001:8). Section 2 of the Constitution gives expression to the principle of constitutional supremacy.

3.7.7.2 The rule of law

The rule of law is entrenched in section 1 of the Constitution. The purpose of the rule of law is to protect basic individual rights by requiring the government to act in accordance with pre-announced clear and general rules that are enforced by impartial courts in accordance with fair procedures. This means that the “branches of the state must obey the law and that the state cannot exercise power over anyone unless the law authorises the state to do so” (De Waal et al., 2001:0). This expression is important to the current situation in South Africa. The Prevention of Organised Crime Act is silent as to which state institutions must investigate and seize assets which are deemed to be proceeds of crime, yet the SAPS, the DSO and the AFU use this piece of legislation to conduct their business.

As for the police, one would understand their actions because they are constitutionally bound by section 205 (3) of the Constitution, to deal with crime. As for the AFU, DSO, SIU and the DIU, the Constitution does not mention them. If this is the situation in South Africa, one tends to ask: Where is the rule of law in South Africa? Therefore, one can assume that the AFU, DSO, SIU and the DIU are actually performing unlawful functions, something the South African Constitution cannot permit.

The behaviour of the DSO in the case of Jacob Zuma is a classical example of the lack of a rule of law, where documents were seized from his legal representative's office, thus violating the privilege between a client and his legal representative.

3.7.7.3 Democracy and accountability

Apart from observing the rule of law, the Constitution also requires the government to respect the principle of democracy. The principle of democracy is referred to in several places in the Constitution. Indeed, section 1 of the Constitution provides that the Republic of South Africa is one sovereign, democratic state, founded on, inter alia, the value of "universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness" (De Waal et al., 2001:20).

The current state of affairs in South Africa, where the DSO, AFU, SIU and the DIU are not subject to any public scrutiny, leaves much to be desired. Accountability is one of the most important building blocks in democratic society. Section 205 of the Constitution and the South African Police Service Act provide clear mechanisms for police accountability.

3.7.7.4 Separation of powers and checks and balances

The doctrine of separation of powers requires the functions of the government to be classified as legislative, executive or judicial, and that each separate function is performed by separate branches of government (De Waal et al., 2001:20). This means that the functions of making laws, executing the law and resolving disputes through the application of the law, should be kept separate, and, in principle, they should be performed by different institutions and persons. The purpose of separating functions and personnel in this manner is to prevent the excessive concentration of power in a single person or body.

The history of South Africa shows that between 1910 and1983 the police and the prisons were both entities of the Department of Justice, including the Attorney General's Office (Heymans, 2006). This was abolished when the police was given its ministry of police which later became the Minister of Law and Order in 1983, after the Potgieter Commission of Inquiry of 1972 recommended a rationalisation of security forces (Heymans, 2006).

However, this arrangement did not subscribe to the principle of separation of powers, because the prisons were still part of the Department of Justice until the Ministry of Correctional Services was established in 1994. Nevertheless, this arrangement did not solve the lack of the separation of powers in South Africa, because the DSO and AFU are part of the NPA which reports to the Department of Justice and Constitutional Development. Therefore, it is clear that the current government did identify the issue of the separation of powers; hence the 1996 Constitution was established. However, the establishment of the Scorpions, DIU, SIU and AFU is a clear indication of defeating the intention of creating a distinct constitutional state with clear separation of powers.

3.7.7.5 Sections 33 and 35 of the Constitution

There are two fundamental aspects that are addressed by sections 33 (1) and (2), namely, that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”, including the mechanism for everyone whose rights are affected by the administrative action. Now that the mandate and powers of the DSO, AFU, SIU and the DIU are not spelt out anywhere in the Constitution, is this not a creation of institutions whose functions are an indirect violation of section 33?

Currently there is no provision where if any of the four institutions violates individual rights, such an individual may obtain recourse. The fact that there is no oversight over these bodies is an indication that such institutions are given super-powers and such powers are vulnerable to abuse. Section 35 deals with the rights of the “arrested, detained and accused persons”. From the literal meaning of this section, the “arrested, detained and accused persons” refers to the people in the custody of the police.

If one considers the fact that the Constitution was adopted in 1996 after the police service was formally established in 1995, but before the establishment of the AFU, SIU, DSO and the DIU, it is an indication that this section refers to the rights that have been infringed by the police. (The DSO, the AFU and the SIU have no detention centres). However, section 35 is vaguely formulated in that it does not specify or define what is meant by “arrested, detained and accused”. Therefore, this section is open to different interpretations.

For example, section 35 (3) © states that “every accused person has a right to a fair trial, which includes the right to a public trial before an ordinary court”. The SIU uses a Special Tribunal which is based in East London.

This court is not an ordinary court as it is referred to in section 35 (3). The provision of the Special Tribunal is contained in the Special Investigation and Tribunals Act. This arrangement is an indication that the SIU is player and referee at the same time. This may lead to serious violations of individual rights in relation to the notion of a “fair trial”.

3.7.8 The National Crime Prevention Strategy of 1996

The National Crime Prevention Strategy (NCPS) was adopted by Cabinet in May 1996. Since then, the NCPS has moved a long way from being a strategic document to an operational programme. Various structures and processes have been put in place to make the NCPS a reality.

The Department of Safety and Security was assigned, by Cabinet, the role of coordinating other departments. The growing weakness of the Criminal Justice System has not escaped Government intervention. The National Crime Prevention Strategy (NCPS) has, as its central task the bringing together of departments involved in crime control and prevention and the coordination of their activities.

The development of the strategy involved six core government departments: Department of Correctional Services, Department of Defence, National Intelligence Agency, Department of Justice and Constitutional Development, Department of Safety and Security, and Department of Social Welfare. This is in itself an important development, representing a holistic (as opposed to sectoral) approach to crime prevention, which has been lacking. What is also clear from the document is the reorientation of the intelligence community, which now assumes an increased crime combating role for specific types of crime.

At a different level, the strategy indicates another significant shift in the discourse on safety and security in South Africa. The focus changed from 'community policing' (which is barely mentioned in the document) to 'crime prevention' and the building of 'partnerships', both between government agencies and with outside organisations in business and civil society, in an effort to stem the tide of crime.

The document provides a detailed analysis of reasons for the growth of crime in the country - seen (correctly) as a complex intermeshing of a diversity of factors - and outlines steps under way in various government departments to counter crime. Outside of the repair of the criminal justice process, three key issues - environmental design, education and transnational crime - are identified as being critical areas for intervention to reduce crime.

In addition, the strategy lays down seventeen nationally driven programmes to be implemented. These are diverse, ranging from the improvement of information systems (poor information transfer is at the heart of the system's problems), victim empowerment and support, and mechanisms to counter organised crime. What seems notably absent from the list of new programme is specific preventive strategies related to drug use, the proliferation of small arms and the gang problem in certain parts of the country.

While all are covered either directly or indirectly within various sections of the document, it would be well worth consolidating current initiatives and developing specific strategies to form two or three additional (and high profile) prevention programmes. These areas are of increasing concern, given that they hold the potential to spawn wider forms of criminality.

The issue of increasing drug usage, for instance, is a critical one. Government response to the drug problem has historically been fragmented and poorly funded with no coordination between reactive and proactive programmes. What needs to be explored is the establishment of a law enforcement body, separate from the current police and intelligence structures that would provide leadership in the areas of prevention and enforcement.

Equally, while the NCPS calls for more research into expenditure on private security, no special initiative is identified to allow an in-depth investigation of the industry and its role (if any) in crime prevention. The key to the success of the strategy is coordination. Without this, it simply becomes a reflection of a wide variety of programmes which may eventually, in any event, have occurred in one form or other. A related problem with such a large and complex initiative is that it is virtually immune to measurement at a national level. There is a danger that success will simply be equated with a flurry of activity rather than any real decreases in crime.

Given the number of players involved, the complexity of the strategy should not be underestimated. Apart from, and in conjunction with, the seventeen programmes initiated through the strategy, there are various initiatives in line function departments and the seeking of partnerships with outsiders.

While the document makes allowance for monitoring at departmental and programme level, the extent to which the whole enterprise will be subject to review is not clear. It would be inappropriate, in the light of the difficulties in interpreting crime statistics, to suggest that the crime rates should be cut by a given percentage by the year 2000. Realistic programme deliverables need to be outlined more clearly.

It is thus of concern that the strategy - despite the fact that it is a framework for implementation - contains virtually no time frames for the completion of the various programmes, although in some cases it appears that these will still be determined. The success of the strategy is critical. Failure will bring growing disillusionment with conceptions of proactive crime prevention which is central to the long term solution of disorder in South African society.

Instead, there will be a continued growth in reactive, self-help and increasingly violent solutions to crime. The NCPS also fails to indicate the establishment of investigative institutions/agencies such as the Special Investigating Unit, the Departmental Investigating Unit, the Asset Forfeiture Unit and the Directorate of Special Operations.

3.7.9 The de-specialisation of the SAPS's investigative units

3.7.9.1 Rationale for reorganisation

In January 2001 the SAPS announced that the specialised units as they existed at the time would be dissolved. This was done in accordance with government's strategy to have an integrated approach to fighting crime. In addition, the National Commissioner of the SAPS was reported as saying that the police's capacity to deal with organised crime syndicates should be coordinated in an integrated manner (Maistry & Redpath, 2001:12).

Furthermore, there was a feeling that local police stations should be empowered to effect expert policing. This would ensure that serious and violent crime was adequately addressed by those with the necessary expertise.

Moreover, it was felt that by dissolving the specialised units the police would be able to address the crime phenomenon more effectively. The intention with the dissolution of the specialised units was to create more generalists than specialists.

A key motivation underlying the restructuring is that it provided an opportunity for removing detectives who were under-performing, from the specialised units. Part of the problem with specialised units is that given the nature of detective work, it was relatively easy for under-performing and under-motivated detectives to operate at sub-optimal level and escape unnoticed (Maistry & Redpath, 2001:13).

3.7.9.2 Transfer of skills to station level

A major theme of the official motivation for redeploying detectives at station level is that a large volume of skills would be transferred to station level. With the uncontrolled proliferation of units across the country, eventually amounting to 503 such units, more and more detectives were lost to police stations. Very often these were the most skilled persons (Maistry & Redpath, 2001:13). With more detectives now based at station level, it is envisaged that detectives will be able to arrive at a crime scene sooner than was possible in the past.

Where units were located some distance from stations, very often some time would pass before a docket ended up in the hands of a unit. There is some optimism that there will be a sharing of skills and expertise at station level. It is hoped that existing station level detectives will benefit from the expertise and experience of their colleagues who were previously based at specialised units. (Maistry & Redpath 2001:13).

More importantly, there is an expectation that crimes investigated at station level will be more thoroughly investigated, and ultimately the conviction rate will improve, given the added capacity. In this way the community living in that police station area may reap the benefits of the dissolution and concomitant re-organisation of the specialised units.

3.7.9.3 Reduction in administrative costs

Prior to restructuring, a ratio of just over two police stations for every specialised unit existed. Each unit had its own office, its own administrative staff and its own vehicles and equipment. Clearly, a large amount of unnecessary duplication of resources and administrative costs resulted (Maistry & Redpath, 2001:13). This was particularly so in the case of small units consisting of fewer than ten persons. These resources were to be redistributed to station level, further boosting the capacity of police stations.

It is clear from the SAPS strategy that a multi-skilled team approach to investigations would yield better results. Similarly, it is rather too early to assess whether or not investigators from specialised units transferred to station level have made a significant contribution to the success rate (Maistry & Redpath, 2001:15). It is clear that the transformation of the police has brought different results, both positive and negative.

From the researcher's point of view, it was good to close the security branch and integrate it to the intelligence structures. It was also good to bring the culture of human rights and police civilian oversight to the SAPS, because of South African history (torture, confessions, admissions and pointing out). However, there are those who believe that the de-specialisation of the police was not a good idea.

The researcher is of the view that there was nothing wrong with this exercise, as long as proper procedures were followed. People who were in comfort zones are the ones who are disillusioned because it is not easy to adjust in a new environment.

3.8. TRANSFORMATION OF THE CORRECTIONAL SYSTEM IN SOUTH AFRICA

3.8.1 The early 1990s

The early part of the 20th century saw the prison system regulated mainly by various Provincial Ordinances. The Prisons Reformatories Act 13 of 1911, introduced shortly after the Union Government of 1910, saw the prison system also becoming responsible for the management of reformatories. Courts started playing an increasing role in the development of prison law. For example, it was unlawful to detain awaiting-trial offenders in solitary confinement, and those who felt that they had been unfairly treated had the legal right to approach the courts for recourse.

This period also saw the introduction of a system that allowed for the remission of part of a prison sentence subject to good behaviour on the part of the inmates, and the system of probation that allowed for the early release of inmates, either directly into the community or through an interim period in a work colony or similar situation (White Paper on Corrections in South Africa, 2005:20).

Punishment for transgressions within correctional centres was harsh and it included whippings, solitary confinement, dietary punishment and additional labour. Racial segregation within correctional centres was prescribed by legislation and it was vigorously enforced throughout the country.

3.8.2 The Lansdowne Commission of 1945

The Lansdowne Commission on Penal and Prison Reform found that the Prison and Reformatories Act had not introduced a new era in South African prisons, but that it had in fact been a vehicle for maintaining the previous harsh and inequitable prison system that preceded it. According to the White Paper on Corrections in South Africa (2005:20), the Landsdowne Commission made the following findings: offenders should not be hired to outsiders; emphasised the need for rehabilitation and the need to extend literacy among offenders - in particular Black offenders; and it was critical of the government's decision to reorganise the prison service on full military lines, which was seen to be an attempt to increase the control it had over prison officials.

The Commission further warned the government that such a militarised system would not be conducive to the "various rehabilitative influences which modern views deemed essential". Nothing much resulted from the Lansdowne Commission Report which was submitted in 1947.

3.8.3 Prisons in the 1960s and 1970s

New prison legislation in the form of Prisons Act 8 of 1959, was introduced. The new Act continued and even extended racial segregation within prisons in line with the national policy of differential development, abandoned the nine pennies a day prison labour scheme and replaced it with a system of parole; it closed the prison system off from inspection by outsiders by prohibiting reporting and publishing of photographs.

Although the new Act took cognisance of the United Nation's Standard Minimum Rules for the Treatment of Prisoners (1958), as far as the emphasis on rehabilitation was concerned, it ignored other crucial aspects, such as the prohibition of corporal punishment for prison offences (White Paper on Corrections in South Africa, 2005:20). The period 1960-1970 was famous for mass detention of political prisoners, and the prison authorities were widely challenged by the detainees and also condemned by the international community.

3.8.4 The Prisons Department in the 1980s

In 1984 the Judicial Inquiry into the Structure and Functioning of the Courts reported that the incarceration of prisoners as a result of influx control measures was a major cause of overcrowding in prisons, and it condemned these measures. As a result of the findings of the Inquiry, progressive changes started taking place, with the closing down of prison outstations and a general decline in the use of prison labour for agricultural purposes (White Paper on Corrections in South Africa, 2005:20). The system of paroling prisoners under paid contracts was also phased out.

These marginal changes in the prison system were, however, soon overshadowed by the declaration of the State of Emergency on 21 July 1985, which lasted until 1990. During 1988 important amendments were made to prison legislation. By excluding all references to race, a reversal of the almost total racial segregation of the prison population was brought about, although it took some years before it was finally implemented. The infamous prison regulation that ruled that White staff members automatically outranked all non-White staff members was also repealed.

3.8.5 Prison reforms in the early 1990s

Late in 1990 the government announced that it planned to introduce extensive reforms to the prison system. The Prison Service was separated from the Department of Justice and renamed the Department of Correctional Services (White Paper on Corrections in South Africa, 2005:22). This triggered important changes to prison legislation. An important milestone in this period was the introduction of the concept of dealing with certain categories of offenders within the community, rather than inside prison. This system was named “correctional supervision” and was introduced as a more cost-effective way of doing corrections and a response to overcrowding.

The release policy and the automatic system of remission were revisited, and a system of credits which prisoners could earn for appropriate behaviour, was introduced. At the same time, in the face of rising challenges to the racial barriers on promotion of Black members into the officer ranks in the Department, the Prisons Act was amended to make it illegal for warders to become union members without the permission of the Commissioner, and also made it an offence to strike (White Paper on Corrections in South Africa, 2005:22).

The introduction of the Public Service Labour Relations Act in 1993 brought another transformation in this regard. This Act was subsequently replaced by the Labour Relations Act of 1995, and introduced aspects such as bargaining, abolishment of unfair discrimination and the use of the Labour Appeal Court, Labour Court, Commission for Conciliation, Mediation and Arbitration (CCMA) and Bargaining Councils by the members of the Department of Correctional Services.

3.8.6 Transformation of Correctional Services in the democratic South Africa

The Interim Constitution, introduced in 1993, embodied the fundamental rights of the country's citizens, including that of offenders. This resulted in the introduction of a human rights culture into the correctional system in South Africa, and the strategic direction of the Department was to ensure that incarceration entailed safe and secure custody in humane conditions (White Paper on Corrections in South Africa, 2005:22).

On 21 October 1994, a White Paper on the Policy of the Department of Correctional Services recognised the fact that the legislative framework of the Department should provide the foundation for a correctional system appropriate to the constitutional state, based on the principles of freedom and equality.

Therefore, the transformation of the Department in the first five years of the new democracy entailed:

- Significant changes in the representivity of the DCS personnel and management;
- The de-militarisation of the correctional system in order to enhance the Department's rehabilitation responsibilities, on 1 April 1996;
- Progressive efforts to align itself with correctional practices and processes that have proved to be effective in the international correctional arena; and
- The introduction of independent mechanisms to scrutinise and investigate its DCS activities, such as the appointment of an Inspecting Judge (White Paper on Corrections in South Africa, 2005:22).

All these initiatives were followed by the introduction and subsequent adoption of the National Crime Prevention Strategy and the Integrated Justice System introduced by the SAPS and the Department of Justice and Constitutional Development respectively. Parallel to this was the passing of the Constitution in 1996, which provided the overall framework for governance in democratic South Africa, enshrined the Bill of Rights, and obliged government departments to align their core business with the Constitution.

As a result, the Department embarked on a massive legislative reform by enacting the Correctional Services Act 111 of 1998. This legislation represented a total departure from the 1959 Act and embarked on a modern, internationally acceptable correctional system, designed within the framework of the Constitution.

The most important features of the Correctional Services Act are:

- The entrenchment of the fundamental rights of offenders;
- Special emphasis on the rights of women and children;
- A new disciplinary system of offenders;
- Various safeguards regarding the use of segregation and of force;
- A framework for treatment, development, and support services;
- A refined community-involved release policy;
- Extensive external monitoring mechanisms; and
- Provision for public and private sector partnerships in terms of the building and operating of correctional centres.

3.8.7 Demilitarisation

The Department of Correctional Services became a militarised institution in the 1950s. To aid transformation, it was demilitarised in 1996, as a militarised approach was considered counter-productive to the goals of prisoner rehabilitation.

Demilitarisation involved changing the structure, ranks systems and mode of address, and scrapping uniform insignia and daily militarised parades. This move was not received without criticism and a good deal of insecurity on the part of staff members who had grown to appreciate their military-like status. Central to the demilitarisation process was the creation of a new civilian structure and mode of discipline.

However, demilitarisation was unfortunately conceptualised in a narrow and mechanistic manner, and has not resulted in extensive change to the culture of the Department (White Paper on Corrections in South Africa, 2005:22). Although prison staff are no longer assigned ranks and wear no visible insignia, hierarchical identities remain. For example, prisoners often still refer to prison staff by their military rank; some prison staff also refer to themselves in this way.

3.8.8 Strategic realignment of the Department of Correctional Services since 2000

The period 2000-2003 has been marked by consistent engagement with the strategic direction of the Department, as role-players have striven to interpret the purpose of the correctional system and unpack the policy direction necessary for successful delivery on rehabilitation and the prevention of recidivism.

To this end the Department identified the enhancement of rehabilitation services as a key starting point in contributing towards a crime-free society. The strategies developed towards the enhancement of rehabilitation were:

- Development of individualised need-based rehabilitation programmes;
- Marketing of rehabilitation services to increase offender participation;
- Promotion of a restorative justice approach to justice to create a platform for dialogue for the victim, the offender and the community, facilitating the healing process; and
- Increase of training facilities for the development of skills (White Paper on Corrections in South Africa, 2005:22). These initiatives were followed by the introduction of the division of correctional centres into smaller manageable units.

3.8.9 Challenges

According to the White Paper on Corrections in South Africa, 2005:26), throughout all of these periods of transformation the Department has faced a range of challenges, some of which are inherent in correctional systems all over the world, and some have particular South African or time-specific dimensions. These challenges are due to both inherent risks in correctional systems and dimensions due to the societal transformation that South Africa has gone through over the past decades, including overcrowding, institutional 'prison culture' and corruption.

Out of the three challenges, corruption has caused much damage to the Department's image. The Department of Correctional Services appears to be plagued by endemic corruption that interferes with its ability to meet its legal objectives.

The Judicial Inspectorate of Prisons was initially charged with investigating corruption and dishonest practices in the Department, but has since refused to undertake this task because it felt it was neglecting its legislative mandate. It has been argued that accomplishing the latter would require far more resources than it presently has at its disposal that such investigations require an approach different to that used to investigate the treatment of prisoners and that such an activity would take up too much of its time.

There were also concerns about compromising the good relationships with personnel, which the Judicial Inspectorate relies on in order to do its work. The Department of Correctional Services then decided to establish its own anti-corruption unit by establishing the Departmental Investigating Unit.

This responsibility was removed from the Judicial Inspectorate when the Correctional Services Act was amended by Parliament at the end of 2001. It is problematic that the investigation of corruption is left solely in the hands of the Department of Correctional Services.

Despite a few high profile arrests and convictions, the Department has so far been unable to deal with it. Corruption, intimidation and nepotism clearly affect the ability of its staff members to investigate their own colleagues. It is, however, difficult to separate the treatment of prisoners from corruption, because of the integral relationships between staff and prisoners.

The two often go hand in hand, and the Judicial Inspectorate of Prisons will most likely find it impossible to completely ignore the issue of corruption, although it falls outside their jurisdiction.

3.8.10 Independent oversight of prisons

The promulgation of the Correctional Services Act led to the establishment in 1998 of independent oversight of prisons through the Independent Judicial Inspectorate, which is headed by an inspecting judge. This office is mandated to inspect prisons and report on the treatment of prisoners and conditions in prison.

The law has been amended so that a person awaiting trial, who is unable to pay the bail amount, can be released if the head of the prison is satisfied that overcrowding threatens the human dignity, physical health or safety of prisoners (Judicial Matters Amendment Act 42 of 2001). The new provisions making allowance for plea bargaining also have the potential to reduce the number of awaiting trial prisoners.

The Judicial Inspectorate is also charged with the appointment of Independent Prison Visitors (IPVs) from the community. One or more, IPVs are appointed for each prison. They make regular visits, interview prisoners and deal with their complaints by reporting these to the head of the prison, and monitoring how they are dealt with. A shortcoming of this initiative is that IPVs are limited to making recommendations to the heads of prisons and cannot actually solve problems themselves.

They cannot ensure that their recommendations are actually implemented. Also, many of the complaints relate to conditions in prison, which are systemic and cannot be resolved by the IPVs or even the Judicial Inspectorate. Another shortcoming of this system is that these oversights do not have powers such as those possessed by the Independent Complaints Directorate (ICD) which can investigate abuse of power by prison officials and deaths in prison custody.

3.9 TRANSFORMATION OF THE JUDICIARY

The Judiciary of South Africa is an independent branch of government, subject only to the South African Constitution and the laws of the country. The Judiciary interprets the laws of South Africa, using as the basis of its interpretation the laws enacted by the South African Parliament, as well as explanatory statements made in the legislature during the enactment.

The Judiciary is divided into Court Services and the National Prosecution Authority (see Chapter 4). In addition, institutions such as the Public Protector, the Special Investigating Unit (see Chapter 4) and the Human Rights Commission also form part of the Department of Justice and Constitutional Development.

3.9.1 The Judiciary before 1994 (during apartheid government)

The judicial system was headed by the Supreme Court, the decisions and interpretations of which were considered an important source of the law. The Supreme Court comprised an Appellate Division and six provincial divisions. Each provincial division encompassed a judge president, three local divisions presided over by judges, and magisterial divisions presided over by magistrates. Separate traditional courts were there to administer African traditional law and custom; they were presided over by traditional leaders, often chiefs or respected elders (http://www.dojcd.gov.za). The Appellate Division of the Supreme Court was the highest court in the country, seated in Bloemfontein, the country's judicial capital. The Appellate Division was composed of the Chief Justice and the judges of appeal, whose number varied as determined by the President (http://www.dojcd.gov.za). Supreme Court members could be removed only on grounds of misbehaviour or incapacity.

The Appellate Division's decisions were binding on all lower courts, as were the decisions within their areas of jurisdiction of the provincial and the local divisions. Lower courts, which were presided over by civil service magistrates, had limited jurisdiction in civil and criminal cases. In 1995 there were 309 district magistrates' offices, presided over by 1,014 magistrates, 1,196 prosecutors, and 3,717 officers (http://www.dojcd.gov.za).

3.9.2 Post-1994 Judicial System

The post-apartheid legal system, introduced by the Interim Constitution, embodies the supreme law of the land and is binding on all judicial organs of the state. It establishes an independent judiciary, including a Constitutional Court with the power to review and abolish legislation inconsistent with the Constitution. It includes provisions not found in apartheid-era laws, such as a prohibition on all forms of discrimination and an emphasis on individual rights.

These rights include "equality before the law and equal protection of the law", freedom of expression, assembly, demonstration, petition, and association; the right to "choose a place of residence anywhere in the national territory"; the right not to be deprived of citizenship without justification; full political rights; full access to the courts; and fair and lawful administrative justice mechanisms, including rights concerning detention, arrest and accusation.

Other provisions provide for specific rights in areas such as economic activity, labour relations, property, environment, children, language and culture, education, and conditions under which a state of emergency can be declared (http://www.dojcd.gov.za). In 1994 the Government established the new Constitutional Court and a Human Rights Commission (http://www.dojcd.gov.za).

Legislation in 1994 also set forth operating procedures for these bodies and established the Office of the Public Protector (public defender). Prior to 1994 South Africa had eleven departments of justice. Courts were run by an Executive Member of Parliament or administrator, and functions within courts were centralised with magistrates and prosecutors.

They were burdened with administrative and transactional procedures, undermining the quality of services. Duplication at the national and regional level was common, and case backlogs grew - in some courts numbering in the hundreds. In an effort to decentralise courts and improve efficiency, regional court offices were introduced to take over selected operational and policy functions.

As a result of all these problems, the Department of Justice and Constitutional Development, in conjunction with the United States of America International Development Aid (USAID), the *Re Aga Boswa* programme was established. *Re Aga Boswa*, which means “we are rebuilding” in the Sotho language, is a comprehensive effort to transform court services, redefining the court environment as the nucleus of service delivery (http://www.dojcd.gov.za).

The new Court Support Services Model eliminates regional court offices. A single national level office retains policy, strategic planning, and budget functions. Main courts are clustered with smaller courts. A professional court manager ensures that administrative functions run smoothly across a cluster. A Court Support Service Centre handles procurement, financial administration, human resources and auxiliary services for all courts within a cluster.

By separating the administrative and technical functions of courts and supporting court administration through a Shared Support Service Centre, prosecutors, judges and court clerks have been able to rededicate focus entirely on case quality, jurisdiction and service (http://www.dojcd.gov.za). Every case is assessed for its processing time and cost when it enters a court, and benchmarks are carefully held to by all members of the court. No court is permitted a backlog of more than 100 cases (http://www.dojcd.gov.za).

Clear lines of accountability and reporting have been established between the Judiciary, the Prosecution, and Court Services (http://www.dojcd.gov.za). In terms of the *Re Aga Boswa* project, the following initiatives have been established:

- *Court Interpretation Services*: This is meant for the illiterate.
- *Rationalisation of the High Courts*: This is intended to do away with the former homeland high courts.
- *Development of Court Shared Services Centre*: This is aimed at performing administrative transactions on behalf of the courts within a province.
- *Appointment of court managers at local court level, area court level, regional and national level:* The aim of this process is to empower court managers to procure, and also the general management of the courts.
- *Establishment of Court Shared Services Centres:* These centres handle and capture data emanating from the courts and therefore operate as back office support for the courts.
- *Information Management System (IMS*): The mandate of this unit is the translation of government policy on e-government into e-justice program and the modernisation of justice process (http://www.dojcd.gov.za).

3.9.3 The courts in South Africa

Chapter 8 of the Constitution of South Africa defines the structure of the South African judicial system. This chapter also guarantees the independence of the courts and requires other organs of the state to assist and protect the courts in order to ensure their independence, impartiality, dignity, accessibility and effectiveness (http://www.dojcd.gov.za).

In addition, Chapter 2 of the Constitution guarantees every person the right to have a dispute or trial heard by a fair, impartial and independent court. The South African court structure consists of: The Constitutional Court; The Supreme Court of Appeal; High Courts; Magistrates' Courts; Circuit Courts; Special Income Tax Courts; Labour Courts and Labour Appeal Courts; Divorce Courts; Land Claims Courts; Specialised Commercial Courts, The Water Tribunal; Small Claims Courts; Community Courts and Courts for Chiefs and Headmen.

3.9.3.1 The Constitutional Court

This Court has a final say on all matters relating to the Constitution of South Africa. Its decisions on the Constitution are binding on all other courts. This court came into existence in 1994 and has jurisdiction as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution. The Constitutional Court also has jurisdiction in respect of any alleged violation of any fundamental right entrenched in the Bill of Rights (Geldenhys & Joubert, 1996:29). One of the most significant findings of this court was the case of **S *v* Makwanyane 1995 (3) SA 391 (CC),** where the death penalty was declared unconstitutional because it violated the right to life as entrenched in the Bill of Rights. This finding had a huge effect on the whole Criminal Justice System in South Africa (http://www.dojcd.gov.za).

3.9.3.2 The Supreme Court of Appeal

The Supreme Court of Appeal is the court which has the final say on all matters, except those that involve the Constitution. For example, all criminal appeal cases from the High Court end up in this court, unless the appeal relates to a point of constitutional law, in which case the Constitutional Court has the final say. The Supreme Court of Appeal used to be called *The Appellate Division*, as it only hears cases on appeal. Decisions of the Supreme Court of Appeal are binding on all courts of a lower order (http://www.dojcd.gov.za).

3.9.3.3 The High Court

The next of the "superior courts" is the High Court of South Africa, which used to be called "The Supreme Court". The High Court divisions have "jurisdiction" – the right to hear a case – over defined geographical areas in which they are situated, and the decisions of the High Courts are binding on magistrates' courts within their areas of jurisdiction (http://www.dojcd.gov.za).

The High Court divisions have jurisdiction over all matters in their geographical area, but they usually only hear civil matters involving more than R100 000, and serious criminal cases (http://www.dojcd.gov.za). They also hear any appeals or reviews from lower courts (magistrates' courts) which fall in their geographical jurisdiction. The High Court usually hears any matter involving a person's status (e.g. adoption, insolvency). There are, at the moment, ten "provincial divisions" of the High Court and three "local divisions" (which have concurrent geographical jurisdiction over an area within a division). These courts still use names which relate to the old provincial and homeland structure of South Africa before 1994 (http://www.dojcd.gov.za).

3.9.3.4 Circuit Courts

Circuit Courts are also part of the High Court. They sit at least twice a year, moving around to serve more rural areas. They can be contacted through the High Court (http://www.dojcd.gov.za).

3.9.3.5 Special Income Tax Courts

The Special Income Tax Courts sit within divisions of the High Court and consist of a judge of the High Court, assisted by an accountant of not less than ten years' standing, and a representative of the business community.

This court deals with any disputes between a taxpayer and the South African Revenue Service, where the dispute involves an income tax assessment of more than R100 000. Appeals against its decisions are made directly to the Supreme Court of Appeal (http://www.dojcd.gov.za).

Tax disputes involving an assessment of less than R100 000 go to the Tax Board. The Tax Board is chaired by an attorney, advocate or accountant who works in the private sector and is specifically appointed by the President to assist as chairman of the Board. One can contact the Special Income Tax Court through the High Court, and the Tax Board through the South African Revenue Service (http://www.dojcd.gov.za).

3.9.3.6 Labour Courts and Labour Appeal Courts

At present there also exist Labour Courts and Labour Appeal Courts which have jurisdiction over labour matters and are on the same level as the High Court. However, the Superior Courts Bill will abolish the Labour Courts and they will be absorbed into the High Court (http://www.dojcd.gov.za).

3.9.3.7 Divorce Courts

Since 1998 Divorce Courts have been able to hear any divorce matters. Prior to that these courts dealt only with divorces between Black people. There are three such courts - the Central, North Eastern and Southern Divorce Courts, and they are designed to deal with less complicated divorces quickly and inexpensively. The Southern Divorce Court is the divorce court that has jurisdiction in the Western Cape, and it has offices at the Family Court Centre in Cape Town and a satellite office in Mitchell's Plain (http://www.dojcd.gov.za).

3.9.3.8 Land Claims Court

The Land Claims Court is on the same level as the High Court, but is independent of the High Court. It was established in 1996 and hears cases dealing with the return of land taken away during apartheid (land reform cases). The Land Claims Court has its own rules and is allowed to conduct its proceedings informally and inquisitorially (where the judge asks witnesses questions directly, rather than through lawyers) and the court can sit wherever it needs to, although its main office is in Randburg, Gauteng. Appeals go to the Supreme Court of Appeal, unless the appeal is on a constitutional question, in which case they go to the Constitutional Court (http://www.dojcd.gov.za).

3.9.3.9 The Water Tribunal

The Water Tribunal is an independent body which has jurisdiction in all the provinces, and consists of a chairperson, a deputy chairperson, and additional members. It has jurisdiction over water disputes. Members of the Water Tribunal must have knowledge in law, engineering, water resource management or related fields of knowledge (http://www.dojcd.gov.za). They are appointed by the Minister on the recommendation of the Judicial Service Commission - the body which chooses judges. The Water Tribunal replaced the Water Court in 1998.

3.9.3.10 The Magistrates' Courts

The Magistrates' Courts are the lower courts which deal with most matters. They are divided into regional courts and district courts. There are more than 400 magistrates' courts in South Africa. They do not have jurisdiction to deal with civil matters dealing with more than R100 000 (unless both the person suing and the person being sued agree to limit the claim to less than R100 000) (http://www.legal-aid.co.za).

With criminal cases, more serious criminal matters are heard in the regional courts. This is because district courts cannot pass a sentence of more than three years on conviction of an accused. The most serious criminal matters are heard in the High Court. There are also a number of magistrates' courts that are specialised to be better able to deal with certain types of matters, such as the rape court in Wynberg (http://www.legal-aid.co.za).

3.9.3.11 Small Claims Court

Small Claims Courts have jurisdiction to hear any civil matter involving less than R3000 (unless both the person suing and the person being sued agree to limit the claim to less than R3000). The judge in the Small Claims Court is called a commissioner and is usually a practising advocate, attorney or a legal academic who acts as a commissioner, free of charge. Neither the plaintiff (the person suing) nor the defendant (the person being sued) are allowed to have lawyers in the case. The commissioner's decision is final and there is no appeal to a higher court (http://www.legal-aid.co.za).

3.9.3.12 Community and Courts for Chiefs and Headmen

Community Courts and Courts for Chiefs and Headmen also have jurisdiction to hear certain matters on the level of magistrates' courts. They are designed to deal with customary disputes in terms of customary law. An authorised African headman or his deputy may decide cases, using indigenous law and custom, brought before him by an African against another African, within his area of jurisdiction (http://www.legal-aid.co.za).

These courts are commonly known as chief's courts. A person with a claim has the right to choose whether to bring a claim in the chief's court or in a magistrate's court. The use of these is in line with the *Re Aga Boswa* project which seeks to empower these courts through a process called Alternative Dispute Resolution (ADR) (http://www.legal-aid.co.za).

3.9.3.13 Equality Courts

These courts are aimed to implement the Promotion of Equality and the Prevention of Discrimination Act. Most of the disputes are handled by the South African Human Rights Commission (http://www.legal-aid.co.za).

3.9.3.14 Special Commercial Courts

Special Commercial Crimes Courts were established in 1999 and their aims were to prosecute commercial crimes. They now operate in all nine provinces. The establishments of these courts play a major role in the fight against crime, especially commercial crimes, in the sense that commercial cases do not have to queue in any ordinary court for processing (http://www.legal-aid.co.za).

3.9.4 Important officers of the court

The *Court Manager:* The duties of a court manager are: to coordinate, manage the financial and human resources of the office, manage the strategic and busines planning processes, provide case tracking services to the judiciary and prosecuting authority, and analyse court statistics to show performance and trends (http://www.legal-aid.co.za).

The Registrar keeps all the official court documents, and the *Family Advocate* must be consulted on all matters involving children, as the High Court is the upper guardian of all children in South Africa (http://www.legal-aid.co.za).

The *Master of the High Court* keeps all the records relating to people's estates (deceased or insolvent). The *Sheriff* delivers certain documents to the parties in a civil case, and also attaches property when a warrant is issued. The *Director of Public Prosecution*, who used to be called the Attorney-General, is responsible for criminal prosecutions by the State (http://www.legal-aid.co.za). The *State Attorney* is the lawyer who represents the state in civil actions (where the State is suing or being sued.

3.9.5 Important legislation

3.9.5.1 Investigation of Serious Economic Offences Amendment Act 46 of 1995

This Amendment Act brings the investigation, search and seizure provisions in line with the draft Constitution.

3.9.5.2 The South African Police Service Act 68 of 1995

This Act seeks to legitimatise the South African Police Service by amalgamating the eleven police agencies, creating the Independent Complaints Directorate, regulations on the establishment of Community Police Forums, Community Police Boards, power to investigate crime - including organised crime, and public order policing (http://www.legal-aid.co.za).

3.9.5.3 The Criminal Procedure Act 51 of 1977

According to Heymans (2006), the Criminal Procedure Act repealed the Criminal Procedure Act 55 of 1956 and brought the end of the jury system in South Africa.

Before the Criminal Procedure Act came into operation, the South Africa legal system was based on a jury system which was influenced by the British system. The jury system consisted of a judge and a jury as well as an assessor. In serious cases, the Criminal Procedure Act 55 of 1956 made provisions for the preliminary investigations which had more accusatorial aspects. The two procedures were abolished when the new Criminal Procedure Act was implemented (Heymans, 2006). The Criminal Procedure Act also brought in police prosecutors, which ended in the early 1990s.

From 1977 onwards, the Criminal Procedure Act has been amended by the following Acts: Criminal Procedure Amendment Act 56 of 1979, Criminal Procedure Amendment Act 64 of 1982, Criminal Procedure Amendment Act 33 of 1986, Criminal Procedure Amendment Act 26 of 1987, Criminal Procedure Amendment Act 8 of 1989, Criminal Procedure Amendment Act 5 of 1991, Criminal Procedure Second Amendment Act 75 of 1995 (the provisions of the Criminal Procedure Act of 1977 relating to bail, were amended to bring them in line with Chapter 3 of the draft Constitution and to make improvements to existing bail provisions), Criminal Procedure Second Amendment Act 85 of 1996, Criminal Procedure Amendment Act 86 of 1996, Criminal Procedure Amendment Act 76 of 1997, Criminal Procedure Second Amendment Act 85 of 1997, Criminal Procedure Second Amendment Act 17 of 2001, Criminal Procedure Second Amendment Act 62 of 2001, and the Criminal Procedure Amendment Act 42 of 2003 (http://www.legal-aid.co.za).

3.9.5.4 Special Investigating Units and Special Tribunals Act 74 of 1996

The object of this Act is to provide for mechanisms through which allegations of serious corruption, maladministration or misappropriation of State funds and assets can be investigated. It makes provision for the establishment of Special Investigating Units and Special Tribunal, with wide powers of investigation.

3.9.5.5 International Cooperation in Criminal Matters Act 75 of 1996

The International Co-operation in Criminal Matters Act of 1996 facilitates the provision of evidence and the execution of sentences in criminal cases, and deals with the confiscation and transfer of the proceeds of crime between South Africa and foreign States. It introduces a new procedure to obtain evidence from foreign States (http://www.legal-aid.co.za).

3.9.5.6 Extradition Amendment Act 77 of 1996

This Amendment Act brings the Extradition Act, 1962 in line with the requirements of the Commonwealth Scheme for Extradition. The Commonwealth Scheme for the Rendition of Fugitive Offenders is a policy guideline to regulate extradition between members of the Commonwealth. South Africa currently has extradition agreements with the following countries: Botswana, Lesotho, Malawi, Swaziland, United States of America, Canada, Australia, Israel, Egypt, Algeria, Nigeria, and China (http://www.legal-aid.co.za). These extradition treaties have been signed in terms of SADC and UN Protocols on Extradition and Mutual Legal Assistance in Criminal Matters, as well as the African Convention on Extradition

3.9.5.7 Proceeds of Crime Act 76 of 1996

This Act provides for the recovery of the proceeds of crime and for the prohibition of money laundering and it makes the reporting of certain information obligatory in certain circumstances. This Act was incorporated into the Prevention of Organised Crime Act 121 of 1998 (http://www.legal-aid.co.za).

3.9.5.8 Criminal Procedure Amendment Act 86 of 1996

The primary aim of the Act is to eliminate delays in the finalisation of criminal trials.

3.9.5.9 Criminal Procedure Second Amendment Act 85 of 1997

This Act further regulates the provisions in the Criminal Procedure Act, 1977 relating to bail, in order to ensure a more effective bail system. These amendments will be discussed in more detail in Chapter 6 (http://www.legal-aid.co.za).

3.9.5.10 Rationalisation of Justice Laws Act 18 of 1996

This Act brings most of the legislation administered by the former Departments of Justice in the self-governing territories and TBVC States in line with the legislation administered by the Department of Justice (DOJ) in the Republic of South Africa. Now the DOJ is called the Department of Justice and Constitutional Development (DOJCD) (http://www.legal-aid.co.za).

3.9.5.11 Judicial Matters Amendment Act 104 of 1996

This Act gives the Office for Serious Economic Offences the power to conduct prosecutions which will eliminate duplication of work, in that the person who conducts the investigation of a particular case will also be able to prosecute the case (http://www.legal-aid.co.za).

3.9.5.12 National Prosecuting Authority Act 32 of 1998

The Act provides for the establishment of a single uniform prosecuting service for the first time in the history of South Africa. The implementation of the Act will have far-reaching consequences for the administration of justice in the government's efforts to combat crime, in that the Act also provides for the development of a coherent and uniform prosecuting policy to be applied throughout the country (http://www.dojcd.gov.za).

3.9.5.13 The Magistrates' Courts Amendment Act 67 of 1998

This Act regulates the appointment of lay assessors in criminal trials in the Magistrates' Courts, so as to increase community involvement in the administration of justice. It addresses some practical problems regarding the involvement of assessors, such as the refusal or non-availability of assessors before a matter is finalized (http://www.legal-aid.co.za).

3.9.5.14 Witness Protection and Services Act 112 of 1998

The Act addresses problems experienced in the present Witness Protection Programme and also provides for the protection of witnesses of commissions of enquiry and inquest proceedings, as well as proceedings of special tribunals established under the Special Investigating Units and Special Tribunals Act, 1996 (http://www.legal-aid.co.za).

3.9.5.15 Judicial Matters Amendment Act 34 of 1998

This Act contains numerous ad hoc amendments to various Acts of Parliament. Provision is made for: the increase of the penal jurisdiction of the lower courts (in the case of district courts from one to three years' imprisonment, and in the case of regional courts from ten to fifteen years' imprisonment); the prohibition of certain acts connected with military, paramilitary or similar operations and weapons, ammunition, explosives or other explosive devices; and the amendment of section 49 (2) of the Criminal Procedure Act, 1977, to bring these provisions relating to justifiable homicide into line with the Constitution (http://www.dojcd.gov.za).

3.9.5.16 Criminal Law Amendment Act 105 of 1997

Sections 51, 52 and 53, as well as Schedule 2, which provide for the imposition of minimum sentences, were implemented on 1 May 1998. These provisions provide that a High Court or Regional Court, on conviction of a person of an offence listed in Schedule 2, must impose a prescribed minimum sentence. Although this is a temporary measure (section 53), it is anticipated that it will play an important role in combating crime (http://www.dojcd.gov.za).

3.9.5.17 Criminal Matters Amendment Act 68 of 1998

This Act deals with the declaration and detention of persons as State patients in terms of the Criminal Procedure Act 1997, and the release of such persons in terms of the Mental Health Act, 1973, including the onus of proof regarding the mental condition of an accused or convicted person (http://www.dojcd.gov.za).

3.9.5.18 Prevention of Organised Crime Act 121 of 1998

The Act aims at giving the police and prosecutors new powers to help them deal effectively with organised crime. It creates the new offence of participation in the affairs of any criminal organisation. It also allows the State to seize assets which have been used to commit crimes, or which are the proceeds of crime, through a civil action. It criminalises certain activities of street gangs, such as the recruitment of members (http://www.dojcd.gov.za).

This is the Act used by the SAPS, the AFU and the DSO to investigate organised crime. The Act, however, does not give clear guidelines on which acts of organised crime must be investigated by the SAPS and which acts must be investigated by the DSO. On the other hand, the Act give powers to the Asset Forfeiture Unit (AFU) to seize assets obtained through criminal activities. The AFU gives service to both the SAPS and the DSO (http://www.dojcd.gov.za).

3.9.5.19 Criminal Procedure Amendment Act 42 of 2003

The aim of this Act is to regulate the detention of juvenile offenders.

3.9.5.20 Interception and Monitoring Prohibition Act127 of 1992

This Act seeks to regulate the monitoring of conversations and communications between or among suspects (http://www.dojcd.gov.za).

3.9.5.21 Prevention and Combating of Corrupt Activities Act 12 of 2004

This is intended to provide for the strengthening of measures to prevent and combat corruption and corrupt activities; to provide for the offence of corruption and offences relating to corrupt activities; to provide for investigative measures in respect of corruption and related corrupt activities; to provide 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; to place a duty on certain persons holding a position of authority to report certain corrupt transactions; to provide for extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities; and to provide for matters connected therewith (http://www.dojcd.gov.za).

3.9.6 The Office of the Public Protector (OPP)

Section 181 of the Constitution and the Public Protector Act, the Office of the Public Protector, is independent of the government and is responsible for investigating the following:

- Maladministration in connection with Government affairs at any level;
- The abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
- Improper or dishonest acts, or omissions, or corruption, with respect to public money;
- Improper or unlawful enrichment, or receipt of any improper advantage or promise of enrichment or advantage; and
- Acts or omissions by a person in government employ or performing a public function, which result in unlawful or improper prejudice to another (http://www.psc.gov.za).

Any person can submit complaints to the Public Protector. These complaints can be either written or oral declarations. The Public Protector submits yearly and half-yearly reports to Parliament on the findings of a serious nature. If necessary, the Public Protector may, at any time, submit a report to Parliament on the findings of a specific investigation.

No government institution or official may hinder the Public Protector in the execution of his or her duties. The Public Protector does not investigate court decisions, matters occurring before 1 October 1995 or cases where the complainants failed to follow the prescribed grievance procedure of the offending institution (http://www.psc.gov.za).

3.9.7 The Human Rights Commission

The South African Human Rights Commission (SAHRC) was launched on 21 March 1996. The powers and functions of the SAHRC are found in section 184 of the Constitution, including the power to:

- Investigate and report on the observance of human rights abuses;
- Take steps to secure appropriate redress where human rights have been violated; and
- Carry out research and educate people about human rights.

3.10 THE IMPACT OF THE EVOLUTION OF THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM ON THE ENTIRE CRIMINAL JUSTICE SYSTEM

After analysing the three departments within the South African Criminal Justice System, the researcher wishes to highlight the impact of the transformation on the entire Criminal Justice System:

- The introduction of the Bill of Rights brought many changes in the investigation of crime, especially the admissibility of confessions, pointings out and admissions.
- The separation of the police, prisons and intelligence from the Department of Justice, paved the way for a proper separation of powers.
- The adoption of the NCPS paved the way for the introduction of the Integrated Justice System.
- The de-specialisation of the SAPS investigation units paved the way for the empowerment of the stations in terms of skills and logistics.
- The demilitarisation of both the police and correctional service created a culture of service delivery.
- The introduction of the parole system and correctional supervision introduced a system of reducing overcrowding.
- The adoption of the Prevention of Organised Crime Act brought a system where the state can seize assets obtained through criminal activity.
- The adoption of the Constitution signalled the end of segregation in South Africa.
- The introduction of the *Re Aga Boswa* project paved the way for the appointment of court managers at local, area, provincial and national level, to manage courts.
- The amalgamation of eleven police agencies paved a way for the establishment of one National Police Service.
- The abolishment of the death penalty in terms of **S *v* Makwanyane 1995 (3) SA 391 (CC).**
- In **S *v* Zuma 1995 (1) SACR 568 (CC)** the aspect of the presumption of innocence had a great impact on the interpretation of the right to a fair trial.

3.11 THE BIRTH OF THE DSO (SCORPIONS) AND OTHER INVESTIGATIVE UNITS

In October 1997 the South African Cabinet noted that there were serious problems with regard to the coordination of anti-corruption agencies. A year later the Public Sector Anti-Corruption Conference resolved that Government should explore the need for a "coordination structure while improving and strengthening the role of existing agencies" (Public Service Commission, August 2001:7). As a result of this parliamentary debate, an Anti-Corruption Strategy of 2001 was introduced by the Minister of Public Service and Administration, Mrs. Geraldine Frazer-Moleketi. The Strategy recommended that each department needed to have structures to deal with corruption.

By this time, institutions such as the Special Investigating Unit and the DSO were already in place. The idea of de-specialising the police investigative units had already begun. One of the reasons that led to the establishment of the DSO, SIU, DIU and AFU is that the government might have realised the existence of corruption as a problem as well as the lack of good judgment, because some institutions were already in existence. Although the Public Service Commission was given a mandate to conduct research and review all the Anti-Corruption Agencies in 2001, the Commission failed to stamp its authority by not coming up with clear recommendations.

Although the Commission admitted in its findings that there was "duplication of functions" among agencies within the criminal justice cluster (PSC, August 2001:3), it failed to recommend a closure of some agencies, or amalgamation. In June 1999 President Thabo Mbeki announced that a "special and adequately staffed and equipped investigating unit will be established urgently to deal with all national priority crimes, including police corruption".

These challenges include corruption among some police officials, the murder of police officers on duty, unsatisfactory standards of investigation, resulting in low conviction rates, and the general lack of an efficiently coordinated attack on organised and syndicated crime by the investigation, intelligence and prosecution authorities (PSC, August 2001:3). A discussion on DSO and other investigative agencies will follow in Chapter 4.

3.12 CONCLUSION

Parliamentary sovereignty was a dominant theme of South African constitutional history from 1910 until it was replaced by constitutional supremacy in 1993. After analysing the history of South Africa, it is clear that our legal system has gone through various stages. It is evident that South Africa derives its legal system from Roman-Dutch law as well as English law. These influences played a major role in the administration of justice. They are a result of the colonisation of this country by both Britain and Holland. It is clear that the European influence resulted in what can be called a mixed system. However, the mixed system has nothing to do with federalism or unitarism.

The fact that the jury system was abolished in 1977 after the promulgation of the Criminal Procedure Act 51 of 1977 is a clear indication that South Africa has been influenced by the European systems including English and Roman-Dutch law. From the 16th century up to 1994 there has been much debate about a system or form of government that South Africa could adopt. A country is at liberty to choose any system, as long as the system addresses the needs of its citizens. However, it should be pointed out that colonialism played a major role in the adoption of particular criminal justice systems. Many African countries have either adopted or modified a criminal justice system that was used by their colonial masters. From the analysis of federalism and unitarism it is clear that South Africa has a mixture of both federal and unitary characters.

CHAPTER 4: CRIME INVESTIGATION IN SOUTH AFRICA

4.1 INTRODUCTION

The purpose of this chapter is mainly to discuss the mandate and legislative powers of the different investigative institutions within the Criminal Justice System. Different countries use different methods to investigate crime. Normally, the methods of investigation are influenced or determined by the Criminal Justice System employed by a particular country. Furthermore, one needs to mention that in **S *v* Botha and others (1) 1995(2) SARC 598 (W)** the presiding judge ruled that crime investigation is not the sole mandate of the SAPS. He also said that the fact that a corporation's internal investigation unit had conducted an investigation was not improper, and referred to the fact that various institutions conduct their own investigations and then hand over the evidence to the police for the institution of a prosecution.

The findings in the above case indicate that the courts have interpreted section 205 (3) of the Constitution by looking at the fact that the Constitution in this section does not give the police "exclusive powers" to investigate and combat crime, but it provides the objects or functions of the police service as to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

Therefore, it may be interpreted that the fact that the Constitution is vaguely formulated might be the reason why the government decided to establish various agencies without looking at the constitutional requirements. In this chapter, statistics will be provided. However, due to the fact that these institutions were not established at the same time, the statistics refer to different periods.

4.2 DEFINITIONS

4.2.1 Criminal investigation

Criminal investigation can be defined as the discovery of relevant facts, the making of inferences from these facts, the reconstruction of the crime scene, the identification and apprehension of the offender, and the preparation of the case for prosecution and trial of the suspect(s) (Van der Westhuizen, 1996:354).

4.2.2 Organised crime

According to Palmiotto (1998:509), organised crime is the continuing criminal enterprise that rationally works to profit from illicit activities that are in great public demand. From this definition it is clear that organised crime is a process where criminals, through conspiracies, work to gain control over specific fields of activity, both legitimate and illegitimate, such as drug sale, gambling, loan sharking and prostitution.

4.2.3 Criminal proceedings

Section 1 of the Criminal Procedure Act stipulates that criminal proceedings include a preparatory examination under Chapter 20 of the Act. This concept is not defined in section 1 of the National Prosecuting Authority Act or in the National Prosecuting Authority Amendment Act. However, section 179 (2) of the Constitution and section 20 of the National Prosecuting Authority Act states that members of the prosecuting authority have powers to institute and conduct criminal proceedings on behalf of the state. This does not mean criminal investigations.

4.2.4 Special investigator

Section 1 of the National Prosecuting Authority Act defines “special investigator” as a special investigator appointed under section 19A of the Act and section 2(d) of the National Prosecuting Authority Amendment Act.

Section 22 [(2)(b)] of the Prevention and Combating of Corrupt Activities Act, states that “[a] special investigator shall be construed as to include a police official”. This is really confusing, because a police official who investigates cases is called a “detective”.

4.2.5 Justice of the peace

A justice of the peace refers to a public official who decides cases brought before a court of law in order to administer justice (http://www.answers.com). This definition is not covered either by the Justices of Peace and Commissioners of Oaths Act or by the Criminal Procedure Act.

4.2.6 Police official

According to section 1 of the Criminal Procedure Act, a police official means any member of the SAPS as defined in section 5 of the South African Police Service Act. This definition is the same one outlined in section 1 of the Prevention and Combating of Corrupt Activities Act (http://www.answers.com).

4.2.7 Peace officer

According to section 1 of the Criminal Procedure Act, a peace officer includes "any magistrate, justice, police official, or correctional official, as defined in section 1 of the Correctional Services Act, and in relation to any area, offence, class of offence or power referred to in a notice issued under section 334 (1), or any person who is a peace officer under that section". The Criminal Procedure Act is silent on whether members of the NPA and SIU are included in this definition (http://www.answers.com).

4.2.8 Oath

An oath is a solemn declaration that the statement is true (http://www.answers.com). An oath must be taken before a Commissioner of Oaths. Oaths are often used to confirm a written statement known as an affidavit, for use in court, estate or land title transactions. In South Africa, neither the Justices of Peace and Commissioners of Oaths Act nor the Criminal Procedure Act define the meaning of an oath. The Justices of Peace and Commissioners of Oaths Act has been amended many times, and in various amendments it has included magistrates, members of the NPA, the Postmaster or CEO of various parastatals, members of the SAPS and DCS members.

A Commissioner of Oaths is an individual who can administer oaths, take and receive affidavits, statutory declarations and affirmations (http://www.answers.com) According to Item 49 of Government Notice Number 905 of 10 July 1998, "all public servants above Salary Level 2 are *Ex Officio* Commissioners of Oaths". This therefore means that members of the NPA are Commissioners of Oaths because they are employed in terms of the Public Service Act 103 of 1994.

However, Item 61A of Government Notice Number 905 of 10 July 1998 further states that “directors of companies or any other person can apply to become a Commissioner of Oaths by completing a **J5 form** which can be obtained at any Magistrate office”. According to Ms D. Mahlangu (10.07.2007), the SIU members are Commissioners of Oaths because they have been granted such status by the court.

4.3 THE SEPARATION OF POWERS (*TREIS POLITIQUE*)

The *treis politique* was advocated by the French philosopher Montesquieu with a view to dividing the state authority into legislative, executive and the judiciary (Botes, 1995:24). This is in line with the view that the general principles of democracy prevent power from being vested in a single body. In South Africa, the Constitution divides power into the executive, the legislature and the judiciary. The aim of this principle is to ensure that the rights and liberties of the individual are guaranteed. This was also done to ensure that sufficient control measures would be in place in order to prevent the abuse of power and to ensure that each institution of government discharges its functions without fear of interference from another institution.

This means that the parliament formulates and adopts policy for South Africa, expressed in legislation to be implemented by the executive authority. Executive institutions include Cabinet, Ministers, executive councils, government departments, directors-general and public officials. This is in line with sections 83 to 141 of Act 108 of the Constitution which states that “the judicial authority is vested in the courts which are independent and subject to the Constitution and the law which they must apply impartially and without fear, favour or prejudice”. No person or government institution may interfere with the functions of judicial officers (Du Toit & Van der Waldt, 1997:215).

This means that according to Chapters 5 and 8 of the Constitution, South African government power is divided into the legislature, which makes the laws, the executive which executes the laws, and the judiciary, which passes judgment in all cases before the courts. The South African system is inclined towards Montesquieu's *treis politique* (Du Toit & Van der Waldt, 1997:215).

This arrangement has a strong accusatorial element, because the police who fall within the executive branch are independent from the judiciary. In this instance the police conduct an investigation and forward it to the National Prosecuting Authority for prosecution (Du Toit & Van der Waldt, 1997:215).

With the introduction of the DSO, AFU, DIU and the SIU, it seems that the three tiers of South African power are compromised. This argument is based on the fact that the DSO, the AFU and the SIU fall within the Ministry of Justice and Constitutional Development which is also in charge of the judiciary. These institutions conduct an investigation and then proceed with prosecution. This is more inquisitorial (Du Toit & Van der Waldt, 1997:215).

This therefore means that at the same time the South African system is also inquisitorial, because other law enforcement agencies fall within the judiciary. This is in line with most European countries such as France, Switzerland and Italy, who are proponents of an inquisitorial system.

This is not to say that one system is superior to the other. If, at the end of the day, justice is achieved, there is no reason to abandon a system that is working. The problem is that the three tiers are prescribed by the South African Constitution, which is the supreme law of the land (Du Toit & Van der Waldt, 1997:215).

4.4 INVESTIGATIVE INSTITUTIONS OF THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

4.4.1 The Detective Service of the South African Police Service

Figure 4.1: The logo of the South African Police Service.

4.4.1.1 Legal mandate

The legal mandate of the Detective Service of the South African Police Service is found in section 205 (3) of the Constitution which stipulates that the objects of the police service are to prevent, combat and investigate crime, to maintain public order, protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.

Although the Constitution does not prescribe exclusive rights for the SAPS to investigate crime, the impression is that the SAPS is constitutionally and legislatively mandated to deal with crime. The SAPS' constitutional mandate filters down to the South African Police Service Act and the Criminal Procedure Act.

4.4.1.2 Power and authority

In terms of section 41 of the Criminal Procedure Act, the police have the power to stop and question an individual at any time. The police can ask an individual to produce an ID book at any time and such individual must do this. The police can question anyone without arresting them.

But, whether a person has to answer the police's questions depends on the circumstances. The police may ask individuals to give their full name and address if they suspect them of committing a crime, suspect them of trying to commit a crime, or think that they might be able to give them some information about a crime. Sometimes the police need to collect evidence against criminals. The police are therefore allowed to search and seize goods or suspected stolen property in terms of sections 20 to 25 of the Criminal Procedure Act.

There are two ways of searching and seizing property. These are search with or without search warrant. Search with a search warrant (section 22 of the Criminal Procedure Act) is the legal permission for a search. It is usually signed by a magistrate. It must describe the person or the place to be searched and the things which the police will seize.

The police must carry out the search by day, unless the warrant says they can search at night. The police can only search the people and property mentioned in the warrant and they can only seize the things mentioned in the warrant.

A special type of search warrant can be issued allowing the police to enter any place or premises if they think that a meeting held on the premises threatens state security, or if they think that any offence was committed or planned on the premises.

In terms of section 22 of the Criminal Procedure Act, the police do not need a search warrant to search if the police have reasonable grounds for thinking that a magistrate would issue a warrant, but that the delay in getting the warrant would give the offender time to get rid of the evidence".

The police can also enter the property to question the suspect, but they must always first ask for consent to search or enter the property. The police can use force to enter premises if the suspect refuses to allow them in. A policeman can only search men, NOT women. Women can only be searched by policewomen or any other woman that the police ask to do the searching. Powers of the police to arrest are found in sections 39 and 40 of the Criminal Procedure Act.

A lawful arrest is executed in terms of section 39 of the Criminal Procedure Act. There are three things the police must do to make an arrest lawful: they must tell the person that such a person is under arrest, and they must have physical control over the person when they effect an arrest. A police officer must tell the suspect why they are under arrest as well as read them their rights.

The Criminal Procedure Act includes the power of the police to "shoot to kill" in certain situations, in terms of section 49 (1) of the Criminal Procedure Act. The Act deals with the use of force when effecting an arrest. Section 49 (2) states that "deadly force" may be used in certain circumstances to carry out an arrest.

The "shoot to kill" clause was challenged in the Constitutional Court, because it infringed a person's right to life (section 11) (as well as their right to human dignity (section 10) and bodily integrity (section 12). Parliament has passed a new section 49, but this has not yet been put into operation by the President.

In addition to these powers, the police have powers to enter premises in connection with state security or any offence (section 25), entering of premises for purposes of obtaining evidence (section 26), forfeiture of articles to the state (section 35), powers in respect of prints and bodily appearance of the accused (section 37) and procedure after arrest, (section 50). In addition to the powers to forfeit an article to the state in terms of section 35, the state may make use of Chapters 5 and 6 of the Prevention of Organised Crime Act.

In terms of section16 of the South African Police Service Act, the police have the power to investigate circumstances amounting to criminal conduct or an endeavour thereto, as set out in subsection (2), shall be regarded as organised crime, crime which requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof. Circumstances contemplated in subsection (1) comprise criminal conduct or endeavour thereto (a) by any enterprise or group of persons who have a common goal in committing crimes in an organised manner; (b) (i) by a person or persons in positions of trust and making use of specialised or exclusive knowledge; (ii) in respect of the revenue or expenditure of the national government; or (iii) in respect of the national economy or the integrity of currencies; (c) which takes on such proportions or is of such a nature that the prevention or investigation thereof at national level would be in the national interest; (d) in respect of unwrought precious metals or unpolished diamonds; (e) in respect of the hunting, importation, exportation, possession, buying and selling of endangered species or any products thereof as may be prescribed.

Besides the Criminal Procedure Act and the Prevention of Organised Crime Act, generally the police have a monopoly on investigating crime. In addition to these powers, the police have powers to grant bail to a suspect in terms of section 59 of the Criminal Procedure Act.

4.4.1.3 Methodology

The Detective Service of the SAPS uses a traditional accusatorial system. Accusatorial investigations imply that the prosecutor directs a highly informal investigation, since, as a rule, the only admissible evidence is that which is accepted during public and oral trial proceedings (http://www.answers.com). The purpose of the investigation is to obtain information that will convince the prosecutor that sufficient proof exists to prosecute and convict the accused.

A criminal case is reported to the police where the detectives conduct an investigation. After an investigation had been completed, a case docket is forwarded to the National Prosecuting Authority where the state prosecutor will decide whether to prosecute or not (http://www.paralegaladvice.org.za).

If the prosecutor is of the opinion that there are still aspects which the police need to follow up before he/she can make a decision about the docket, he/she will record such an instruction in the docket and refer it to the investigating officer for further investigation (Joubert, 2001:210).

Once the prosecutor has made a decision on the docket, it is returned to the investigating officer to finalise the matter. If the prosecutor has decided to prosecute, he/she will formulate the charge and decide when and in which court the trial will be heard (Joubert, 2001:210). The investigating officer is responsible for serving the summons on the accused and for ensuring that all the witnesses are also subpoenaed to be at the court on the particular day for the trial to take place. The following diagram indicates a typical accusatorial system used by the Detective Service of the SAPS.

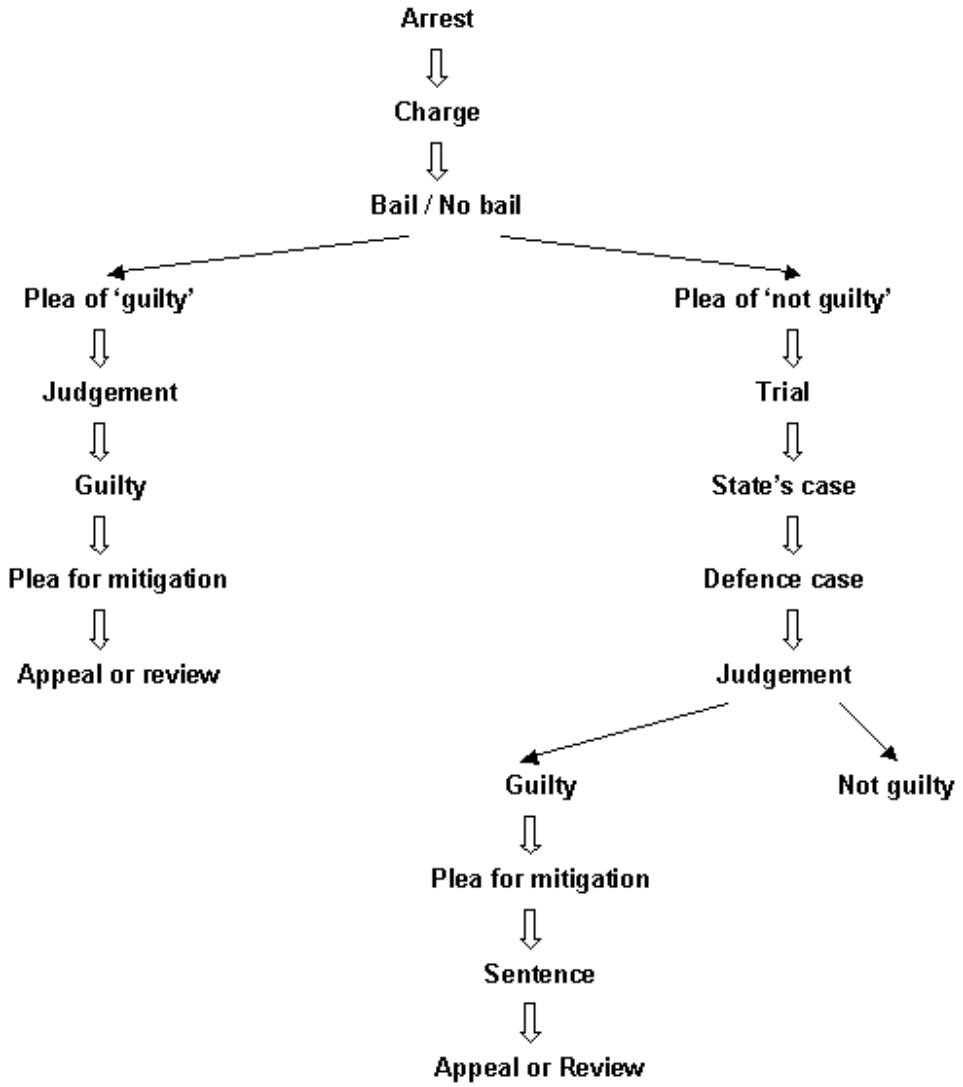

Diagram 4.1: This is a chronological arrangement of a criminal case dealt with by the police.

4.4.1.4 Intelligence gathering

Section 199 of the Constitution stipulates that security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

In this case, the Constitution names four government departments as the leading departments mandated to deal with the security of the Republic, namely, the South African National Defence Force (SANDF), the South African Police Service (SAPS), the National Intelligence Agency (NIA) and the South African Secret Services (SASS).

According to section 3 of the National Strategic Intelligence Act, [it is the duty of the SAPS to gather, correlate, evaluate and use crime intelligence, in support of the SAPS as contemplated in section 205 (3) of the Constitution, to institute counter intelligence measures within South Africa in order to supply crime intelligence to the National Intelligence Coordinating Committee]. Crime intelligence is carried out by the Crime Intelligence Division.

4.4.1.5 Accountability and civilian oversight

In terms of section 207 of the Constitution, the National Commissioner is the accounting officer, and he/she is accountable to the Minister of Safety and Security who is the political head. In addition, there is also the Secretariat for Safety and Security which is responsible for policy matters.

At provincial level, the Member of the Executive Council is also the political head of the police in that particular province. What is important is the role of the Independent Complaints Directorate (ICD).

The ICD was established in terms of section 50 of the South African Police Service Act. The functions of the ICD are “investigation of police misconduct, deaths in police custody or as a result of police action”. These functions are extended to the members of the Metropolitan and Municipal Police agencies.

4.4.1.6 Code of conduct and ethical behaviour

The SAPS uses two codes of conduct/discipline regulations, namely, the SAPS Discipline Regulations of 2006 for police officials and the Public Service Bargaining Council Disciplinary Code of 2002 for civilians. This is done to minimise confusion.

4.4.1.7 Structures of the Detective Service

The Detective Service consists of four components, namely, General Investigation, Serious and Violent Crime, Organised Crime and Commercial Branch (http://www.saps.gov.za). This means that there are four main investigative components, and within the components there are various investigative units, including the stock theft unit and others.

In order to ensure effective investigation, the Detective Service uses the services of the Criminal Record Centre, the Forensic Science Laboratory Division and Crime Intelligence.

The functions of the Detective Service are: to ensure effective investigation of general crime including crime that is not investigated by any other investigation unit; to ensure effective investigation of commercial related crimes; to ensure effective operational information service, which is dactyloscopically based, and also the collection of physical evidence at crime scenes including the reconstruction of scenes by means of scientific techniques.

4.4.1.6 (a) General Investigation

The main function of the general investigation unit is to ensure the development and maintenance of crime stop facilities, occult-related investigations and witness protection related matters (Circular 3/1/5/1/155, dated 2001-04-25). The general investigation component is made up of operational detectives who investigate a broad category of crimes. They normally work from police stations. These detectives carry out duties such as gathering evidence, executing warrants of arrest or search warrants, preparing case dockets for court proceedings, attending crime scenes, tracking and arresting criminals, etc.

4.4.1.7 (b) Organised Crime Unit

Organised Crime in South Africa is governed by the Drugs and Drug Trafficking Act; Prevention of Organised Crime Act and section 16 of the South African Police Service Act. The functions of the Organised Crime Unit component are: investigation of selected organised crime regarding identified individuals and syndicates, conducting special intelligence-driven operations or task teams regarding organised crime, (especially vehicles, firearms and drugs).

The functions of this unit also include the investigating of corruption cases, and managing specialised desks or disciplines in respect of vehicle thefts, cross-border crimes, endangered species, illegal aliens, drug-related crimes, gold and diamond, stock theft, transito theft (heists), family, child and sexual offences (Circular 3/1/5/1/155, dated 2001-04-25).

4.4.1.7 (c) Serious and Violent Crime Unit

This component deals with the investigation of national priority and other identified serious and violent crimes. It also deals with the management of the desks of disciplines relating to serious and violent crime. The functions of this unit are to investigate murder and robbery related crimes, taxi-related crimes, vehicle hijackings, gangsterism, illegal firearm related crimes and crimes against the State.

Emphasis is also placed on the project-driven investigation of selected serious and violent crimes which are a national priority (Circular 3/1/5/1/155, dated 2001-04-25). Recently, due to transformation and reorganisation of the SAPS, this unit also investigates the following crimes: murders involving important persons such as judicial officials, politicians, members of the SAPS, and political violence (http://www.saps.gov.za).

4.4.1.7 (d) Commercial Branch

This component deals with the effective investigation of commerce-related crimes, as well as the development and maintenance of the strategic direction of the following units: Commercial Crime Unit, Syndicate Fraud Unit, Serious Economic Offences, Computer Crimes Unit and Custom Law Enforcement Tasks Groups (CLETG), (Circular 3/1/5/1/155, dated 2001-04-25). The commercial branch investigates offences in terms of statutes regarding the actions of accountants and auditors, agriculture, banking and currency, companies, courts, debtors and creditors (http://www.saps.gov.za).

In practice, the SAPS's Commercial Branch investigates commercial crime cases that are serious enough to be dealt with in a regional court or High Court. The commercial branch is also responsible for the investigation of fraud and corruption, as well as theft involving assets, money, clone cheques, forgery and uttering of credit cards.

Commercial Crimes Reported to the SAPS	2004/2005
Commercial crimes	53 281

Table 4.2: This table show crimes reported to the SAPS and does not include the cases finalised and those where assets have been finalised. Assets recovered fall under the NPA Annual report (http://www.saps.org.za).

4.4.2 The Departmental Investigating Unit (DIU) of the Department Correctional Services (DCS)

Figure 4.2: The South African Coat of Arms used by the Department of Correctional Services as its departmental logo.

4.4.2.1 Legal mandate

The DIU conducts investigations in terms of section 95 of the Correctional Services Act, read with section 34 of Correctional Services Amendment Act.

Section 34 of the Correctional Services Amendment Act gives the DIU a mandate to “conduct an internal service evaluation by means of internal auditing, performance auditing, inspections and investigations of theft, corruption and any other dishonest practices or irregularities”. Section 95 suggests “measures to combat theft, fraud, corruption and any dishonest practices”.

4.4.2.2 Powers and authority

Section 96 of the Correctional Services Act stipulates that the “powers and functions of a correctional officer are the same as those stipulated in the purpose of the Act, which is the safe custody of inmates”. This is vague because these powers refer to the powers given to general members of the Department of Correctional Services, and not those of the DIU.

According to Malatjie (2006) the DIU uses the same powers as those bestowed upon all correctional officers in terms of section 96 of the Correctional Services Act read with section 34 (b) of the Correctional Services Amendment Act which states that “the Commissioner must establish a unit to investigate theft, corruption and any dishonest practice or irregularities”.

This unit is responsible for conducting investigations of reported cases of corruption, fraud and serious maladministration. The anti-corruption desk is tasked with the function of ensuring clean and transparent administration by means of pro-active and reactive anti-corruption measures in order to promote a corruption-free department. The main responsibilities of this unit are: to identify corruption, dishonesty and malpractice by investigating written, verbal and telephonic reports, submit findings as well as recommendations to the Commissioner, and advise top management on strategies to prevent corruption, dishonesty and malpractice (http://www.dcs.gov.za).

4.4.2.2 (a) Arrest

Section 100 (1) of the Correctional Services Act states that “in addition to the powers of arrest which a correctional officer has in terms of section 40 of the Criminal Procedure Act, any correctional officer has the power to arrest without a warrant any person whom he/she reasonably suspects of having committed an offence defined in the Act”. Again, these powers are general powers of all correctional officers and not only members of the DIU.

4.4.2.2 (b) Entry, search and seizure

In addition to the powers conferred on an ordinary correctional officer as a peace officer in terms of section 40 of the Criminal Procedure Act, any correctional officer has the power to enter any premises to search without warrant any other person or place and seize any article, when this is reasonably necessary. This is done in terms of section 101 (1) (2) (3) of the Correctional Services Act. These powers are more focused on prisoners or inmates. These powers are not linked to DIU members specifically, but to correctional officers generally.

4.4.2.2 (c) Use of force

In terms of section 102 (1) of the Correctional Services Act, [the use of force in terms of any other provision of the Act or any other Act, which include mechanical restraints, non-lethal incapacitating devices, firearms and any other weapons, any correctional officer is authorised to use force against any person who assists an escapee or who disrupts or threatens to disrupt the operation or the enforcement of the conditions of community corrections].

Every correctional officer is also authorised to use force in terms of sections 32, 33 and 34 of the Correctional Services Act. In the case of firearms, such a firearm can only be used by a trained correctional officer and sections 49 (1) and (2) of the Criminal Procedure Act apply. These powers are in relation to the way in which correctional officers should handle inmates or prisoners.

4.4.2.3 Methodology

According to Malatjie (2006), the DIU uses both accusatorial and inquisitorial investigative methods. Accusatorial investigations imply that the prosecutor directs a highly informal investigation, since, as a rule, the only admissible evidence is that which is accepted during public and oral trial proceedings.

The researcher does agree with Malatjie's view in the sense that certain investigations are sent to the police after completion, which uses a more accusatorial system. Some cases are also referred to the DSO, AFU and SIU, which use a more inquisitorial system.

4.4.2.4 Intelligence gathering

The DIU does not have an intelligence gathering mandate. It is somehow surprising that Chapter 11 of the Constitution does not recognise the Correctional Services, as part of the security institutions. In addition to the omission in the Constitution, the National Strategic Intelligence Act also does not recognise Correctional Services, including the DIU, as an institution that is capable of gathering intelligence.

4.4.2.5 Accountability and civilian oversight

According to section 3 of the Correctional Services Act, Correctional Services is accountable to the Commissioner of Correctional Services, who is also the accounting officer. The Commissioner reports to the Minister of Correctional Services, who is the political head.

Although there are DIU units in the provinces, such units report directly to the DIU National Office in Pretoria (Malatjie 2006). The Correctional Services Act and the Correctional Services Amendment Act do not make any provision for a civilian oversight for the DIU. The Judicial Inspectorate and the Independent Person Visitors are only responsible for the inspection of prisons and the treatment of prisoners.

4.4.2.6 Structures

The DIU is a unit within the Chief Directorate Legal and Special Operations, entrusted with spearheading the implementation of the Department of Correctional Services's anti-corruption strategy.

According to Malatjie (2005), the Directorate Legal and Special Operations has three legs, namely, investigation, code enforcement and prevention. The investigation arm is known as the Departmental Investigation Unit (DIU).

4.4.3 The National Prosecuting Authority (NPA)

Figure 4.3: The logo of the National Prosecuting Authority of South Africa

Section 179 (1) of the Constitution provided a mechanism for the creation of a National Prosecuting Authority. This led to the promulgation of the National Prosecuting Authority Act. The aim of this Act is to simplify the cooperation between different government departments within the Criminal Justice System. Accordingly, the office of the Attorney-General underwent some changes with the enactment of the Act.

Furthermore, the Act creates certain channels that result in closer cooperation between the Department of Justice and Constitutional Development and the South African Police Service. A National Director of Public Prosecutions heads the National Prosecuting Authority (Joubert, 2001:13).

Currently, the National Prosecuting Authority (NPA) is divided into six components, namely: Directorate of Special Operations (DSO), National Prosecuting Services, Assets Forfeiture Unit, Witness Protection, Support Services and Corporate Services. For the purpose of this research, the focus will be on the Directorate of Special Operations (DSO) and Asset Forfeiture Unit.

4.4.3.1 Directorate of Special Operations (DSO)

Figure 4.4: The logo of the Directorate of Special Operations (DSO)

The Directorate of Special Operations (DSO), nicknamed “The Scorpions”, was launched in September 1999 in Guguletu near Cape Town. After experiencing some problems, the National Assembly amended the National Prosecuting Authority Act to establish the Directorate of Special Operations as an investigating directorate of the National Prosecuting Authority. This was done in terms of the National Prosecuting Authority Amendment Act.

Before the DSO could be established, there were two units which functioned in terms of Presidential Proclamation 102 of 1998: the Investigating Directorate of Organised Crime and Public Safety, as well as the Investigating Directorate of Serious and Economic Offences. With the passing of the National Prosecuting Authority Amendment Act, the two investigating units amalgamated and formed the DSO.

4.4.3.1 (a) Legal mandate

The legal mandate of the Scorpions is found in the following pieces of legislation: section 43A of the National Prosecuting Authority Act, section 179 of the Constitution (it is so alleged), section 7 of the National Prosecuting Authority Act and section 2 of the National Prosecuting Authority Amendment Act. The existing mandate is ambitious, and this, together with the fact that the DSO was to be built ‘from scratch’, made it inevitable that there would be some disappointment in its performance in the short-term (Mashele, 2006:3).

4.4.3.1 (b) Powers and authority

The legislative aim is to investigate, gather, keep and analyse information, institute criminal proceedings, related to offences committed, in an organised fashion and categories of offences determined by the President by proclamation (NPA Strategic Plan, 2001:49).

In terms of section 7 of the National Prosecuting Authority Act, read with section 4 of the National Prosecuting Authority Amendment Act, the powers of the investigative directorate are:

> *to investigate, and carry out any functions incidental to investigations, gather, keep and analyze information and where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings.*

In terms of section 30 of the National Prosecuting Authority Act, read with section 14 of the National Prosecuting Authority Amendment Act, the DSO special investigators have the powers - as provided for in the Criminal Procedure Act - which have been bestowed upon a peace officer or a police official relating to the investigation of offences, the ascertainment of bodily features of an accused person, the entry and search of premises, the seizure and disposal of articles, arrest, the execution of warrants, and the attendance of an accused person in court.

According to the wording of the appointment certificates (identification cards) of the members of the DSO, investigators have the power to use their official firearms in terms of sections 49 (1) and (2) of the Criminal Procedure Act, section 7 of the National Prosecuting Authority Amendment Act and the Firearms Control Act.

4.4.3.1 (c) Methodology

The methodology used by the DSO is based on the *troika* principle which integrates the following: analysis/intelligence, investigation and prosecution. The DSO investigative team consists of an investigator, a prosecutor and analysts who collect intelligence information. This happens from the beginning to the end of the case. After completing the investigation, they take the case to court and the prosecutor, who was involved in the initial stage, leads the prosecution. This is more inquisitorial because of the involvement of the prosecutor who is part of the judiciary in terms of the separation of powers doctrine. Intelligence gathering will be discussed in detail in Chapter 7, under 7.11.

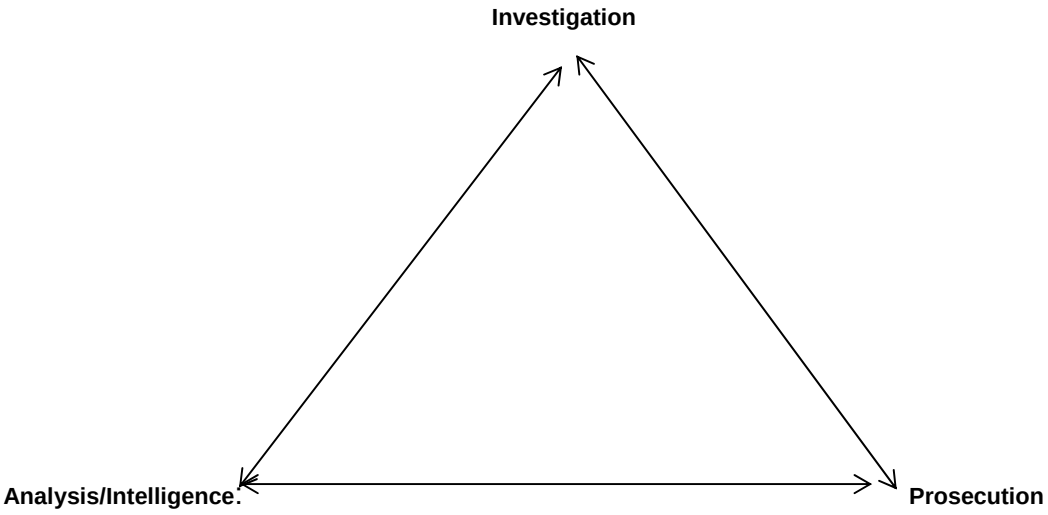

Diagram 4.2: This triangle is used in the DSO methodology of investigating its cases

4.4.3.1 (d) Intelligence gathering

Section 199 of the Constitution stipulates that the security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

According to section 1 of the National Strategic Intelligence Act, the DSO is not part of the security agencies. On the other hand, the DSO collects and analyses crime intelligence, contrary to section 1 of the National Strategic Intelligence Act and section 199 of the Constitution.

4.4.3.1 (e) Structures of the DSO (Scorpions)

The DSO consists of four divisions, namely, operational support, crime analysis (intelligence), training and investigation. There are five regions situated in the following provinces, Gauteng (Pretoria), KwaZulu-Natal (Durban), Eastern Cape (East London), Western Cape (Cape Town) and the Free State (Bloemfontein). The following is the breakdown of successes of the DSO during the 2004/5 financial year.

OUTPUT/INDICATOR	**ACHIEVED** 2004/5	**TARGET** 2004	**ACHIEVED** 2005
Match between threat analysis and targets in focus areas	24 Targets	30	38
Pro-activity scope and intelligence products	37	46	77
Number of investigations finalised in focus areas	205	250	325
Number of prosecutions finalised	180	250	234
Conviction rate	94%	80%	88%
Asset value under restraint	R 132.49 m	250 m CARA	220,1 m
Money Laundering and racketeering cases	4	Benchmarking aimed at reaching 50	39
Operative action	656	660	1103
Contraband Yield	R1.151 Billions	R605 m	R2,46 Billion

Table 4.3: These are the successes of the DSO for the 2004/2005 financial year. NPA Annual Report for 2004/2005:87.

4.4.3.1 (f) Cherry-picking accusations

Almost as soon as successful DSO cases began to be publicised, accusations of DSO "cherry-picking" arose. Specifically, the DSO is accused of choosing to investigate and prosecute only matters which they are sure to win. Sometimes this accusation went further, to suggest the DSO had a tendency to take over cases already substantially investigated by the SAPS, taking all the credit for the subsequent successful conclusion of the matter.

More generally, there is discomfort as to which cases become "DSO matters" in law enforcement language, (Maluleke, 2005:1). It is easy to dismiss the accusations as 'sour grapes', but the very real uncertainty remains how a matter comes to be pursued by the DSO. What then, is the DSO's mandate?

Given the complexity of the answer to this question, it is not unsurprising that uncertainty exists (Redpath, 2004:2). The legislation creating the DSO describes a legislative mandate encompassing a broad concept of organised crime – any crime committed in an "organised fashion" – which is so wide that just about any matter could be argued to fall under the DSO mandate.

Presidential Proclamations 105 and 123 of 1998 do not make things any easier, because the lists of offences are very long and vague. The legislation furthermore specifically retains all of the police's powers of investigation, so that this mandate is not exclusive to the DSO. Clearly, such a broad mandate is not practical for those 'on the ground' who must put it into practice (Maluleke, 2005:2).

The legislature appeared to have envisaged that a negotiated operational mandate would emerge, and that a Ministerial Committee, consisting solely of Cabinet members created by the legislation, would confirm procedures for the transferals of matters to the DSO (Maluleke, 2005:1). There are further general criteria or factors that must be considered, covering such questions as ‘‘is the criminal activity involved complex, and does it comprise at least five persons?’’

4.4.3.1 (g) The Khampepe Commission of Inquiry findings

The President of South Africa appointed the Khampepe Commission in October 2005 to inquire into the mandate and location of the Directorate of Special Operations (DSO) and other matters pertaining to the functioning of this institution. The commission has completed its report after a process that entailed written and oral submissions from various interested parties. The commission asserted that the legal framework regulating the mandate and location of the DSO was not in conflict with the Constitution.

The commission found that the Minister of Justice and Constitutional Development did not have practical and effective oversight responsibility in respect of the law enforcement functions of the DSO. The commission also recommended that the DSO should be retained within the NPA, but in order to enhance oversight, it recommended that the President should exercise the power conferred on him by section 197(b) of the Constitution by conferring the political oversight and responsibility for the law enforcement component of the DSO to the Minister of Safety and Security.

In the above framework, prosecutors who work for the DSO would continue to receive instructions and be accountable to the National Director of Public Prosecutions (NDPP).

The NDPP, in turn, would remain accountable to the Minister of Justice and Constitutional Development as currently provided for in the law (Mashele, 2006:3). The commission further recommended that the capacity of the relevant entities within the SAPS should be enhanced, for example, by investing them with the same legal powers of the DSO and co-locating prosecutors with its investigators and analysts (http://www.info.gov.za).

It was also recommended that the DSO should desist from making public announcements on the subject matter of its investigations, where such communication could undermine the fundamental rights of affected entities and individuals (Mashele, 2006:3).

4.4 3.2 Assets Forfeiture Unit (AFU)

4.4.3.2 (a) Legal mandate

In South Africa, the Asset Forfeiture Unit was established in May 1999 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. Strangely, the Prevention of Organised Crime Act does not mention the establishment of an Asset Forfeiture Unit within the NPA.

The Act speaks of the state recovering the proceeds of crime and instruments used to commit crime. As to which institution is responsible for the seizure of property, the Act is silent. This is a problem, because the legal mandate is not spelt out clearly.

4.4.3.2 (b) Powers and authority of the Asset Forfeiture Unit (AFU)

Chapters 5 and 6 of the Prevention of Organised Crime Act make provision for property tainted by criminal activity to be forfeited to the state by way of a civil action. Commonly called civil asset forfeiture, this allows the state to confiscate a suspected criminal's assets purely through a civil action against the property, without the need to obtain a criminal conviction against the owner of the property.

On application by the National Director of Public Prosecutions (NDPP), the High Court can make an order forfeiting property to the state that the court, on balance of probabilities, finds to be "an instrumentality" of a crime, or is the "proceeds of unlawful activities".

In terms of the Prevention of Organised Crime Act, the Asset Forfeiture Unit (AFU) has the following functions: seizure of large amounts of cash associated with the drug trade; seizure of property used in the drug trade or other crime; investigating corruption; white collar crime; targeting serious criminals; and violent crime.

The application of Chapter 5 of the Prevention of Organised Crime Act is dependent on the State securing a conviction in a criminal court. After conviction, the State may apply to have forfeited, from the convicted person, an amount equal to the benefit derived as a result of the commission of the proven offence. Chapter 6 of the Prevention of Organised Crime Act permits the State to forfeit the proceeds and instrumentalities of crime in a civil process that is not dependent on or related to any criminal prosecution or conviction.

AFU does not have investigative and arresting powers but provides service to both the SAPS and the Scorpions. According to Chinner (2006), the AFU has personnel seconded from both the DSO and the SAPS, who are used as their investigators.

4.4.3.2 (c) Methodology

According to Chinner (2006), the AFU uses both inquisitorial and accusatorial systems, depending on the situation. The inquisitorial and accusatorial systems have already been discussed under the methodology of the police and the DSO. The researcher's assessment of the AFU is that the fact that investigators are located within the NPA premises makes it more inquisitorial than accusatorial.

4.4.3.2 (d) Intelligence gathering

The Prevention of Organised Crime Act, the National Strategic Intelligence Act, The National Prosecuting Authority Act and the National Prosecuting Authority Amendment Act do not make provision for the AFU to gather intelligence.

4.4.3.2 (e) Accountability and civilian oversight

The Prevention of Organised Crime Act does not make any provision as to who is the accounting officer of the AFU. However, the fact that the AFU is a unit within the NPA is an indication that the National Director of Public Prosecution (NDPP) is the accounting officer.

The NDPP is accountable to the Minister of Justice and Constitutional Development, who is the political head. The Prevention of Organised Crime Act, the National Prosecuting Authority Act and the National Prosecuting Authority Amendment Act do not make provision for civilian oversight, which looks at the activities of the AFU.

4.4.3.2 (g) Structures of the AFU

The AFU consists of a litigation unit and seconded investigators from the SAPS and the DSO, advocates and accountants, even though this is not provided for in the Prevention of Organised Crime Act.

Indicator	**Target**	**Achieved**	**% Target achieved**	**2003/4**	**2004/5.**	**Total as of 31/03/05**
Case load						
Number of seizures	180	160	89%	228	70%	681
Cases completed	150	148	99%	148	100%	429
Monetary target	Rm			Rm		
Seizures	250.0	233.8	94%	222.6	105%	958.3
Cases completed	75.0	171.2	228%	86.7%	197%	331.5
Funds into CARA	60.0	24.5	41%	35.7	69%	78.5
Funds to victims	20.0	66.3	332%	15.0	442%	78%

Table 4.4: These are the achievements of the AFU for the 2004/2005 financial year: NPA Annual Report 2004/2005:78.

4.4.4 Special Investigating Unit (SIU)

Figure 4.5: The logo of the Special Investigating Unit (SIU)

4.4.4.1 Legal mandate

The mandate of the SIU is contained in the Special Investigating Units and Special Tribunals Act 74 of 1997. The unit carries out investigations as referred to it by the President, via publication of a proclamation in the Government Gazette. Following the investigation, civil action can be instituted in the Special Tribunal for the recovery, savings or prevention of loss of State assets and State moneys, should the investigation reveal that such monies or assets were misappropriated and unlawfully obtained.

The SIU was first established in 1996 headed by former Judge Willem Heath. Judge Heath resigned in June 2001 after a Constitutional Court finding indicated that a judge was not able to head an investigating unit. In the **Case CCT 27/00 at [70],** Judge Chaskalson made the following ruling: section 3 (1) of Special Investigating Units and Tribunals Act was declared to be inconsistent with the Constitution and invalid, and Presidential Proclamation R24 of 1997 and R31 of 1999 were declared to be inconsistent with the Constitution, and invalid. The SIU then formally ceased to exist. The President then established the new SIU by Presidential Proclamation R118 on 31 July 2001, and appointed Willie Hofmeyer as its head.

The SIU works closely with the National Prosecuting Authority (NPA) to ensure that prosecutions are done as soon as possible. It also works with the Asset Forfeiture Unit (Willie Hofmeyer is also the deputy head of the NPA) in cases where its powers are more suited to recover the proceeds of crime.

4.4.4.2 Powers and authority

The SIU focus is on civil action, and it does not have the power to make arrests or prosecute suspects. The SIU is an investigative body set up by the government to investigate corruption and maladministration in the public sector and to use civil proceedings to recover losses and secure savings for the State.

Its strength lies in its powers to act speedily to save, recover and protect public assets through the Civil Law Procedure and litigate through a Special Tribunal. The SIU can, for example, obtain court orders, in terms of section 5 of the Special Investigating Units and Special Tribunals Amendment Act 12 of 2004, to compel a person to pay back any wrongful benefit they have received, to cancel contracts when the proper procedures were not followed, and to stop transactions or other actions that were not properly authorised.

4.4.4.3 Methodology

The SIU employs investigators, lawyers, forensic accountants and analysts in multidisciplinary investigations. According to PSC August, (2001:73), the activities of the unit are designed to effectively combat maladministration, corruption and fraud involving the administration of State institutions, to protect assets and public money, and to take civil legal action to correct any wrongdoing.

4.4.4.4 Intelligence gathering

According to Davids (2006), the SIU does not have any intelligence gathering powers and functions. The Special Investigating Unit and Special Tribunals Act, the Special Investigating Unit and Special Tribunals Amendment Act and the National Strategic Intelligence Act make no provision for intelligence gathering by the SIU.

4.4.4.5 Accountability and civilian oversight

The SIU reports to Mr Willie Hofmeyer who is one of the deputies of the National Prosecuting Authority who is also the head of the AFU. This means that the AFU, SIU and the DSO are accountable to the NPA. The NPA reports to the Minister of Justice and Constitutional Development as the political head. The Special Investigating Units and Tribunals Act does not make any provision for a civilian oversight.

4.4.5.6 Structures of the SIU

According to Davids (2006), the SIU consist of three sections, namely, investigation section, prosecutors and forensic auditors. These are the main sections of the investigating arm of the SIU. The following table indicates the work done by the SIU since 2003.

Performance measures	2003/2004 Target	Actual	2004/2005 Target	Actual	2005/2006 Target
Savings	R70 m	R372.8 m	R 500 m	R 92 m	R 1 000 m
Preventions	_	_	_	R3 435 m	_
Cash recoveries	R 50 m	R13.7 m	R30 m	R12 m	R4 m
Totals	R120 m	R 386.5 m	R530 m	R3 539 m	R1 040 m

Table 4.5: These are the successes of the SIU for the 2004/2005 financial year. SIU Annual Report 2004/2005:10.

4.5 CONCLUSION

It is important that whenever an agency is established, the government should guard against duplication of functions which may result in waste of time and resources. It is now an international norm for countries to have agencies responsible for crimes such as corruption, fraud, economic crime and organised crime. However, such agencies need to have a properly defined mandate and jurisdiction.

The researcher has recently (November 2006) visited the Independent Commission Against Corruption (ICAC) in Hong Kong where he witnessed the functioning of that agency and noted why this agency is so successful in fighting corruption. It is not only Hong Kong - Nigeria has established an Economic and Financial Crimes Commission (EFCC), Botswana has a Directorate on Economic Crimes Commission (DECC), and Malawi has an Anti-Corruption Bureau (ACB). (These agencies will be discussed in detail in Chapter 6).

CHAPTER 5: PROCESSES IN THE INVESTIGATIVE FUNCTIONS

5.1 INTRODUCTION

The purpose of this chapter is to discuss the kind of processes that are currently practised in South Africa, and also to determine if the current system is consistent with our Criminal Justice System. Crime investigation by any law enforcement agency is in essence a systematic and scientifically oriented search for facts in the form of direct or indirect evidence.

In this case, law enforcement agencies use either inquisitorial or accusatorial investigative systems or, a combination of the two, depending on the type of Criminal Justice System used in a particular country. The debate about the use of inquisitorial or accusatorial systems in this discussion comes as a result of different investigative methods used by the DSO, the SAPS's Detective Service, the AFU, the SIU and the DIU. This discussion will look at which method is used by each institution and find out which method conforms to the legal system in South Africa.

5.2 DEFINITIONS

5.2.1 Criminal procedure

Criminal Procedure regulates the entire workings of the prosecutorial machinery, including the court's structure, the structure of the prosecution, the position of suspects or accused person, police powers, pre-trial procedure, detention, bail, charge sheets, indictments, pleading, the trial, verdict, sentencing, and post-trial remedies (Geldenhuys & Joubert, 1996:4).

5.2.2 Due process model

A due process model presupposes that a suspect or an accused is a full legal subject with rights and powers, and that State power is circumscribed and limited by law. The modern Western European system, for instance, is due process inquisitorial systems. In Germany an accused has all the rights that an accused has under Anglo-American systems, if not more (Geldenhuys & Joubert, 1996:15).

5.3 THE INQUISITORIAL SYSTEM

The inquisitorial system is broadly centered in Europe, particularly in France, Switzerland and Italy. The Federal Bureau of Investigation (FBI) in the United States of America (USA) also use the same system and they were forerunners in introducing it to South Africa. This happened around 1997 when the former USA Director General of the Department of Justice visited South Africa.

One of the offers given to South Africa at that time was training, hence the first DSO intake were trained by the FBI. In this system the judge is a much more active participant in the proceedings. This means that the judge actively conducts and even controls the truth by dominating the questioning of the witnesses and the accused, (http://www.iap.nl.com).

After arrest, the accused is questioned primarily by the investigating judge and not by the police. In the trial, the presiding judge primarily does the questioning and not the counsel for the prosecution or the defence. In this way the judge has the task of determining the truth of the matter by whatever means he feels necessary to use.

The judge is not bound by the evidence which the parties present to him and is free to utilise his/her own enterprise to locate appropriate information which could assist in ascertaining the truth of the matter, and thus do real justice to the parties concerned. In doing so, the judge is seeking the truth in a much more objective way (Palmieri, undated: 2).

Indeed the judge may look behind the specific facts and issues of the case, if it is felt that the information found may help to discover the truth of the matter. The only ostensible circumscription is that the evidence which the judge seeks to prove must be relevant, although relevance is given a much broader definition than might be had in the adversarial system (Geldenhuys & Joubert, 1996:14).

The decision in an inquisitorial criminal trial is made by the collective vote of a certain number of professional judges and a small group of lay assessors. Neither the prosecution nor the defendant has an opportunity to question the lay assessors for bias (http://www.answers.com). Prosecutors in the inquisitorial system do not have a personal incentive to win convictions for political gain.

Prosecutors initiate criminal proceedings and then transfer cases to an examining magistrate. However, they supervise and control all police and *gendarmerie* (police force under the Ministry of Defence in France) investigations before such cases are transferred to the investigating judge (http://www.polis.osce.org).

In France, for example, once a case has been transferred and a judicial investigation begun, the police and *gendarmerie* officers act under the authority and supervision of the examining magistrate.

5.4 THE ACCUSATORIAL SYSTEM

In this system the judge is in the role of detached umpire, who should not enter the arena of the fight between the prosecution and the defence, for fear of becoming partial or losing focus as a result of all the 'dust caused by the frays' (Geldenhuys & Joubert, 1996:14). The police are the primary investigative force, in the sense that they pass the collected evidence on to the prosecution, in a dossier or docket format, who then becomes *dominis litis*.

The prosecution decides on the appropriate charges, the appropriate court, etc. In court the trial takes the form of a contest between two theoretically equal parties, namely, the prosecution and the defence who do the questioning in turn, leading their own witnesses and cross-examining the opposition's witnesses (Palmieri, undated:2). As has been pointed out, no real-life system conforms exactly to a specific model.

South African Criminal Procedure has basically been accusatorial, but in certain circumstances a judge may call witnesses of his own. In terms of section 112 (1) (a) (b) of the Criminal Procedure Act,

> *when an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea – and the accused or his legal representative hands a written statement by the accused into court, in which the court the accused sets out all the facts which he admits and on which he has pleaded guilty, the court may in lieu of questioning the accused convict the accused on the strength of such statement and sentence him, but the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement*.

The discretion to put questions to the accused lies with the presiding judge or magistrate. This is an inquisitorial element. If the accused pleads ‘not guilty’ to the offence charged at a summary trial, “the presiding judge, regional magistrate or magistrate, as the case may be, may ask the accused whether he wishes to make a statement indicating the basis of his defence” in terms of section 115 of the Criminal Procedure Act.

Therefore, the procedure of questioning that takes place under sections 112 and 115 of the Criminal Procedure Act contains inquisitorial elements. On the other hand, the fact that an accused can be found guilty of an offence solely on his plea of guilty, without the judge doing any questioning to investigate the truth, is a strong accusatorial element, even though it can happen only in the case of relatively minor offences.

Section 112 (b) of the Criminal Procedure Act further states that if the presiding judge is satisfied that the accused is guilty of the offence to which he has confessed or admitted, convict the accused on his plea of guilty of that offence and impose any competent sentence.

Furthermore, section 112 (3) of the Criminal Procedure Act states that nothing in the Ac prevents the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

5.5 THE JURY SYSTEM

This system is favoured in Common Law countries like Australia, Great Britain and the United States of America. The system is minted by the party's legal council, whose task is to present their side of evidence and arguments, and thus their version of the truth, to the court.

The parties are presumed to be in an equal position with an objective moderator, in the form of the judge, to determine relevant points of view and to instruct the jury, if there is one in the particular case (http://www.hrschool.org). The jury trial was a significant expression of the consent of the people in American history. Among the reasons given by the signers of the Declaration of Independence to dissolve the political bonds, which connected them to Great Britain, was the deprivation of trial by jury.

Trial by jury in criminal cases was incorporated into the constitution itself and the grand jury; the criminal petit jury and the civil petit jury were all enumerated in the Bill of Rights (http://www.crfc.org). The Anglo American jury is a remarkable political institution. It recruits twelve laymen, chosen at random from the widest population. It convenes them for the purpose of the particular trial, entrusts them with great official powers of decision and it permits them to carry on deliberation in secret and to report their judgment without giving reasons for it.

After their momentary service to the State has been completed, it orders them to disband and return to private life (Joubert, 1996:14). The jury is thus, by definition and experience, in the conduct of serious human affairs that virtually from its inception has been the subject of deep controversy. In practice however, not all criminal prosecutions require a jury trial.

The Supreme Court of America has consistently excluded “petty offences”, as distinguished by the punishment of the nature of the offences itself, from both state and federal court’s jury, in favour of a trial judge (http://www.opj.usdoj.gov). The final phase of a jury's work is also most mysterious. Jury deliberations are absolutely secret. There are no prescribed procedures for juries to follow. They are left to themselves in a locked room guarded by the court.

To reach a conclusion, the jury is neither required nor allowed to refer their reasoning in court, but they are asked only for their verdict. Juries are charged today with the responsibility of reaching a verdict based on the facts of the case within the law as the trial judge explains it (http://www.opj.usdoj.gov). Almost since the beginning of the jury in England, however, jurors have engaged in “nullification”, where the jury exercises its discretion in favour of a defendant whom the jury nonetheless believes to have committed the act with which he is charged.

Jury deliberations are secret, thus nullification is both a convert and controversial activity. When people suspect that it has occurred, nullification is seen as a fundamental threat to the rule of law, a triumph of democratic government, or little or both (Jefferson, 1994:3).

5.6 THE INQUISITORIAL INVESTIGATION

The main feature of the inquisitorial system in criminal justice anywhere in the world is the function of the investigating judge or magistrate. The judge or the magistrate conducts investigations in the case of severe crimes or complex enquiries. It is also the duty of the judge to hear witnesses and suspects in order to order searches or other investigations.

The goal of the judge is not to prosecute certain people, but the finding of the truth, and as such his duty is to look for both incriminating and exculpating evidence (http://www.flac.htmlplanet.com). If this judge decides that there is a valid case against the suspect, he defers the suspect to a tribunal or court, where the proceedings oppose the prosecution and the defence.

The investigating judge does not sit in the court that tries the case, and is, in fact, prohibited from sitting on future cases involving the same defendant (Palmieri, undated: 2). In France, where this system originates, a suspect is presumed guilty until proven innocent. The judge questions the suspect and witnesses, arranges a re-enactment of the crime and a confrontation between the accusers and suspect (Palmieri, undated: 2).

Every detail, including material favourable to the suspect, goes into a dossier on the case. The investigative process itself is written, secret, formal and intermittent. The case file is a compilation of chronologically arranged documents and affidavits covering a wide range of subjects.

On rare occasions in which a sentence is issued, it becomes just one more document in the file, based on the information in the preceding pages. The suspect's lawyer can inspect the dossier at any time and can suggest other lines of inquiry (Lawday, 2000:18). This process almost conforms to what the prosecutors within the Scorpions do.

During investigation in an inquisitorial system, a case file or dossier remains open for an indefinite period, and items are added as information is obtained by the police or others involved. Since this evidence does not have to be articulated as a formal charge, it does not matter very much if no one is in charge of the investigation.

In this regard, the individual police officer is rarely identified, nor will s/he testify about the events. Instead, the officer's signature authenticates documents introducing evidence into the proceedings, greatly reducing the potential for judicial oversight of police activities (http://www.nationmaster.com).

In cases of a serious or complicated nature, the investigation of the case before it comes to trial is led by an investigating judge whose functions are not the same as the trial judge. The investigating judge does not have to decide upon the guilt of the accused. His function is merely to ascertain whether there are sufficient grounds for suspicion to warrant an actual trial by a competent court.

These kinds of functions can be compared with preparatory investigations, in the South African context. In this instance police services are at his assistance. His investigations are carried out strictly within the limits of the processual rules governing the criminal procedure, and he carefully keeps a record of all the steps he has taken and every investigation he has conducted.

In his search for the truth, one of the principle tasks of the investigating judge is to examine and consider all factors which may exonerate the accused (http://www.64.233.183.104/search?q). In France, where an inquisitorial system is often practiced, the guidelines for investigating judges are governed by Chapter I of Title III of the Criminal Code. The situation in France is very complicated, because there are various law enforcement agencies with almost the same mandate and functions.

These agencies include: the military force or the *Gendarmerie Nationale*, the National Police or *Police Nationale*, the Municipal Police or *Police Municipale*, Rural Police or *Police Rural* as well as the Judicial Police or *Police Judicial* (http://enwikepedia.org/wiki/Law-enforcement-in-France).

The Judicial Police comprises a variety of actions and functions under the direction and supervision of the judiciary. Such functions include: pursuing and arresting of suspects, interrogating suspects in some phases of judicial enquiries, gathering evidence, and serving search warrants

According to Article 54 of the Criminal Code, “a French Judicial Police official who is informed of an offence, informs a prosecutor, goes forthwith to the scene of the crime and records any appropriate findings”. This officer ensures the conservation of any clues liable to disappear and of any item which may be of use in the discovery of the truth (http://www.en.wikepedia.org/wiki/Law-enforcement-in-France).

Furthermore, the officer seizes any exhibits or instruments which were used to commit the crime, as well as any item which appears to have been the product of the crime. In terms of Article 72 of the Criminal Code, “where the district prosecutor and the investigating judge are simultaneously on the scene of crime, the district prosecutor may initiate a regular judicial investigation of which the judge present is then seized.

Therefore, it is now clear that criminal enquiries or investigations are conducted under the supervision of the public prosecutor or an investigating judge. During a preliminary investigation, the police can arrest a person as a suspect for 24 hours, if necessary. After arresting a suspect, the police must immediately inform the public prosecutor, in order to submit the proceeding to judicial control. If this is not done immediately, the proceeding is not valid. This process differs slightly from the South African process, in the sense that the South African Criminal Procedure Act requires that a suspect must appear within 48 hours after arrest.

The investigating judge normally invites the accused to cooperate with him in the investigation, and he may for this purpose interrogate the accused. It is of the utmost importance that the accused is warned by the investigating judge that he is no way compelled to speak to the accusation. The accused's legal representative and the prosecutor may only ask questions with the leave (permission) of the judge (http://www.64.233.183.104/search?q).

However, the fact that the investigating judge has dual roles, that of a detective and that of a judge, compromises objectivity. These two functions of a judge contradict each other. In South Africa, the DSO involves the prosecutor, the investigator and the analyst right from the beginning of an investigation. This process amounts to a clear inquisitorial system.

This allows the prosecutor to know and understand the case right from the beginning of the investigation, thus giving him/her an unfair advantage. The SAPS do not use this process. When a case is reported, detectives conduct an investigation where they use investigation techniques and tactics. After the investigation has been completed, the docket is submitted to the NPA for a decision whether to prosecute or not to prosecute.

The danger in this process is that the DSO is based within the NPA, and the perception is that this arrangement allows the DSO to 'highjack' certain investigations which the SAPS have already started, or where they have completed the investigation.

The fact that there are no clear methods and procedures to control the cases done by both the SAPS and the DSO means that there is always room for manipulation. According to Malatjie (2006), the DIU uses both inquisitorial and accusatorial systems, depending on the complexity of the matter.

Malatjie indicates that there are no rules governing the use of accusatorial or inquisitorial investigations. The same has been confirmed by Chinner (2006) of the Asset Forfeiture Unit. The SIU uses investigators and specialists such as forensic auditors, accountants and lawyers/prosecutors. This gives the prosecutors an unfair advantage in the case. The fact that the SIU uses the Special Tribunal to prosecute their cases is a clear indication of an inquisitorial system.

According to Davids (2006), the SIU uses a more inquisitorial system because of the nature of their investigations. Malatjie (2006) also believes that the DIU uses a more inquisitorial system. However, the researcher believes that the DIU uses a more accusatorial system because its investigation teams consist of investigators only, and once an investigation is completed, the case is handed over to the DSO or SAPS for prosecution.

5.7 THE ACCUSATORIAL INVESTIGATION

Accusatorial investigations imply that the prosecutor directs a highly informal investigation, since, as a rule, the only admissible evidence is that which is accepted during public and oral trial proceedings. The purpose of the investigation is to obtain information that will convince the prosecutor that sufficient proof exists to prosecute and convict the accused.

This system is similar to the one used by the SAPS' Detective Service. In an accusatorial investigation, in addition to the prosecutor's oversight functions, the judge also performs an oversight role and does not conduct the investigation (Palmieri, undated: 2).

Unlike an investigating judge in an inquisitorial system, a presiding officer may not call witnesses from the outset, but may only do so in order to bring evidence before the court which has been omitted by mistake, or is necessary to cure a technical deficiency.

The accusatorial system, on the other hand, is branded as a contest between two parties, which seeks to find a winner. The accusatorial systems generally require that before a person can even be charged, there must first be in existence and available to the prosecutor a body of evidence, gathered by the police, capable of establishing beyond a reasonable doubt the guilt of the person to be charged (Barnes, 2004: 2).

The availability of such evidence is achieved by means of a system of criminal investigation undertaken by the police. The accusatorial investigation begins when a case is reported to the police. Thereafter, an investigator who is a police official is appointed to conduct an investigation. During the investigation process, covert and overt operations may be used, depending on the nature of the offence.

Scientific methods are also used in order to achieve maximum results. Therefore, it is clear from the above explanation that the system used by the SAPS Detective Service is more accusatorial, as opposed to the *troika system* used by the DSO which is more inquisitorial. The following diagram (Diagram 5.1) illustrates various steps in a criminal case which is more accusatorial.

This process is similar to the one used by the SAPS. The DSO follows this process after the investigation has been completed. Nothing in the Criminal Procedure Act prescribes the manner in which a case should be dealt with.

Perhaps this is one of the reasons why the five agencies within the Criminal Justice System use different methods. This is problematic, because the law creates a vacuum where it does not guide the agencies on how to conduct their investigations.

If this is allowed to continue, there will be a stage where every institution will do as it pleases. The fact that the Criminal Procedure Act was promulgated to actually eliminate the jury system shows that the government wanted to bring in some guidelines to law enforcers. However, this has not been fulfilled up to today.

5.8 PLEA BARGAINING

A plea bargain is an agreement in a criminal case in which a prosecutor and a defence arrange to settle the case against the defendant (http://www.nationmaster.com). In terms of this arrangement, the defendant agrees to plead guilty, or no contest, in exchange for some concession from the prosecutor. This concession can include reducing the original charge or charges, dismissing some of the charges against the defendant, or limiting the punishment a court can impose on the defendant.

Generally, a plea bargain allows the parties to agree on the outcome and settle the pending charge. Plea bargaining in some instances helps the courts and prosecutors manage caseloads (http://www.nationmaster.com). In South Africa, a number of cases referred/investigated by the Scorpions have been settled by plea bargaining. A good example of such cases is the Mark Thatcher case, which was highly publicised and was settled by a plea bargain.

On the other hand, there have not been many cases that were investigated by the police and settled by a plea bargain. Can this be an indication that the DSO is not effective in dealing with criminals, or it is an indication that freedom can be bought in South Africa? These disparities clearly indicate that there is a lot that still needs to be done in order to shape the South African Criminal Justice System.

5.9 SHOULD SOUTH AFRICA USE AN INQUISITORIAL OR ACCUSATORIAL SYSTEM?

According to the current functioning of South African criminal procedure, it is clear that the country subscribes to an accusatorial system. However, various investigative institutions use different methods and procedures, because there are no clear guidelines outlining and codifying South African criminal procedure and its investigations. The lack of proper guidelines allows various institutions to use various methods without sanction.

In 1989, the then Minister of Justice requested the South African Law Commission to investigate the possibility of simplifying South African criminal procedure by looking at introducing more inquisitorial elements into it. This was never achieved, but in 2002 the South African Law Commission (2002:xxiii) commissioned Project 73 to debate the issue.

The commission made the following suggestion, that section 115 of the Criminal Procedure Act be amended to oblige the presiding officer to inform an accused of the right to silence, the consequences of remaining silent, that he is not obliged to make any confession or admission and to ask him whether he wishes to make a statement indicating the basis of his defence.

It also obliges the presiding officer to question an accused where the accused fails to disclose the basis of his defence (South African Law Commission (2002:1). What is lacking in this investigation is the application of these proposals. The commission failed to outline whether the proposed changes are applicable to the SAPS, the DSO, the AFU, the SIU or the DIU.

From what is known as common practice, these proposals are aimed at the police. Another problem is that the commission failed to pinpoint that South Africa subscribes to an accusatorial system and now needs to combine both accusatorial and inquisitorial systems. These uncertainties are also not properly explained by the Criminal Procedure Act.

5.10 CONCLUSION

The question that one needs to ask is: which system is prescribed by South African law? Is it inquisitorial or accusatorial? The answer to this question is: accusatorial, but in practice it is both accusatorial and inquisitorial. Both the accusatorial and inquisitorial systems have advantages and disadvantages in obtaining the truth in any given matter. If South Africa applies the inquisitorial system, the idealised task of discovering the truth by whatever means necessary, then a trial may become expensive and may involve considerable delays or place unnecessary demands on people who are only remotely connected with the case.

On the one hand it is clear that as things stand, South African criminal procedure is both accusatorial and inquisitorial, almost like the French system. In reality there is no system in the world today which can claim to be truly accusatorial or inquisitorial in nature. All systems throughout the world are derived from each other.

Opinion is divided as to whether the accusatorial model or inquisitorial system is the better for achieving the truth in a particular case, although more evidence is apparent for the virtues of the inquisitorial system. Whether the inquisitorial system affords a better method of finding the truth within the limits imposed by the rights and freedom of the individual than the accusatorial system, has been the subject of some considerable debate.

South Africa is a good example of a country which borrowed various systems from Europe, due to her historical background. In South Africa, the fact that the judge is in the role of detached umpire is an indication of an accusatorial system. However, with the establishment of the DSO, which uses the "*troika*" system commonly used by the FBI, the scenario changes altogether.

For example, section 27 of the Criminal Procedure Act is almost the same as section 29 (7) (a) of the National Prosecution Authority Act. This is an ongoing confusion to officials responsible for the administration of justice, as well as to ordinary citizens.

CHAPTER 6: INTERNATIONAL EXPERIENCE

6.1 INTRODUCTION

Corruption and other financial crimes are not limited to any one part of the world. It is a reality in industrialised countries as well as in countries in transition and in developing countries. Within the Southern African region, corruption is of growing concern as a developmental issue. In conjunction with drug trafficking and other forms of transnational crime, it undermines the regional capacity to provide for economic growth.

On a political and legislative level, the Southern African Development Community (SADC), in response to corruption, culminated in the adoption and signing of the SADC Protocol Against Corruption in 2001. International trends indicate that not only corruption is problematic, but fraud, organised crime and other financial crimes cannot be left alone to be dealt with by the police agencies. It is now a world trend for countries to develop independent agencies to deal with corruption, fraud, organised crime and financial or economic crimes.

The following countries have established independent agencies to deal with corruption, fraud, organised crime and financial or economic crime: Angola: High Authority Against Corruption (HAAC); Botswana: Directorate on Corruption and Economic Crime (DCEC); Lesotho: Directorate on Corruption and Economic Offences (DCEO); Malawi: Anti-Corruption Bureau (ACB); Zambia: Anti-Corruption Commission (ACC); Zimbabwe: Anti-Corruption Commission (ACC); Tanzania: Anti-Corruption Squad (ACS) - later the Prevention of Corruption Bureau (PCB); Swaziland: Anti-Corruption Commission (ACC); Malaysia: Anti-Corruption Agency (ACA); Mauritius: Central Tender Board (CTB) and the Ombudsman; Namibia: Anti-Corruption Commission (ACC); Nigeria: Economic

and Financial Crime Commission of Nigeria (EFCC); Singapore: Corrupt Practices Investigation Bureau (CPIB); and, Hong Kong: Independent Commission Against Corruption (ICAC). The following discussion will focus on the analysis of the Botswana, Malawian, Nigerian and Hong Kong models, to see if South Africa can develop its own model. The reason for focusing on these agencies is that they have proved to be effective.

This discussion will focus on the Directorate on Corruption and Economic Crime (DCEC) of Botswana, the Anti-Corruption Bureau of Malawi, the Economic and Financial Crimes Commission (EFCC) of Nigeria and the Independent Commission Against Corruption (ICAC) of Hong Kong. After analysing each model, the researcher will develop a model for the South African Criminal Justice System.

6.2 DEFINITIONS

6.2.1 Corruption

According to Snyman (1992:277), corruption means the giving or offering of a benefit to another with the intention of influencing them to commit or omit to do any action relating to their power or duty. Corruption refers to bribery or any corrupt act as defined by the Prevention and Combating of Corrupt Activities Act 12 of 2004.

The crime is committed when giving or offering a benefit to another with the intention of influencing them to commit or omit to do anything in relation to their power or duty. An agreement to give or to receive a benefit is also sufficient as a contravention of the Act.

6.2.2 Organised crime

According to Abadinski (1990:227), organised crime refers to those self-perpetuating, structured associations of individuals or groups, combined together for the purpose of obtaining monetary or commercial gain or profit, wholly or in part, by illegal means, while protecting their activities through a pattern of graft and corruption.

6.2.3 Money laundering

This is a process by which one conceals the existence, illegal source or illegal application of income and disguises that income to make it appear legitimate (Ryan, 1997:179). De Koker (1997:18) also defines money laundering as a process by which criminals attempt to disguise the criminal origin of the proceeds of crime.

Money laundering is also a process by which criminals attempt to disguise the criminal origin of the proceeds of crime. Therefore it can concluded that money laundering is the hiding of the source of the money, which was obtained through illegal means.

6.3 BOTSWANA'S DIRECTORATE ON CORRUPTION AND ECONOMIC CRIME (DCEC)

Figure 6.1: The logo of Botswana's Directorate on Corruption and Economic Crime

6.3.1 Background

According to Heilbrunn (2004:15), Botswana is among the states that have adopted the universal model to combat corruption. Botswana's commission evolved out of a series of scandals in which senior officials in the ruling Botswana Democratic Party were implicated in accepting bribes. In September 1994 the Botswana National Assembly enacted the Corruption and Economic Crime Act to establish the Directorate on Corruption and Economic Crimes (DCEC). This Act created new offences of corruption, including being in control of disproportionate assets or maintaining an unexplained high standard of living.

Changes in law were necessary to create clearly defined offences, to provide specific powers of investigation, and create effective deterrent punishments for those convicted. The investigation branch of the DCEC collects information on alleged corruption and other financial crimes and also effects arrests (http://www.gov.bw). Intelligence branch analysts are responsible for the information gathering functions of the directorate and they also receive reports from the public.

6.3.2 Types of crimes investigated by the DCEC

The DCEC investigates public and private corruption, including bribery and related activities, as well as other economic crimes. On economic crimes, the legislation does not outline which offences are regarded as economic crimes. According to Batty (2004:45), the Directorate on Corruption and Economic Crimes Act only specifies private and public corruption as crimes falling under the jurisdiction of the DCEC.

6.3.3 Crimes not covered by the DCEC

In terms of the Corruption and Economic Crimes Act, the following crimes are not covered by the DCEC: murder, assault, robbery, rape (common or statutory), domestic violence, domestic disputes and stock theft. As for fraud and other commercial crimes such as advanced fee fraud - also known as “419 scams”, the Act does not specify whether the police or the DCEC should investigate.

6.3.4 Schedule of duties

Initially, the DCEC was staffed with a combination of imported expatriate experts and officers seconded from Botswana are other law enforcement agencies, notably the police, customs and taxes departments (Batty, 2004:46). It also recruited local newly graduated university students. By 2001 all but five of the original fourteen expatriate experts had left the organization, and secondments were no longer taking place. At managerial level, the DCEC is headed by a director who is appointed by the President of the country under the Office of the President (http://www.gov.bw). The Director is assisted by the regional heads and branch managers. No outsiders or members of the other agencies form part of the management team.

6.3.5 Code of conduct and ethical behaviour

The Corruption and Economic Crimes Act does not make provision for a code of conduct for investigators.

6.3.6 Legislative mandate to investigate

The DCEC has a mandate to investigate, prevent and educate the public on all issues relating to economic crimes and corruption. The DCEC has, however, no role in the prosecution of corruption cases. Evidence is forwarded to judicial authorities for prosecution. This is similar to the Independent Commission Against Corruption (ICAC) model of Hong Kong. The mandate to investigate corruption is found in section 11 of the Corruption and Economic Crime Act, read with section 339 (5) of the Criminal Procedure and Evidence Act, which states that: “the DCEC officers have the same powers and authority as the Botswana Police Force members”.

6.3.7 Powers and authority to investigate

The Directorate on Corruption and Economic Crime (DCEC) uses the Corruption and Economic Crime Act. This legislation was enacted to enable the government to establish the DCEC, so that cases of corruption and complex commercial crimes are not handled by the police alone.

Section 7 (1) of the Corruption and Economic Crime Act provides that the DCEC has the same powers as the police, which include:

the power of arrest, search with or without a warrant, to compel banks and other financial institutions to disclose otherwise confidential information about suspects, to compel the provision of information by witnesses and suspects, of restraint of assets and of forfeiture of assets, investigate, detain and subpoena potentially incriminating information from suspects

6.3.8 Authority to gather crime intelligence

The authority to gather financial and intelligence information on corruption is found in section 10 of the Corruption and Economic Crime Act, read with section 337 (2) of the Criminal Procedure and Evidence Act. However, wiretapping is not lawful in Botswana, but evidence obtained by other covert means such as physical and technical surveillance is admissible (Batty, 2004:45). The use of covert equipment is strictly controlled, and before such a process can be undertaken, authority from a Principal Investigator must be sought.

6.3.9 Collaboration with other agencies

The DCEC collaborates with agencies such as the Federal Bureau of Investigation (FBI), the Independent Commission Against Corruption (ICAC), as well as other law enforcement agencies in Botswana, including the Botswana Police Force.

The only problematic area is the procedures used to locate suspects outside Botswana. According to the DCEC Investigation Procedures Manual (1999:40), consent should be obtained from concerned countries through INTERPOL Gaborone at least fourteen days prior to the intended visit.

6.3.10 Legislation governing corruption, fraud, organised crime, economic and financial crimes

The Directorate on Corruption and Economic Crime (DCEC) uses the following pieces of legislation to investigate corruption: Corruption and Economic Crime Act of 1994, Penal Code (particularly Division II of the Penal Code which makes certain conduct by public officials punishable as corruption), and the Criminal Procedure and Evidence Act. The Penal Code of 1970 also adopts as a common denominator the concept of “valuable consideration” as a commodity exchanged for corrupt activity, and defines the concept in wide, all-encompassing terms (Goredama, 2000:24).

6.3.11 How to report cases to the DCEC

The public can access the DCEC through the following means of communication: telephone (hotline), fax, and letter - or in person in strategically located offices of the DCEC throughout the country (http://www.gov.bw).

6.3.12 Level of training for investigators

No evidence is available concerning the level of training of the investigators. However, the fact that the agency is staffed by investigators, lawyers/prosecutors, intelligence gatherers and educators, indicates that members are highly qualified. In addition, the DCEC has a training Academy which caters for their own personnel and other local law enforcement agencies, as well as providing/hosting training for international agencies (DCEC Investigation Procedures Manual, 1999:45). This is an indication that it is a well-functioning institution.

6.3.13 Civilian oversight /oversight bodies

In carrying out its work, the DCEC functions as an autonomous Directorate under the Office of the President, but the decision to institute prosecutions is reserved for the Attorney General. Where evidence of an offence is obtained, it is referred to the Attorney General in a Prosecution Report (http://www.gov.bw).

6.3.14 Best Practice Packages (BPPs)

The Corruption and Economic Crime Act does not make provision for Best Practice Packages.

6.3.15. Detention centres

The DCEC does not have its own detention facilities. Sections 10 and 12 of the Corruption and Economic Crime Act stipulate that “after arrest, the DCEC investigators shall detain the suspects at a police station where the offence has been committed”.

6.4 MALAWI'S ANTI-CORRUPTION BUREAU (ACB)

Figure 6.2: The logo of the Malawi Anti-Corruption Bureau (ACB)

6.4.1 Background

On 17 May 1995 the new Constitution of Malawi was introduced. This expressed the new democratic Malawi's commitment to public trust and good governance. Section 13 of the Constitution of 1995 committed the country to "introduce measures which will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and transparency will strengthen confidence in public institutions" (http://www.sdnp.org.mw).

In conformity with this commitment, on 1 December 1995 the President gave his assent to the Corrupt Practices Act of 1995. The Bureau is a government department headed by a director, assisted by a deputy director, who is both appointed by the President, but whose appointment is subject to ratification by the Public Appointments Committee of Parliament. The Bureau commenced full operations on 9 February 1998.

6.4.2 Types of crimes investigated by the ACB

In terms of the Corrupt Practices Act, only corruption cases are investigated by the ACB. Although the Act does not stipulate the level of corruption that falls under the jurisdiction of the ACB, it is assumed that all corruption cases are investigated by the ACB. It is also not clear from the Act if some acts of corruption are referred to the police.

6.4.3 Crimes not covered by the ACB

In terms of the Corrupt Practices Act, only corruption is investigated by the ACB. Essentially this means that the Bureau is restricted to only handling cases of corrupt practices, as mentioned above.

However, it has already become apparent that many cases of alleged or suspected corrupt practices which are reported to the Bureau turn out, upon investigation, to involve other offences, particularly fraud, fraudulent false accounting and theft. In strict terms, the Bureau is not permitted to investigate such complaints (http://www.sdnp.org.mw).

6.4.4 Schedule of duties

According to the Corrupt Practices Act, the Bureau is managed by a director, assisted by a deputy director. These two members are accountable to the Minister of Justice who is in turn is accountable to the President. The Act does not make any provision for a Board of Directors or a Governing Body.

6.4.5 Code of conduct and ethical behaviour

The Bureau has Standing Orders, which are aimed at regulating operations of the Anti-Corruption Bureau that have been approved by the Minister of Justice in accordance with the Act. In addition, the ACB has a Code of Conduct and Ethical Behaviour for staff members. The Code sets ethical standards for all persons employed in the Bureau, and will form part of the employees' Conditions of Service (http://www.sdnp.org.mw).

The Code demonstrates the Bureau's commitment to high standards and professional conduct within its ranks. The Code of Conduct covers areas such as personal and professional conduct, use of information, bribes, financial and private interests, discipline, and complaints against the Bureau staff (http://www.sdnp.org.mw).

6.4.6 Legislative mandate to investigate

The legislative mandate to investigate corruption in Malawi is found in the following pieces of legislation: the Constitution of Malawi and the Corrupt Practices Act.

6.4.7 Powers and authority to investigate

The Anti-Corruption Bureau is empowered under Section 10 (1) (b) of the Corrupt Practices Act to receive and investigate complaints of alleged or suspected corrupt practices and, subject to the directions of the Director of Public Prosecutions, to prosecute offences under the Act.

It also investigates under Section 10 (1) (c) "*the conduct of any public officer which is conducive or connected to corruption and to report thereon to the Minister".* It does so through the Investigations and Legal Division, which comprises an Investigations Branch, a Prosecutions Branch and a Documentation Centre.

The Investigations and Legal Division is under the command of an assistant director (http://www.sdnp.org.mw). Every single investigation must however, be authorised by the director in accordance with section 11 (1) (a) of the Act.

This section is an important safety check in the investigation process, as it guarantees that no officer of the Bureau can commence any investigation without authority, and hence precludes potential abuse of the investigative process. Similarly, the director can, in terms of section 11 (1) (a) of the Act, decline to investigate a complaint if he considers it to be made in bad faith, trivial, frivolous, unnecessary, improper or futile.

A person who knowingly makes a false complaint or delays or hinders the work of the Bureau can be prosecuted under the law with heavy fines and long imprisonment. The law prohibiting false complaints against innocent citizens is similar to the one used by the ICAC of Hong Kong.

This is done to ensure that time and resources are not wasted and that the credibility and image of the ACB are not tarnished. In deciding to authorise an investigation, the director therefore needs to critically examine the complaint to see that an investigation is justified and based on sound and credible information. It would be improper to order an investigation on frivolous grounds, or to satisfy unjustified public demand, or to witch-hunt (http://www.sdnp.org.mw).

6.4.8 Authority to gather crime intelligence

The ACB is only allowed to investigate corruption. No mandate is extended to the Bureau to gather intelligence. When an investigation is initiated and other crimes such as fraud and organised crime come out, the ACB refers them to the police.

6.4.9 Collaboration with other agencies

The Bureau has made useful contacts with the Anti-Corruption Commission in Zambia, the Directorate on Corruption and Economic Crime in Botswana, the Independent Commission Against Corruption in the New South Wales, Australia, and the Independent Commission Against Corruption in Hong Kong. With the Bureau's capacity improving all the time, these contacts will be fully utilised in order for Malawi to learn about best practices in the anti-corruption fight in other jurisdictions (http://www.sdnp.org.mw).

6.4.10 Legislation governing corruption, fraud, organised crime, economic and financial crimes

Although the Corrupt Practices Act is more than ten years old, there are already signs that a review is necessary. Corruption is not defined in the Corrupt Practices Act, although the Act does define "corruptly" as the "soliciting, accepting or obtaining, or the giving, promising, or offering of gratification by way of a personal temptation or bribe".

"Gratification" means payment in cash or kind or in other forms made with the intention to bribe (http://www.sdnp.org.mw). Accordingly, all offences centre upon the giving or receiving of bribes (or the possession of unexplained property).

This has caused some constraints to effective investigation and prosecution of corruption in Malawi. Section 10 (1) (b) of the Corrupt Practices Act permits the Bureau to receive and investigate complaints of corrupt practices, and, subject to the direction of the Director of Public Prosecutions, prosecute offenders.

6.4.11 How to report cases to the ACB

In terms of the Corrupt Practices Act, members of the public are allowed to register their cases through the following: letters, fax, telephone and e-mail.

6.4.12 Level of training for investigators

The Act makes no mention of the level of training for investigators. However, one can deduce that the fact that the agency is staffed by investigators and lawyers/prosecutors, is an indication these are highly educated people.

6.4.13 Civilian oversight /oversight bodies

In terms of the Corrupt Practices Act, there is no provision for civilian oversight. The only instance that can be interpreted as a safety check is section 11 (1) (a) of the Corrupt Practices Act which provides that every single investigation must be authorised by the director, in accordance with the law.

This section is an important safety valve in the investigation process, as it guarantees that no officer of the Bureau can commence any investigation without authority, and hence precludes potential abuse of the investigative process.

6.4.14 Best Practice Packages (BPPs)

The ACB is a fairly new organisation with limited resources. At this stage there is nothing that can be regarded as and equated to Best Practice Packages. However, section 10 (1) (a) (i) and (ii) of the Corrupt Practices Act require the

Bureau to discharge its preventive functions by working with both public and private institutions to review methods and systems of work in order to eradicate or minimise corruption opportunities, introducing new methods and systems of work in such institutions, assisting in the framing of a Code of Ethical Conduct for public officers. This process includes morality, conflict of interests and declaration of assets and liabilities and becomes directly involved in the strengthening of the Public Procurement Process.

6.4.15 Detention centres

The Corrupt Practices Act does not specify this aspect. The Act does not even indicate the procedures after arrest.

6.5 NIGERIA'S ECONOMIC AND FINANCIAL CRIMES COMMISSION (EFCC)

Figure 6.3: The logo of the Nigerian Economic and Financial Crimes Commission (EFCC)

6.5.1 Background

The preponderance of economic and financial crimes such as Advance Fee Fraud (419), money laundering, etc., has had severe negative consequences for Nigeria, including decreased Foreign Direct Investments in the country and tainting of Nigeria's national image (http://www.efccnigeria.org). . The menace of these crimes and the recognition of the magnitude and gravity of the situation led to the establishment of the Economic and Financial Crimes Commission (EFCC)

The legal instrument backing the Commission is the EFCC (Establishment) Act, and the Commission has a high level of support from the Presidency, the Legislature and key security and law enforcement agencies in Nigeria.

6.5.2 Types of crimes investigated by the EFCC

In terms of the Economic and Financial Crimes Commission (Establishment) Act, the following are offences covered by the EFCC: all suspicious financial and economic transactions, illegal bunkering, vandalisation and damage to oil, gas and power lines and installations, all acts of economic sabotage, including: financial malpractices of all types (particularly in banks and other financial institutions), and money laundering (http://www.efccnigeria.org).

The EFCC also investigates all acts or suspected acts of terrorism, or movement of money, assets or property for terrorist organisations. Cyber crime includes computer crime, which includes Internet fraud, Internet pornography, use of computers for theft, destruction, or harassment, and failure of a cybercafé to comply with EFCC regulations. It is the duty of the EFCC to investigate the following: bank fraud, issuance of bounced cheques, fraudulent cashing of cheques and foreign exchange malpractices, Advanced Fee Fraud (419), contract scams, inheritance scam, job scams, credit card scams, lottery scams, money doubling, marriage scams, counterfeiting, religious scams, juju-based scams, long-term stings and swindles, i.e. obtaining by false pretences, business scams and fraudulent schemes, land allocation fraud, tax fraud and evasion, fraud in relation to custom duties and other payments to Government, conversion, concealment or transfer of property used for criminal activity, financing of economic and financial crimes, destruction of records relating to financial crimes, and failure to report such crimes (http://www.efccnigeria.org).

6.5.3 Crimes not covered by the EFCC

In terms of the Economic and Financial Crimes Commission (Establishment) Act, the following are offences not covered by the EFCC: marital disputes, chieftaincy matters, assault, petty theft, debt collection, communal clashes, religious riots, and so on.

6.5.4 Schedule of duties

In terms of the Economic and Financial Crimes Commission (Establishment) Act, the Commission consists of the following members: a Chairman, who is the Chief Executive and Accounting Officer of the Commission, a serving or retired member of any government security or law enforcement agency, a Director-General who is the head of administration, a Governor of the Central Bank or his representative, a representative of the Federal Ministry of Foreign Affairs not below the rank of a Director, a representative of the Federal Ministry of Finance not below the rank of a Director, a representative of the Federal Ministry of Justice not below the rank of a Director, the Chairman of the National Drug Law Enforcement Agency, the Director General of The National Intelligence Agency, the Director General of the Department of State Security Services, the Director-General Securities and Exchange Commission, the Commissioner for Insurance, the Postmaster-General of the Nigerian Postal Services, the Chairman, Nigerian Communications Commission, Nigeria Customs Services, the Commissioner-General of the Nigeria Immigration Services, a representative of the Nigeria Police Force not below the rank of an Assistant Inspector-General of Police, and four eminent Nigerians with cognate experience in any of the following: finance, banking or accounting (http://www.efccnigeria.org).

6.5.5 Code of Conduct and ethical behaviour

The EFCC Establishment Act does not make any provision for a code of conduct for investigators.

6.5.6 Legislative mandate to investigate

The Economic and Financial Crimes Commission Establishment Act mandates the EFCC to combat financial and economic crimes (http://www.efccnigeria.org). The Commission is empowered to prevent, investigate, prosecute and penalise economic and financial crimes, and is charged with the responsibility of enforcing the provisions of other laws and regulations relating to economic and financial crimes.

6.5.7 Powers and authority to investigate

Section 46 of the Economic and Financial Crimes Commission (Establishment) Act mandates the EFCC to combat financial and economic crimes by authorising the Commission to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, organised crime and other criminal activities. The Commission is empowered to prevent, investigate, prosecute and penalise economic and financial crimes, and is charged with the responsibility of enforcing the provisions of other laws and regulations relating to economic and financial crimes, including: the Money Laundering Act, the Money Laundering (Prohibition), the Advance Fee Fraud and Other Fraud Related Offences, the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, the Banks and other Financial Institutions Act, and the Miscellaneous Offences Act.

6.5.8 Authority to gather crime intelligence

The activities of the Nigerian Financial Intelligence Unit are covered in Clause 1 (2) (c) of the EFCC Act and Part I of the Money Laundering (Prohibition) Act. The two sections state that the EFCC has power to gather or investigate financial and crime intelligence through the Nigerian Financial Intelligence Unit. Such powers include gathering, processing, and dissemination of information. The core role of the NFIU is that it serves as the country's central agency for the collection, analysis and dissemination of information regarding money laundering and the financing of terrorism (http://www.efccnigeria.org).

6.5.9 Collaboration with other agencies

The EFCC has collaboration with all the law enforcement agencies in Nigeria, INTERPOL, the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), the ICAC of Hong Kong, and Scotland Yard.

6.5.10 Legislation governing corruption, fraud, organised crime, economic and financial crimes

The EFCC uses the following pieces of legislation: the Economic and Financial Crimes Commission (Establishment) Act, the Money Laundering Act; the Money Laundering (Prohibition) Act, the Advance Fee Fraud and Other Fraud Related Offences Act; the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act; the Banks and other Financial Institutions Act, and Miscellaneous Offences Act (http://www.efccnigeria.org).

6.5.11 How to report cases to the EFCC

Cases are reported to the EFC by means of oral reports to the EFCC, written petitions by an individual or organisation, or EFCC Hot Lines, and all petitions are addressed to the Chairman.

6.5.12 Level of training for investigators

The Training and Research Institute (TRI) provide quality training for staff of the EFCC and other stakeholders. The training programmes are designed to ensure that personnel are equipped with the knowledge and skills to meet the challenges set by criminals who use technology in their criminal endeavours.

Students or participants are taught how to ask the right questions, deal correctly with digital devices, investigate Internet and network crimes, conduct forensic IT investigations and know when specialist skills are needed and where to find them (http://www.efccnigeria.org). The following are minimum educational qualifications and experience prescribed:

6.5.12.1 Junior Staff

Minimum of Senior Secondary School Leaving Certificate with five credits and at least a Pass in English Language obtained after not more than two sittings.

6.5.12.2 Senior Staff

Minimum of a first degree or (its equivalent) from recognised institutions of higher learning. In addition, such candidates must possess a discharge/exemption certificate.

6.5.12.3 Management Staff

A candidate must have not less than fourteen years' relevant professional qualifications and experience, and be certified physically and mentally fit by a Government Medical Officer or any other designated Medical Practitioner registered by the Nigerian Medical Council (http://www.efccnigeria.org).

6.5.13 Civilian oversight/ oversight bodies

In terms of the Economic and Financial Crimes Commission (Establishment) Act, no provision is made for a civilian oversight. The only body that may be regarded as an oversight body is the EFCC Advisory Committee, which serves as advisory support to the Commission, through the Chairman.

6.5.14 Best Practice Packages (BPPs)

In terms of the Economic and Financial Crimes Commission (Establishment) Act, no provision is made for a Best Practice Package.

6.15 Detention centres

The Economic and Financial Crimes Commission (Establishment) Act does not specify this aspect. The Act does not even indicate the procedures after arrest.

6.6 HONG KONG'S INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC): THE UNIVERSAL MODEL

Figure 6.4: The logo of the ICAC of Hong Kong

6.6.1 Background

The Independent Commission Against Corruption was set up in 1974. Since its inception, the Commission adopts a three-pronged approach to investigation, prevention and education to fight corruption. With the support of the Government and the community, Hong Kong has now become one of the least corrupt places in the world (Chen, 2006).

Since 1974, the Hong Kong Independent Commission Against corruption has enjoyed resounding success in fighting corruption. The ICAC was established after a botched investigation into corruption in the colonial police led to Police Superintendent Peter Godber's flight from prosecution. Shortly thereafter, governor Sir Murray MacLehose empanelled a commission under the chairmanship of Justice Alastair Blair-Kerr (Heilbrunn, 2004:19).

The Blair-Kerr Commission concluded that corruption was systemic in Hong Kong. High-level officials, as well as police officers on the street, were accepting bribes. In response, the Blair-Kerr Commission recommended the establishment of a special agency to investigate allegations of corruption, prevent bribery in business and government, and educate citizens about corruption through outreach programmes (Heilbrunn, 2004:9).

To enact these changes, the Crown Colony established an independent commission to investigate allegations of corruption. In 1974 the ICAC commenced operations. In October 1974, the Independent Commission Against Corruption Act of 1974 set up an anti-corruption bureau independent of the Colonial Police. Political authorities recognised that “an essential part of the strategy was to ensure that the legal framework within which (the ICAC) was contained was as strong, clear and effective as it could be made” (Heilbrunn, 2004:9).

Existing legislation was revised and new laws were passed to set up an anti-corruption agency with a mandate to investigate any allegations of corruption and forward evidence to colonial prosecutors. Nowadays, Hong Kong ranks one of the least corrupt jurisdictions in East Asia, and this reputation is despite its free-wheeling market economy. Corruption is a secretive crime that is extremely difficult to investigate and prove in court. The ICAC is therefore given specific legal powers to bring the corrupt to book under three specific laws.

6.6.2 Types of crimes investigated by the ICAC

The Independent Commission Against Corruption Act stipulates that the ICAC is responsible for corruption only. This includes private and public corruption, including blackmail and misuse of public office.

6.6.3 Crimes not covered by the ICAC

The ICAC does not have jurisdiction over any other crimes besides corruption. However, in cases where an investigation is conducted and other crimes are discovered, the Hong Kong Police are called in to form a joint investigation team (Chen, 2006).

6.6.4 Schedule of duties

The Independent Commission Against Corruption Act does not make provision for a body or committees to run the ICAC. Instead, the ICAC is headed by a CEO who is assisted by two directors. The four committees that exist are oversight bodies.

6.6.5 Code of conduct and ethical behaviour

The Independent Commission Against Corruption Act does not make provision for a code of conduct for ICAC investigators.

6.6.6 Legislative mandate to investigate

The Independent Commission Against Corruption Ordinance establishes the ICAC and prescribes the duties of the ICAC Commission as being to investigate, search and seizure that are consistent with the powers of arrest and detention; vests ICAC with the power of taking non-intimate sample from a suspect for forensic analysis; and empowers the ICAC to investigate any alleged offence of blackmail committed by a public servant through misuse of office as well as crimes facilitated by or connected with suspected corruption offences.

6.6.7 Powers and authority to investigate

Corruption is a secretive crime that is extremely difficult to investigate and prove in court. The ICAC is therefore given specific legal powers to bring the corrupt to book under three specific laws, as follows: the Independent Commission Against Corruption Ordinance establishes the ICAC and prescribes the duties of the ICAC Commissioner, sets the parameters of the ICAC's investigation work, the procedure in handling a suspect and the disposal of property connected with offences; gives the ICAC the powers of arrest, detention; and granting bail, which are fundamental to any law enforcement agency; confers on the ICAC the powers of search and seizure that are consistent with the powers of arrest and detention, vests the ICAC with the power of taking non-intimate sample from a suspect for forensic analysis; and empowers the ICAC to investigate any alleged offence of blackmail committed by a public servant through misuse of office, as well as crimes facilitated by or connected with suspected corruption offences.

6.6.8 Authority to gather crime intelligence

Intelligence gatherings are conducted in terms of the Independent Commission Against Corruption Ordinance as well as the Interception of Communications and Surveillance Ordinance. Overt and covert operations are conducted in terms of the two pieces of legislation.

6.6.9 Collaboration with other agencies

The success of the ICAC fight against corruption does not lie solely in its capability to investigate, but also in its ability to liaise with other partners. Through joint proactive intelligence and regular Operational Liaison Group (OLG) meetings, the ICAC has developed and strengthened strategic partnerships with other law enforcement agencies (ICAC Operations Department, 2005:21).

6.6.10 Legislation governing corruption, fraud, organised crime, economic and financial crimes

The following pieces of legislation govern the investigation of corruption in Hong Kong: Prevention of Bribery Ordinance (Cap.201), Prevention of Bribery (Appeal Against Confiscation Order) Rules (Cap.201.sub.leg.A), Independent Commission Against Corruption Commission (Cap.204), Independent Commission Against Corruption (Treatment of detained persons) Order (Cap.204 sub. leg. A), Theft Ordinance (Cap.210), Elections (Corrupt and Illegal Conduct) Ordinance (Cap.554), and Interception of Communications and Surveillance Ordinance.

6.6.11 How to report cases to the ICAC

The Report Centre operates on a 24-hour basis like a police station. Reports and enquiries made to the ICAC's regional offices are also referred to the Report Centre (Chen, 2006).

The Quick Response Team (QRT) provides valuable support by dealing with minor cases which appear capable of quick resolution. The Quick Response Team also analyses the cases to see if such cases fall within the mandate of the ICAC or Hong Kong Police (ICAC Annual Report, 2005:39).

6.6.12 Level of training for investigators

Although the emphasis on a tertiary qualification as a requirement has been relaxed, the majority of investigators have degrees in various fields including law and accounting. Induction training for new recruits covers the first three years of the officer's employment.

6.6.12.1 Stage 1 Induction Course

The first stage of training is the fourteen-week Stage 1 Induction Course. This course includes law, legal issues, practical investigation techniques, cognitive interviews and outdoor activities (ICAC Operations Department Training School Manual, 2005:1). Officers are also given training in first aid, self-defence and the use of firearms. Other elements of the course deal with conduct and discipline, administrative procedures and the use of computers (ICAC Annual Report, 2005:29).

After Stage 1 Induction Course, the officers are placed in an investigation section, either in the Investigation Branch 1 that deals with Public Sector Corruption, or in Investigation Branch 2 that deals with Private Sector Corruption.

6.6.12.2 Stage 2 Induction Course

After a twelve-month tour of duty the in Investigation Branch1 or Investigation Branch 2, officers attend a three-week Stage 2 Induction Course. This course builds upon the practical experiences that they have been exposed to in their first year (Chen, 2006). This course also has a large element of fraud and financial investigation training.

Upon the conclusion of this course, the officers are cross-posted to whichever investigation branch they had not been in during their first twelve months (ICAC Annual Report, 2005:29).

6.6.12.3 Stage 3 Induction Course

Upon completion of the second twelve months' induction or on-the-job training, officers attend a Stage 3 Induction Course. This course again builds upon their experience and introduces in more detail than hitherto the practical aspects of informant handling and undercover operations.

The second and third week of the course are designed as an Assessment Centre exercise (ICAC Operations Department Training School Manual, 2005:1). Here officers are assessed while being put through a demanding series of practical scenarios, from briefing skills to arrest-and-search, to compilation of a file of evidence and giving oral evidence in court.

Direct Entrant Investigators are given an opportunity to not only attend a three-week Investigator Command Course, but are subject to one day Recall Days throughout their first year, to support their professional development (ICAC Annual Report, 2006:29). From time to time, investigators are called to attend a one-week Refresher Course to ensure that they keep up to date with developments in law and best practices.

Newly promoted investigators attend a three weeks' Investigators Command Course, which is aimed at leadership and management within a law enforcement context (ICAC Annual Report, 2006:29). The four weeks' Chief Investigators Command Course is designed for newly promoted Chief Investigators in the Commission as a whole. The course focuses on leadership and management within a law enforcement context (Chen, 2006). In addition to these training courses, investigators are given financial investigation courses, firearms training and ad hoc training.

The ICAC also affords bursaries to those who want to study privately. For promotion purposes, officers write a promotion examination irrespective of a degree qualification.

After writing the promotion examination, the candidates are assessed by their immediate supervisors and must then appear before a promotion board which has a final say in their suitability. However, candidates are also remunerated according to their educational qualifications (Chen, 2006).

6.6.13 Civilian oversight/oversight bodies

The three committees are the Operations Review Committee, the Corruption Prevention Advisory Committee, and the Citizen Advisory Committee on Community Relations. Members are nominated in recognition of their distinguished reputations in the larger community, and they meet at regular intervals to review the ICAC's activities and issue a report to the Hong Kong Special Administrator.

6.6.13.1 Operations Review Committee (ORC)

The Operations Review Committee (ORC) examines reports on current investigations, cases over twelve months old, cases involving individuals on bail for more than six months, and searches authorised under section 17 of the Prevention of Bribery Act. The ORC enforces a level of accountability that prevents the ICAC from evolving into a tool of repression or political favoritism.

6.6.13.2 Corruption Prevention Advisory Committee (CPAC)

The Corruption Prevention Advisory Committee receives reports on strategies to demonstrate the costs of corruption to private sector actors. Activities of the Prevention Department complement those outreach programmes of the Community Relations Department (Chen, 2006).

6.6.13.3 The Citizens Advisory Committee on Community Relations (CACCR)

The Citizens Advisory Committee plays a crucial role in the content of films, billboards and other forms of advertising to educate the public. The Citizens Advisory Committee on Community Relations also advises the Commissioner of the ICAC on the work of the Community Relations Department, and focuses on mass media, education and community research, by scrutinising specific aspects of the department's work in relation to the measures to be taken to foster public support in combating corruption, as well as educating the public against the evils of corruption (Reports of the ICAC Advisory Committees, 2005:26).

6.6.13.4 Advisory Committee on Corruption (ACC)

The Advisory Committee on Corruption is the principal advisory body of the ICAC and oversees all the Commission's activities. Its members include the members of the other three advisory committees (http://www.icac.org.hk).

6.6.14 Best Practice Packages (BPPs)

Best practice packages (BPPs) have been developed by the Department to provide private sector companies and public corporations with user-friendly guidelines on plugging corruption loopholes.

According to Chen (2006), the BPPs cover a wide range of topics and the related checklists outlining areas of potential corruption risks are provided here for reference, if any: Management of Consultants; Staff Administration; Stores Management; Contracting Out Security Services; Procurement Practices; Contracting Out Cleaning Services; Monitoring Staff Attendance and Overtime Work; Information Systems Security; Retail Incentive Programmes; Payment Procedures; Construction Industry Best Practices Principles; Construction Quality Control Testing; Sales Receipts Administration; Estate Management by Property Management Companies; Hotel Management and Travel Agent Operations.

6.6.15 Detention Centres

The power to detain arrested persons is provided for in section 10 A (2) of the ICAC Ordinance. The ICAC (Treatment of Detained Persons) Order sets out the rights and entitlements of persons detained. To ensure that the rights of the detainees are not violated, the law provides for visits by the Justices of the Peace. Another purpose of such visits is to ensure that the detention facilities are properly maintained, and to take notice of any requests or complaints that detainees may wish to make. The detention centre is used to detain suspects while the ICAC is still busy with the investigation. In exceptional cases suspects can be detained after conviction for the purpose of further investigations (Chen, 2006). After conviction, suspects are taken to Correctional Services to serve their sentences.

6.7 NECESSITY FOR AN INDEPENDENT AGENCY IN SOUTH AFRICA

With corruption in local and national governments on the rise, many countries and cities are calling for the creation and strengthening of independent anti-corruption agencies. South Africa has more or less fourteen independent agencies which deal with corruption directly and indirectly.

This is an indication of the seriousness of the government to fight corruption. However, this number seems to be too high and most of these agencies tend to duplicate functions; this is not helping the country. As corruption grows more sophisticated in character and method, conventional law enforcement agencies are less able to detect and prosecute complex corruption cases (Heilbrunn, 2004:2).

6.8 CONCLUSION

Corruption, fraud, organised crime, and financial or economic crime are a major concern throughout the world. It is clear now that in order to fight these crimes, many countries have established independent agencies or commissions. It is the duty of every country to ensure that structures are established to deal with these problems.

Corruption, fraud, organised crime, and financial or economic crime not only distorts economic decision making, but also deters investment, undermines competitiveness and, ultimately, weakens economic growth. This is why the United Nations has developed policy guidelines and protocols to deal with corruption and transnational crimes.

CHAPTER 7: PROPOSED INVESTIGATIVE MODEL FOR THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

7.1 INTRODUCTION

It is now clear that South Africa has a serious problem with crime, particularly organised crime, corruption, and financial or economic crime. Therefore, the state has a legal duty to protect its citizens from crime. The State has made blunders there and there by creating various institutions that tend to duplicate functions. Now it is time for the State to rectify these problems by looking at a model that will assist South Africa in dealing with crime.

One should also bear in mind that by creating a new agency, the government will not be taking away the functions of the police. It is also important to be aware that the 'hands of the police are full'. As a result, there have been accusations of police incompetence and corruption.

A multi-agency approach has proved to be problematic and inefficient. It is an international norm that a single-agency approach is used to solve these problems. Therefore, after analysing various international agencies that deal with organised crime, fraud, economic and financial crimes, the researcher proposes a model which will help South Africa to combat corruption, fraud, financial and economic crimes.

The model is neither accusatorial nor inquisitorial but a "prosecution-led investigation" model. One need to acknowledge that corruption, fraud, organised crime, economic and financial crimes are terrorising South Africa and its newfound democracy.

During 2000, South Africa, in conjunction with the United Nations Office for Drug Control and Prevention, hosted an International Anti-Corruption Expert Round Table. The NPA were represented by Bulelani Ngcuka, the then National Director of Public Prosecutions. Other international agencies such as the ICAC were also represented.

At this conference a document was compiled in which various anti-corruption agencies shared their experiences. On page 18 of the document presented at the conference, the ICAC outlined its origin, mandate and successes. These experiences were ignored by the NPA.

The fact that South Africa subscribes to constitutional democracy, makes it vital that whatever South Africa establishes must be in line with the Constitution. The purpose of designing a new model is to assist the South African government and responsible Ministers to solve the current operational and legislative problems that have surfaced during this research. This will ensure effective investigation of organised crime, corruption, fraud, financial and economic crimes.

7.2 DEFINITIONS

7.2.1 Model

According to the Pocket Oxford Dictionary (1994:611), a model is a representation in three dimensions of an existing person or thing, or of a proposed structure, especially on a smaller scale. This definition is more or less in line with the present topic.

7.2.2 System

A system is a complex whole, a set of connected things or parts or organised body of things (Pocket Oxford Dictionary 1994:982) This definition also includes methods, scheme of action, procedure classification or orderliness.

7.3 PROSECUTION-LED INVESTIGATION: THE WAY FORWARD FOR THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

Prosecution-led investigations are not new in South Africa. On 12 January 2000 Parliament passed amendments to the National Prosecuting Authority Act which, according to the preamble, were aimed at making provision for the establishment of an Investigating Directorate with the capacity to prioritise and investigate particularly serious criminal or unlawful conduct, and with the object of prosecuting such offences or unlawful conduct in the most efficient and effective manner.

The Directorate of Special Operations, or the DSO, also known as the Scorpions, were to report at the office of the National Director of Public prosecution. The effects of these amendments were to carve out for the prosecution a niche in the investigation of crime, a role that had hitherto been the exclusive domain of the SAPS. These amendments heralded in South Africa the advent of the concept of prosecution-led investigations. These amendments represented such a fundamental deviation from conventional wisdom about the need for a “Chinese wall” to exist between the investigative and prosecutorial functions, that serious questions were raised about whether the amendments to the NPA Act establishing the DSO would in fact withstand constitutional muster.

7.3.1 Factors that warrant innovations to the traditional model

Organised crime is an enterprise, not an event. There are, in the researchers' view, several factors that justify the establishment, under the auspices of the prosecution, of a limited investigative capacity to deal with specific types of offences - in particular, organised crime and serious and complex financial crime, including fraud and corruption. South Africa today is characterised in the media both at home and abroad as a place where levels of serious violent crime, as well as crimes committed by more organised criminal networks, are rapidly on the increase. Statistics have been provided in Chapter 4 in this regard.

Like many other emerging democracies in the world, South Africa has to grapple with the serious threat to the safety and security of its citizens. South Africa's unique location, relatively sophisticated infrastructure and many fairly "porous" borders, has turned the country into a playground of international criminal organisations, fleeing intensified law enforcement activity in their countries of origin (Ngcuka, 2001:3).

Partly as a result of a general liberalisation that came with democratisation in 1994, South Africa has increasingly become a target for international drug syndicates, both as a market and a conduit for onward distribution. The inability on the part of law enforcement to deal with the upsurge in criminal activity provided fertile ground for vigilante groups to fill the gap.

The bombings of American franchises in the Western Cape posed new challenges to law enforcement in South Africa (http//:www.npa.gov.za). The role and rapid expansion of organised crime both in South Africa and other emerging democracies, has been well documented.

At best, law enforcement has been able to target the ‘foot soldiers’. The leaders of these organisations have been immune from prosecution. There are many reasons for this state of affairs. Syndicate leaders and other organised crime figures are often the first to invoke the protection that the South African Bill of Rights affords its citizens (http://www.npa.org.za). So much so, that there exists a perception by the public that it is only criminals who reap any benefits from the country’s democracy and that the Bill of Rights serves as a shield to protect criminals from being brought to justice.

The reality of the situation is that since the inception of the Bill of Rights, the South African courts have developed a complex body of constitutional criminal jurisprudence that is a virtual minefield to the average prosecutor, let alone the average investigator. “Just a cursory glance at the grounds upon which cases are thrown out of court on a daily basis bears testimony to this fact” (Ngcuka, 2001:4).

If this is the case, does South Africa have to be complacent and watch the country being terrorised by criminals? This is a phenomenon far from unique to South Africa. Other constitutional democracies experience the same problems. Criminals and organised crime bosses in particular have exploited this trend. Invariably, whenever they are faced with a formidable case on the merits they focus the court's attention away from the determination of their innocence or guilt and turn the spotlight instead on the manner and propriety of the investigation (http://www.npa.org.za).

Every decision taken in the course of the investigation is attacked: from the institution of the investigation and the application for a search warrant, to every aspect of how the warrant is effected.

Countries such as Nigeria, Botswana, Singapore, Hong Kong, Tanzania, and Malawi have changed from the traditional models to a single agency approach. It is often at the investigation stage that mistakes are made that ultimately result in the exclusion of evidence as a result of its inadmissibility, with the eventual acquittal of the accused. These are but some of the factors that precipitate the establishment of an agency and, in particular, the evolution of a greater role for prosecutors in the investigative process.

The fact that in an accusatorial system a prosecutor is far away from an investigation process creates a problem, because such prosecutors do not have enough time to assist the police. This problem is made worse by the lack of teamwork between the prosecutors and the police.

7.3.2 The evolution of a more expanded role for the prosecutor in criminal investigations

Prior to the establishment of the DSO in South Africa, the Office for Serious Economic Offences (OSEO), established in 1991 by the Investigation of Serious Offences Act, co-located investigators, prosecutors and accountants for the purpose of investigating economic crimes.

The Director of OSEO, a prosecutor, was empowered to institute an enquiry for purposes of determining whether or not an offence, which fell within its mandate, had been committed. The establishment of OSEO did not constitute a major departure from the conventional separation of the investigation and prosecution functions.

By and large, the investigators in OSEO remained under the ultimate command and control of the SAPS and were made available to work with the prosecutors in OSEO merely on a secondment basis (http://www.npa.org.za). In essence, OSEO had an investigative capacity that operated at a distance from the prosecution of the offences.

The model still required that the investigation be completed and handed to someone who had to take time to familiarise themselves with the case from the beginning (http://www.npa.org.za). What was still lacking was a person intimately involved in the investigation of the matter and also taking responsibility for the prosecution thereof.

This is a clear indication that the establishment of a new agency using a prosecution-led investigation method cannot be regarded as a new approach altogether, because it was once used and had some successes. According to Richards (2001), the model was not operationally functioning due to excessive red tape from the side of the police.

In many instances, prosecutors could fly from one province to another, whereas police investigators (non-commissioned junior investigators) were only allowed to drive, which could take a few days to arrive at a particular destination to start an investigation. Only senior police officers were allowed to fly. These unnecessary restrictions led to a situation where the government had to change its strategies and approaches.

7.4 TYPES OF CRIMES TO BE INVESTIGATED BY THE NEW AGENCY

The Act establishing the new agency needs to be clear in that there is no duplication of functions with agencies such as the police, the Asset Forfeiture Unit, the Special Investigating Unit and the Departmental Investigation Unit. In Hong Kong, for example, any corruption case goes to the ICAC because it is the only agency responsible for enforcing corruption legislation.

In Nigeria, section 13 of the Economic and Financial Crimes Commission (Establishment) Act, outlines the offences investigated by the EFCC as follows: offences relating to financial malpractices, offences relating to terrorism, offences relating to public officers, retention of proceeds of criminal conduct, offences relating to economic and financial crimes and penalties, forfeiture after conviction in criminal cases, and forfeited property.

What is problematic about the Nigerian legislation is the exclusion of corruption, which falls under the jurisdiction of another agency. In Botswana, corruption and economic crimes fall under the jurisdiction of the DCEC, and in Malawi corruption is investigated by the ACB. In South Africa, the new agency needs a properly outlined mandate so that it is able to function properly.

Before the researcher can address the issue of crimes to be investigated by the new agency, a definition of what shall be regarded as economic and financial crimes needs to be given. In this instance the researcher propose the following as a definition for economic and financial crimes:

Economic and financial crimes shall include the non-violent criminal and illicit activity committed with the objective of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing economic activities of Government and its administration and shall include any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery/corruption, illegal arms dealing and smuggling, foreign exchange malpractices including counterfeit currency, pyramid schemes, advanced fee fraud (Nigerian 419 scams), transnational crimes, terrorism, gangsterism, and armed robberies (cash in transits.

This definition is a combination of the Botswana and the Nigerian models. It is therefore suggested that the following offences be investigated by the new agency:

- Corruption (private and public)
- Organised crime
- Advanced fee fraud (Nigerian 419 Scams)
- Money laundering
- Fraud and theft
- Illicit drug trafficking
- Transnational crimes
- Terrorism (terrorism which involves financial transactions and organised crime). This is in line with the EFCC of Nigeria
- Gangsterism
- Armed robbery (cash in transit)

To ensure that the new agency does not investigate everything, legislation should provide a limit of R 500, 000.00. Anything less than this amount should go to the SAPS.

7.5 CRIMES NOT COVERED BY THE NEW AGENCY

Rape, child abuse, domestic violence, assault, murder, public violence, arson, kidnapping, and any other offence not listed above.

7.6 SCHEDULE OF DUTIES

The new agency shall be managed by a Board of Directors consisting of the following members: National Commissioner or one of the Deputies of the SAPS; Chiefs of Metropolitan/Municipal Police agencies; the Director General of SASS; the Director General of NIA; the Chief of Staff or the Commander of Military Intelligence (MI); the Commissioner of SARS; the Director General of Foreign Affairs; the Director General of Home Affairs; the Chief Executive Officer (CEO) of Business Against Crime (BAC); a Governor of the South African Reserve Bank or his representative; a representative of the Ministry of Finance and the National Treasury not below the rank of a Director; a representative of the Ministry of Justice and Constitutional Development not below the rank of a Director, the Chairman Office of the Interception Centre (OIC); a representative from Financial Services Board not below the rank of a Director; a representative of the Judicial Services Commission not below the rank of a Director; a representative of the South African Human Rights Commission not below the rank of a Director; a representative of the Legal Aid Board not below the rank of a Director; a representative of State Information Technology (SITA) not below the rank of a Director; a representative of the Safety and Security Education Training Authority (SASSETA) not below the rank of a Director and others.

This is in line with the EFCC of Nigeria, the ICAC of Hong Kong as well as section 19 of the South African Financial Intelligence Centre Act which established an Advisory Council on money laundering and terrorism financing, consisting of various law enforcement agencies in South Africa.

7.7 THE RANK STRUCTURE OF THE NEW AGENCY

In order to ensure that the agency discharges its mandate without any hindrances, the following rank structure, based on the ICAC and DCEC models, is suggested:

- Director General
- Deputy Director General
- Director
- Chief Investigator
- Principal Investigator
- Senior Investigator
- Investigator
- Assistant Investigator

In order to eliminate excessive red tape, the following organogram is suggested:

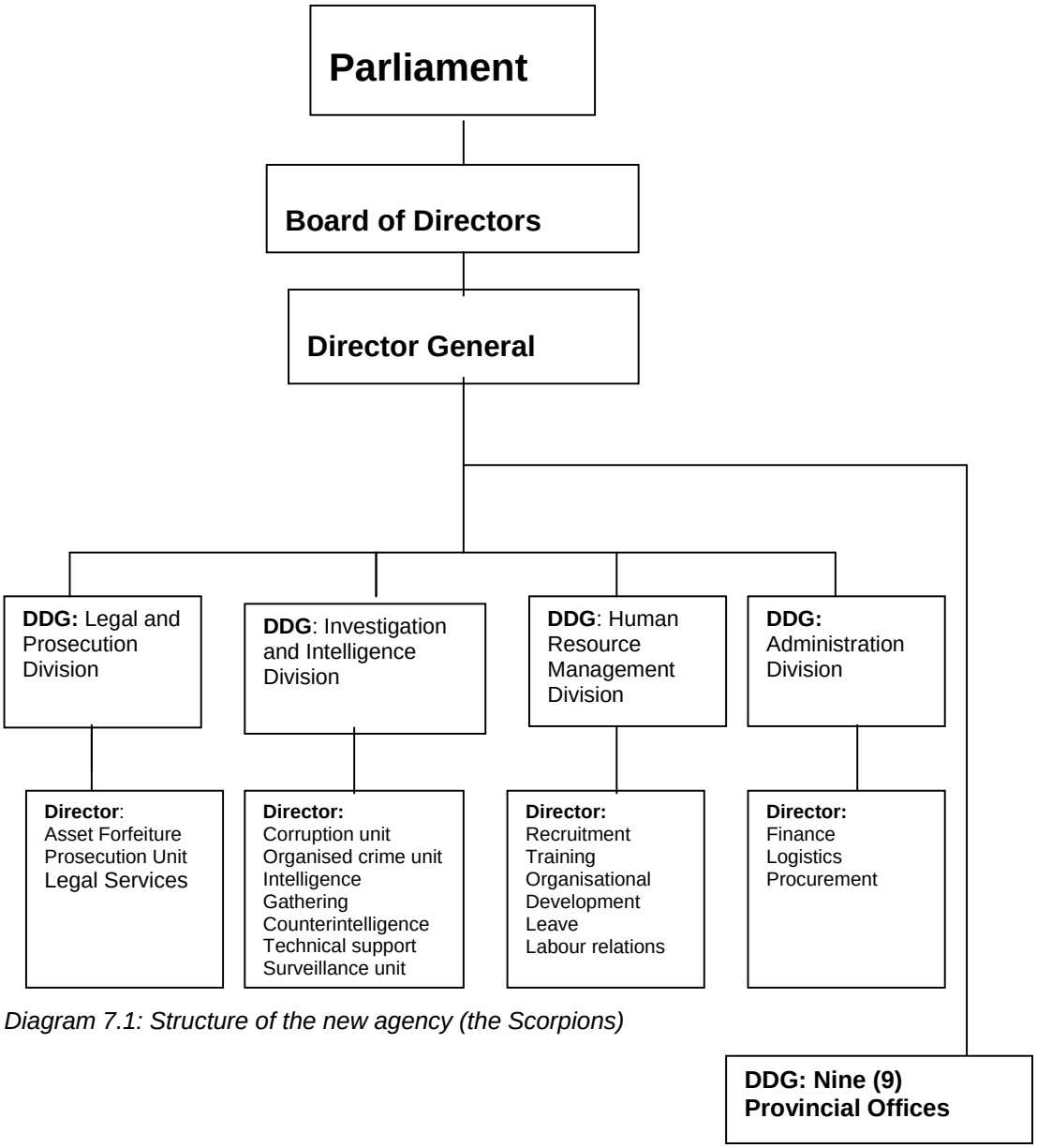

Diagram 7.1: Structure of the new agency (the Scorpions)

7.8 CODE OF CONDUCT FOR THE INVESTIGATORS OF THE NEW INVESTIGATION AGENCY

A Code of Conduct needs to be drawn up. Currently, section 40 of the National Prosecuting Authority Act makes provision for the Minister to promulgate regulations and a Code of Conduct for the members of the DSO.

Therefore, the new Act (to be known as the Directorate of Special Operations Act) needs to make provision for a code of conduct. This will ensure that the Code of Conduct will be integrated into the regulations which will assist management to enforce discipline. A Code of Conduct that is not attached to the discipline regulations does not have much of legal force and is difficult to enforce. This is in line with the ACB of Malawi.

7.9 LEGISLATIVE MANDATE TO INVESTIGATE

Due to the fact that South Africa is a constitutional State which subscribes to constitutional democracy, Chapter 9 of the Constitution which deals with “State Institutions Supporting Constitutional Democracy” needs to be amended to accommodate the new agency.

In addition to this, Chapter 11 of the Constitution which deals with “Security Services” also need to be amended to accommodate the new agency, so that it will be able to gather intelligence without any constitutional restriction. Thereafter, a new Act must be enacted to establish the new agency. This is in line with international trends. In Hong Kong, the Prevention of Bribery Ordinance (Cap.201) makes provision for the establishment of the ICAC and provides a legal mandate thereof.

The same applies to Nigeria, where the Economic and Financial Crimes Commission (Establishment) Act provides a mandate to the EFCC. In Malawi the Corrupt Practices Act established the ACB and provided the legal mandate thereof. In Botswana the Corruption and Economic Crime Act of 1994 was enacted to establish the DCEC and its mandate thereof. Therefore, South Africa needs to promulgate an Act such as the abandoned Directorate of Special Operations Bill of 2000, to establish the new agency.

In addition, legislation such as the Prevention of Organised Crime Act, the Drugs and Drug Trafficking Act, the Regulation of Interception of Communications and Provision of Communication Related Information Act, the National Strategic Intelligence Act, the Special Investigating Unit and Tribunals Act and the Prevention and Combating of Corrupt Activities Act need to be amended to accommodate the new agency. Once these Acts have been amended, the new agency can function smoothly, without questions being asked about its legitimacy.

7.10 POWERS AND AUTHORITY TO INVESTIGATE

The current powers given to the SAPS by the Criminal Procedure Act should be given to the new agency. By so doing, the state will be ensuring that the new agency is not confronted with any hindrances in the execution of its duties. However it must also be ensured that while giving this new agency sweeping powers, human rights as enshrined in section 35 of the Constitution, are not compromised. The new agency shall exercise powers by its establishing Act, and shall possess the following powers:

- Arrest
- Arrest without warrant
- Breaking open premises for purposes of arrest
- Use of force in effecting arrest
- Procedures after arrest
- Seizures
- Disposal of articles
- Search with a warrant
- Search procedures of arrested persons

- Search of premises
- Forfeiture of article to the state
- Powers in respect of prints and bodily appearance of the accused
- Manner and effect of arrest
- 48-hour rule after arrest
- Detention procedures
- Treatment of detainees
- Procedures to be followed after conviction (criminal records)
- Fingerprinting
- DNA tests
- Questioning, interrogation and interviewing

Such sweeping powers are not something new in law enforcement. If South Africa wants to defeat crime, a compromise must be reached at some stage. In Hong Kong the ICAC has such powers and in Nigeria the EFCC has such powers. Botswana has given the DCEC sweeping powers to fight corruption and economic crime.

7.11 AUTHORITY TO GATHER CRIME INTELLIGENCE

In order to have an effective investigative agency, it is important to ensure proper intelligence structures. In South Africa, intelligence is governed by section 209 of the Constitution and the National Strategic Intelligence Act. These two pieces of legislation recognise intelligence gathering institutions such as the Military Intelligence of the SANDF, Crime Intelligence of the SAPS, the National Intelligence Agency and the South African Secret Services. With the birth of the new agency, this arrangement needs to change.

The new agency needs to be given the powers to “gather, keep and analyse information in relation to crimes falling under the jurisdiction of this agency”. As for the other agencies, they continue to gather, keep and analyse information as stipulated in the National Strategic Intelligence Act. In addition to these powers, the new agency needs to be able to use surveillance methods and wire-trappings in terms of legislation.

7.11.1 Military Intelligence (MI)

The South African National Defence Force shall conduct intelligence gathering and counter-intelligence; investigate offences relating to the security of the Republic, gather domestic military intelligence in a covert manner within the geographical area and time scales specified in such authorisation. Gather, correlate, evaluate and use foreign and local military intelligence relating to strategic intelligence to inform the National Intelligence Coordinating Committee. Gather, correlate, evaluate and use domestic military intelligence excluding covert collection. (This is in line with section 4 of the National Strategic Intelligence Act).

7.11.2 SAPS Crime Intelligence

According to section 3 of the National Strategic Intelligence Act, “it is the duty of the SAPS to gather, correlate, evaluate and use crime intelligence, in support of the SAPS as contemplated in section 205 (3) of the Constitution, to institute counter-intelligence measures within South Africa in order to supply crime intelligence to the National Intelligence Co-ordinating Committee. This arrangement should be maintained as it is at the moment.

7.11.3 South African Secret Services (SASS)

Conduct foreign intelligence and counter-intelligence, protect classified intelligence and any classified information, (section 1 (1) (a) of the National Strategic Intelligence Amendment Act).

7.11.4 National Intelligence Agency (NIA)

Conduct intelligence and counter intelligence, protect classified intelligence and any classified information, conduct security screening investigations and to counter subversion, treason and sabotage aimed at or against personnel, strategic installations or resources of the Republic (section 1 (1) (a) of the National Strategic Intelligence Amendment Act).

7.11.5 Scorpions (new agency)

The functions of the new agency shall be: to gather, correlate, evaluate and use crime intelligence in support of the Scorpions (new agency) as shall be contemplated in Chapter 11 of the Constitution, to institute counter-intelligence measures within the Scorpions in order to supply crime intelligence to the National Intelligence Coordinating Committee. These operations shall be limited to a situation where more than R500 000.00 is involved. This means that the new agency shall follow the format used by the EFCC and the ICAC.

7.12 COLLABORATION WITH OTHER AGENCIES

Currently, the DSO and the SIU have collaborations with the FBI of the United States of America, DCEC of Botswana, Scotland Yard of England, ICAC of Hong Kong, SAPS, DCS and the United Nations Office of Drugs and Crime. These collaborations should be maintained. In addition, it should be mentioned that in order to widen the scope of collaboration, the new agency may also collaborate with agencies such as INTERPOL, SARPCO, Serious Organised Crime Agency of England, High Authority Against Corruption (HAAC) of Angola, Directorate on Corruption and Economic Offences (DCEO) of Lesotho, Anti-Corruption Bureau (ACB) Malawi, Anti-Corruption Commission (ACC) Zambia, Anti-Corruption Commission (ACC) Zimbabwe, Anti-Corruption Squad (ACS) later became Prevention of Corruption Bureau (PCB), of Tanzania, Anti-Corruption Commission (ACC) of Swaziland, Anti-Corruption Agency (ACA) of Malaysia, Central Tender Board (CTB) and the Ombudsman of Mauritius, Anti-Corruption Commission (ACC) of Namibia, Economic and Financial Crime Commission of Nigeria (EFCC) of Nigeria, and Corrupt Practices Investigation Bureau (CPIB) of Singapore. Such collaborations will enhance the investigative skills of the investigators. In addition to these international agencies, the new agency must collaborate with institutions such as the NIA, SASS, Customs Service, South African Receiver of Revenue (SARS), Department of Home Affairs, SAPS, DIU, and others.

7.13. LEGISLATION GOVERNING CORRUPTION, FRAUD, ORGANISED CRIME, ECONOMIC AND FINANCIAL CRIMES

- The Constitution of Republic of South Africa Act
- Prevention of Organised Crime Act
- Drugs and Drug Trafficking Act

- Regulation of Interception of Communications and Provision of Communication Related Information Act
- National Strategic Intelligence Act
- Special Investigating Unit and Tribunals Act
- The Prevention and Combating of Corrupt Activities Act
- The Criminal Procedure Act
- The Directorate of Special Operations Act (proposed new Act)
- Financial Intelligence Centre Act

7.14 HOW TO REPORT CASES TO THE NEW AGENCY

The Quick Response Team (QRT) may be established to provide valuable support to Investigation Branches in dealing with routine and minor cases, thus enabling the investigation units to focus on cases of substance and complexity.

This is in line with the ICAC model and the DCEC of Botswana. Teams need to be established in each province, so that cases can be scanned at local level without wasting time. In Hong Kong the ICAC uses this method very effectively. Cases should be reported through the provincial or regional Report Centre. These centres are like Client Service Centres of the police.

In Hong Kong, Report Centres operate on a 24-hour basis to receive reports or complaints from the public. All complaints made to the Report Centre are carefully recorded and monitored. These Report Centres also act as a filter in order to filter out cases that fall outside the jurisdiction of the new agency. Cases that fall outside the scope of the new agency (e.g. where the amount involved is less than R500 000.00) are then forwarded to the SAPS for investigation.

7.15 LEVEL OF TRAINING FOR THE INVESTIGATORS

Due to the fact that this agency is expected to deal with complex financial and economic crimes, it is suggested that investigators should possess the following qualifications: Diploma or Degree in Forensic Investigation, Diploma or Degree in Criminal Justice, Degree in Police Science, LLB, Diploma or Degree in Computer Science, Degree in Chartered Accounting or Auditing, or Diploma or Degree in Security Management and Intelligence. There shall be a strong emphasis for a tertiary qualification as an entry requirement.

The fact that the new agency involves amalgamation of other agencies, means that it will not be easy to start a new agency like the ICAC. However, it is recommended that it does not recruit from the police, to ensure credibility. In addition to this requirement, recruits shall be trained in line with the ICAC and the EFCC model, which consists of three stages.

7.15.1 Stage 1 Basic training

This course shall include law, legal issues, practical investigation techniques, cognitive interviews and outdoor activities (Operations Department Training School Manual, 2005:1). Investigators shall be given training in first aid, self-defence and the use of firearms. Other elements of the course shall deal with conduct and discipline, administrative procedures and the use of computers (ICAC Annual Report, 2005:29). After Stage 1 Induction Course, investigators shall be placed to an investigation section. After a twelve-month tour of duty in that section, the investigators shall attend a three-week Stage 2 Induction Course.

7.15.2 Stage 2 Induction Course

This course shall build upon the practical experiences that the investigators have been exposed to in their first year. This course shall contain a large element of fraud and financial investigation training. Upon the conclusion of this course, the investigators shall be posted to whichever investigation unit they have not been in during their first twelve months (ICAC Annual Report, 2005:29). Upon completion of the second twelve months' induction or on the job training, investigators shall attend a Stage 3 Induction Course.

7.15.3 Stage 3 Induction Course

The purpose of the Stage 3 Induction Course is to build upon their experience, and introduce in more detail than hitherto the practical aspects of informant handling and undercover operations. The second and third week of the course shall be designed as an Assessment Centre exercise (Operations Department Training School Manual, 2005:1).

Here investigators shall be assessed while being put through a demanding series of practical scenarios from briefing skills to arrest, search, compilation of a dossier of evidence and giving oral evidence in court. Direct Entrant Investigators shall be given an opportunity to not only attend a three-week Investigator Command Course, but shall be subject to one day Recall Days throughout their first year, to support their professional development (ICAC Annual Report, 2006:29). From time to time, investigators shall be called to attend a one-week Refresher Course to ensure that they keep up to date with developments in law and best practices. Newly promoted investigators shall attend a three-week Investigators Command Course which is aimed at leadership and management within a law enforcement context (ICAC Annual Report, 2006:29).

The four weeks' Chief Investigators Command Course shall be designed for newly promoted Chief Investigators in the agency. In addition to these training courses, investigators shall be given financial investigation courses, firearms training and ad hoc training. The new agency can also afford bursaries for those who want to study privately. For promotion purposes, officers shall write a promotion examination irrespective of a degree qualification. After writing the promotion examination, the candidates shall be assessed by their immediate supervisors and must then appear before a promotion board which has a final say in their suitability (ICAC Annual Report, 2006:29).

In order to ensure that officers are retained by the agency, they shall be remunerated according to their educational qualifications. In addition to these training programmes, the new agency will be required to establish a Learnership Programme that will focus on the following fields:

- Investigation techniques and tactics
- Criminal prosecutions
- Asset seizure procedures
- Financial intelligence
- Computer specialisation
- Crime intelligence gathering and analysis
- Crime scene management
- Interviewing, questioning and interrogation skills
- Informer handling
- How to conduct covert and overt operations
- Weapons handling
- Statement taking and investigation reporting

- Arrest, search, seizure procedures
- Exhibit handling and storage
- Forensic or financial investigation
- Extradition
- How to give evidence and how to oppose bail

This kind of training or learnerships will ensure that the agency invests in new recruits. In order to cut training costs, the new agency needs to establish a Training Academy. It has now become an international norm that independent law enforcement agencies have their own Training Academies. Institutions such as the FBI, ICAC, EFCC and the DCEC have their own Training Academies. Such a Training Academy shall be headed by a Director.

The purpose of the establishment of the Training Academy is to create a centre of excellence to train, develop and improve training programmes for the new agency and for the development of the staff charged with the responsibility of eradicating corruption, organised crime, fraud, economic and financial crimes.

The training to be developed shall be required to involve the following, inter alia:

- Methods of crime detection
- Criminal techniques and their countermeasures
- Techniques for detecting and monitoring the movement of proceeds and property derived from corruption, fraud, organised crime, economic and financial crimes and their countermeasures
- Methods of collecting evidence
- Law enforcement techniques

- Dissemination of information on corruption, fraud, organised crime, economic and financial crimes and related offences.
- Electronic surveillance
- Matters of extradition
- Criminal confiscations
- Dealing with illicit funds and recovery of illicit funds
- Easing the burden of proof in gathering and use of evidence to prove corruption, fraud, organised crime, economic and financial crimes - especially money laundering based on country cases and international cases.

The Training Academy shall be required to acquire proper infrastructure, equipment, office consumables and the academy structure. The fact that the new agency shall be regarded as the elite crime fighting agency means that it shall be required to provide sufficient training to the staff of the agency, and to local and international law enforcement agencies.

7.16 CIVILIAN OVERSIGHT/ OVERSIGHT BODIES

The Constitution and the Establishment Act need to outline the accountability of the agency. This means the Head of the new agency needs to be accountable to the parliament as is the ICAC in Hong Kong. To ensure checks and balances, the standing committee on safety and security in Parliament must also play an oversight role. In addition, an independent oversight body needs to be established to 'police' the new agency. Alternatively, the ICD needs to be established by another Act so that it assumes its status as an independent organ of the State. The fact that the ICD functions in terms of the South African Police Service Act 68 of 1995 makes it impossible to have powers over the new agency.

To ensure that the new agency is a credible organisation, there should be other bodies acting as oversights. This is in line with the practice in Hong Kong. Such bodies may include the Operation Review Committee (ORC). This committee will examine reports on current investigations, cases over twelve months old, cases involving individuals on bail for more than six months, and searches.

The ORC will enforce a level of accountability that will prevent the new agency from evolving into a tool of repression or political favouritism. For example, the ORC may maintain both a supervisory and advisory role over any investigation, and a case cannot be dropped without its approval.

This is in line with the ICAC model of Hong Kong. The Citizens Advisory Committee on Community Relations will advise the Head of the new agency on the work of the Community Relations Department, and focus on mass media and education and community research by scrutinising specific aspects of the department's work in relation to the measures to be taken to foster public support in combating corruption, fraud, organised crime and economic crime, as well as educating the public against the evils of crime.

This is a common practice in Hong Kong. The Advisory Committee on Corruption, fraud, organised crime and economic crime will be the principal advisory body of the new agency and will oversee all the agency's activities. Its members may include the members of the other three advisory committees (http://www.icac.org.hk).

7.17 BEST PRACTICE PACKAGES (BPPs)

The DCEC, ACB and EFCC have no Best Practice Packages (BPPs). However, the new agency needs to develop its own Best Practice Packages (BPPs) in line with the ICAC model. These packages shall be developed to provide private sector companies and public corporations with user-friendly guidelines on plugging loopholes on corruption, organised crime, fraud, money laundering, terrorism financing and other financial and economic crime loopholes.

Such Best Practice Packages (BPPs) shall cover a wide range of topics and the related checklists outlining areas of potential risks for criminal activities. The BPPs shall provide the following guidelines: Management of Consultants; Staff Administration; Stores Management; Contracting Out Services; Procurement Practices and Procedures; Monitoring Staff Attendance And Overtime Work; Information Systems Security; Retail Incentive Programmes; Payment Procedures; Construction Industry Best Practices and Principles; Construction Quality Control Testing; Sales Receipts Administration; Estate Management by Property Management Companies; Hotel Management, Travel Agent Operations, and others. This is in line with the ICAC model.

7.18 DETENTION CENTRES

The Criminal Procedure Act, as well as section 35 of the Constitution, lays down the rights and entitlements of a person detained in custody. Such detention centres are needed to ensure that suspects in the custody of the police and those under the new agency are not mixed.

This is in line with the ICAC model of Hong Kong. Such detention centres need to be visited by the Justices of the Peace, the Human Rights Commission and Non-Governmental Organisations (NGOs). The purpose of these visits is to ensure that the detention centres' facilities are properly maintained, and to take notice of any requests or complaints that detainees may wish to make.

7.19 CONCLUSION

Corruption, fraud and organised crime are a serious problem in South Africa. It is clear that the SAPS is not coping in dealing with each crime that is reported. On the other hand, it is not helping South Africa to establish many criminal investigative institutions with overlapping mandates. This is the time where South Africa needs to assemble its best resources to fight the scourge of corruption, fraud and organised crime. This can only be achieved by means of a prosecution-led investigation model. It is time to stop crisis management and start building an agency that will stand tall amongst the best in the world. It is very important to ensure that private and public corruption is dealt with the same way as does the ICAC in Hong Kong and DCEC in Botswana. The researcher supports the existing system in place in South Africa, namely, the investigation-led principle. However, the new model combines and replaces the three existing investigative agencies (AFU, DSO and SIU). This will solve the problems presently encountered between the SAPS and the DSO, as it will clearly explain the mandate of each agency.

The new model will eliminate all existing discrepancies regarding various mandates: to investigate, to collect intelligence and prosecution, as identified in this research. The DIU will remain an internal investigation unit of the DCS with a minor role to investigate misconduct. The current crimes investigated by the DIU shall be handed over to the new agency to eliminate duplication of functions.

CHAPTER 8: FINDINGS AND RECOMMENDATIONS

8.1. INTRODUCTION

The objectives of doing this research were to alert the politicians to the legislative ambiguities with regard to the investigation of corruption, organised crime, fraud, financial and economic crimes within the Criminal Justice System. The researcher has been a police official for eleven years and has first-hand experience regarding the stated problems, such as cooperation, communication, accountability, separation of powers, intelligence gathering and others.

By means of this research the researcher intended developing a criminal investigation model to solve the stated problems. The objective of this research was also to identify, analyse, interpret and explain the stated research problem. The last objective of this research was to contribute to the criminal justice field of study, especially the investigation of crime, in order to contribute to the development of skillful investigators within the Criminal Justice System.

8.2 FINDINGS

After discussing the issues identified in this research, the researcher has come to the following findings:

8.2.1 Research rationale

The research rationale in Chapter 1 suggested that there was a perception and confusion created by the media when activities of the SAPS, DIU, SIU, AFU and DSO are reported. Therefore, this research has found that these perceptions and confusion are caused by the following:

Types of crimes investigated: In terms of sections 19 to 59 of the Criminal Procedure Act, read with section 205 (3) of the Constitution, the SAPS has the monopoly to investigate any crime in South Africa. Section 34 of the Correctional Services Amendment Act gives the DIU mandate to “conduct investigations of theft, corruption and any other dishonest practices or irregularities”, and section 95 of the Correctional Services Act suggests ‘‘measures to combat theft, fraud, corruption and any dishonest practices.’’

Theft, corruption and fraud are also investigated by the SAPS and the DSO. This amounts to duplication of functions. As for the DSO, Presidential Proclamation R102 of 16 October 1998 provides a long list of offences investigated by the DSO. The offences on this list are the same as those covered by the SAPS. This is also a duplication of functions.

Chapters 5 and 6 of the Prevention of Organised Crime Act make provision for property tainted by criminal activity to be forfeited to the State by way of a civil action. The Act also give powers to the State to seize large amounts of cash associated with the drug trade; seize property used in the drug trade; corruption; white collar crime; targeting serious criminals; and violent crime.

The SIU investigate corruption and maladministration in the Public Sector, and uses civil proceedings to recover losses and secure savings for the State. Corruption is covered by the DIU, DSO and the SAPS. The recovery of losses is also covered by the AFU. Therefore, there is duplication between the SIU and the DIU, SAPS, DSO and AFU. This is a serious problem and amounts to an excessive waste of State resources.

Types of crimes not covered: In terms of Presidential Proclamation R102 of 16 October 1998, offences covered by the DSO are the same offences covered by the SAPS. The SIU does not cover cases of murder, rape, assault, robbery, etc. In terms of the Proclamation for the DSO, nothing is excluded. DIU and AFU do not investigate murder cases, but this is not spelt out properly in the respective pieces of legislation.

Schedule of duties: It has been found that the SAPS is commanded by the National Commissioner of Police who in turn reports to the Minister of Safety and Security. The DIU is under the command of the National Commissioner of Correctional Services who in turn reports to the Minister of Correctional Service. In terms of the National Prosecuting Authority Act, the DSO reports to the NPA which is accountable to the National Director of Public Prosecution.

However, in terms of the findings of the Khampepe Commission of 2005, the DSO is supposed to report to the Minister of Safety and Security. This is very unrealistic, because one cannot be responsible for an institution which has no total control in terms of budget, methods and procedures. Both the AFU and the SIU are managed by the Deputy Head of the NPA. This is unrealistic because the SIU is an independent institution which was expected to be independent from the NPA.

Code of conduct and ethical behaviour: It has been found that the SAPS have two codes of conduct: one for civilians and one for police officials. The same applies to the DIU whose code of conduct is generally applicable to all correctional officials and there is one applicable to the civilian employees. The DSO and AFU use the same code of conduct which is applicable to all public servants. This is problematic, because members of the DSO are not ordinary public servants. It is not wise to enforce discipline on law enforcement members by using a general code of conduct or discipline regulations. As for the SIU, they use their own code of conduct.

Legal mandate to investigate: The legal mandate of the SAPS' Detective Service comes from section 205 (3) of the Constitution, read with sections 5 and section 17 of the South African Police Service Act. The DIU's legal mandate is found in section 96 of the Correctional Services Act and section 34 (b) of the Correctional Services Amendment Act. The legal mandate of the DIU does not come from the Constitution, as opposed to the SAPS. As for the DSO, its legal mandate is found in the following pieces of legislation: Section 43A and 7 of the National Prosecuting Authority Act, as well as section 2 of the National Prosecuting Authority Amendment Act.

The mandate of the DSO is not spelt out in section 179 of the Constitution, which deals with the National Prosecuting Authority. The legal mandate of the Asset Forfeiture Unit is found in Chapters 5 and 6 of the Prevention of Organised Crime Act. This mandate is not covered by the Constitution, the National Prosecuting Authority Act or the National Prosecuting Authority Amendment Act. The mandate of the SIU is contained in the Special Investigating Units and Tribunals Act. No other law covers the mandate of the SIU.

However, in terms of operating procedures, there is a thin line between the functions performed by the Asset Forfeiture Unit and those performed by the Special Investigating Unit (SIU). This is a clear case of duplication of functions that result in wastage of resources and manpower.

Powers and authority to investigate: The powers of the SAPS are found in sections 19 to 59 of the Criminal Procedure Act, read with sections 5 and 17 of the South African Police Service Act. These powers include, among others, power to arrest, detain, search, etc. In addition to these powers, the police have a monopoly of enforcing almost all the laws of South Africa.

What is important is that the Criminal Procedure Act provides guidelines on what the police should do, and how to do it. The powers of the DIU are found in sections 40 and 49 of the Criminal Procedure Act and section 96 of the Correctional Services Act, read with section 34 (b) of the Correctional Services Amendment Act.

These powers are limited in the sense that section 40 deals with arrest by a private person and section 49 deals with the use of force. No other legislation gives power to the DIU. The powers of the DSO are found in section 7 and 43A of the National Prosecuting Authority Act, read with section 2 of the National Prosecuting Authority Amendment Act. In addition, these powers are supplemented by sections 40 and 49 of the Criminal Procedure Act.

The Criminal Procedure Act does not mention any name of the DSO except that it gives powers to private people, in sections 40 and 49. This study has found that there are no guidelines on how the DSO must perform their duties in the Criminal Procedure Act as opposed to the SAPS.

According to Presidential Proclamation R102 of 16 October 1998, the then Minister of Justice, A.M Omar gave power to the National Prosecuting Authority, particularly the DSO, to investigate the following crimes: murder, fraud, theft and any offence involving dishonesty, robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, extortion, kidnapping, arson, malicious injury to property, breaking or entering any premises, with the intent to commit an offence, or public violence.

These are the same offences investigated by the SAPS. Therefore, there is excessive duplication of functions between the SAPS and the DSO. Although sections 35 and 36 of the Constitution are worded vaguely, in the sense that they do not mention specifically that the rights of the arrested, the accused and the detained must be respected at all times.

It is common knowledge that this was meant for the police. The National Prosecuting Authority Act, the National Prosecuting Authority Amendment Act, the Criminal Procedure Act and the Constitution do not mention the manner in which the issue of human rights should be handled by the DSO.

The powers of the AFU are found in Chapters 5 and 6 of the Prevention of Organised Crime Act. These powers do not include powers to arrest, detain and the use of firearms. No other law gives power to the AFU.

Section 5 of the Special Investigating Units and Special Tribunals Amendment Act give powers to the SIU. These powers do not include powers to arrest and detain suspects. No other law extends the powers of the SIU.

Methodologies: The SAPS uses a traditional accusatorial system, where a case is reported at a police station and investigated by the detectives. After the investigation has been completed, the docket is forwarded to the Public Prosecutor for a decision to prosecute. In court the prosecutor leads the proceedings and the judge is a neutral umpire.

The DIU uses accusatorial investigation methods. According to Malatjie (2006), certain investigations are sent to the police after their completion, which uses an accusatorial system. Some cases are also referred to the DSO, AFU and SIU which use a more inquisitorial system.

All these methodologies are not prescribed by the Criminal Procedure Act. This causes confusion within the Criminal Justice System. The methodology used by the DSO is based on the *troika* principle, which integrates the following: analysis/intelligence, investigation and prosecution. This methodology differs from the rest of the agencies within the Criminal Justice System.

This in itself could be interpreted as interference by the NPA, thus gaining an unfair advantage and defeating the spirit of the separation of powers. Neither the National Prosecuting Authority Act nor the Criminal Procedure Act prescribes an accusatorial or an inquisitorial system. What is also visible within the DSO is the prosecution-led investigation process which is not prescribed by either the National Prosecuting Authority Act or the Criminal Procedure Act.

It has been found that both the SAPS and the DSO perform the same duties, but they use different methodologies to achieve the same goal. According to Chinner (2006), the AFU uses both inquisitorial and accusatorial systems, depending on the situation.

The researcher's observation of the AFU is that the fact that investigators are located within the NPA premises makes it more inquisitorial than accusatorial. However, neither the Criminal Procedure Act nor the Prevention of Organised Crime Act makes provision for the use of an inquisitorial or accusatorial methodology. Another problem is the use of civil procedure, which is the same method used by the SIU. The SIU employs investigators, lawyers, forensic accountants and analysts in multi-disciplinary investigations.

According to PSC (August 2001:73), the activities of the SIU are designed to effectively combat maladministration, corruption and fraud involving the administration of State institutions, to protect assets and public money and to take civil legal action to correct any wrongdoing. The multi-disciplinary approach is almost the same methodology used by the DSO and AFU. This amounts to a duplication of functions with the DSO and AFU.

Intelligence gathering: Section 199 of the Constitution identifies four government departments as the leading departments mandated to gather intelligence, namely, the South African National Defence Force (SANDF), the South African Police Service (SAPS), the National Intelligence Agency (NIA) and the South African Secret Services (SASS).

According to section 3 of the National Strategic Intelligence Act, it is the duty of the SAPS to gather, correlate, evaluate and use crime intelligence. Crime intelligence is carried out by the Crime Intelligence Division. According to the Constitution, the Correctional Services Act and the Correctional Services Amendment Act, the DIU has no power to gather intelligence. According to section 1 of the National Strategic Intelligence Act, the DSO is not part of the security agencies, but in practice it collects and analyses crime intelligence in terms of section 7 of the National Prosecuting Authority Act.

This is a violation of section 209 (1) of the Constitution and sections 1, 2 and 3 of the National Strategic Intelligence Act. This means that, legally, the DSO does not have an intelligence gathering mandate.

Civilian oversight/oversight bodies: Civilian oversight for the police is governed by section 50 of the South African Police Service Act. In terms of section 50 of this Act, the functions of the Independent Complaints Directorate (ICD), include the "investigation of police misconduct, deaths in police custody or as a result of police action".

These functions are extended to the members of the Metropolitan/Municipal Police agencies. As for the DSO, DIU, SIU and AFU, the ICD has no jurisdiction. This is a problem, because in a democratic society, there is a need to be transparent. Transparency cannot be achieved if certain institutions are excluded from certain processes. The fact that the DSO and the DIU carry firearms but are not covered by the ICD, creates a serious concern.

Separation of powers: The doctrine of separation of powers requires the functions of the government to be classified as legislative, executive or judicial, and that each separate function be performed by separate branches of Government (De Waal et al., 2001:20).

This means that the functions of making laws, executing the law and resolving disputes through the application of the law, should be kept separate, and in principle they should be performed by different institutions and persons. The purpose of separating functions and personnel in this manner is to prevent the excessive concentration of power in a single person or body.

It has been found that this arrangement does not solve the lack of the separation of powers in South Africa, because the DSO and AFU are part of the NPA which reports to the Department of Justice and Constitutional Development.

The SIU is an independent entity which is overseen by Advocate Willie Hofmeyer, who is the Deputy Head of the NPA. This is against the principle of separation of powers. In this instance, the DSO, AFU and the SIU fall under the command of the Department of Justice and Constitutional Development, but investigate crimes which should be the sole mandate of the executive branch. What is also problematic is the use of the inquisitorial investigative methodology which might imply that they are 'player and referee.

Cooperation and communication: From the discussion of the five agencies, it has been found that there is communication and cooperation between the following agencies:

SAPS, AFU and SIU

DIU, AFU and SIU

DIU, AFU, SIU and DSO.

However, there is no good cooperation and communication between the SAPS' Detective Service and the DSO. The cooperation and communication between the SIU, AFU and the DSO are strengthened by the fact that they all report to the same accounting officer, even though there is no memorandum of understanding among them. The Khampepe Commission of Enquiry of 2005 also made the same findings.

Media reporting: It has been found that the media does not differentiate between the SIU and the DSO (Scorpions), between the SIU and the AFU, or between the SAPS Detective Service and the DSO. In addition to this, whenever there is a joint operation between the SIU and the DIU or the DIU and the DSO, these operations are reported as being those of the DSO.

This was confirmed by Davids (2006). Such reports have a tendency to be biased, and tend to give credit to the wrong agency. In this case it has been found that all the credit is normally given to the DSO.

Collaboration with other agencies: It has been found that the SAPS have collaborations with institutions such as INTERPOL, SARPCO, the AFU, the SIU, and the DIU. The DSO has collaboration with the FBI, Scotland Yard, ICAC, AFU, SIU, and the DCEC.

The DIU has collaboration with the SAPS, DSO, AFU and SIU whilst the AFU and the SIU have collaboration with the SAPS, DSO and the DIU.

Legislation governing corruption, fraud, economic and financial crimes: It has been found that both the DSO and the SAPS use the same pieces of legislation to perform their functions which include: the Prevention of Organised Crime Act, the Criminal Procedure Act, the Drugs and Drug Trafficking Act, the Regulation of Interception of Communications, the Provision of Communication Related Information Act and the Financial Intelligence Centre Act.

The only difference is the use of the of the National Prosecuting Authority Act by the DSO and the use of the South African Police Service Act and the National Strategic Intelligence Act by the SAPS. The SIU use the Special Investigating Unit and Tribunals Act.

Level of training for investigators: It has been found that the SAPS provides a basic training for all police officials, this is followed by the basic detective course for those chosen to be detectives. Later, the chosen detectives undergo further specialised training. As for the DSO, training is not structured because their investigators are either trained by the FBI, Scotland Yard and the SANDF, as well as to some extent by the SAPS.

According to Chinner (2006), the AFU members are qualified attorneys and advocates. It has been found that the DIU employs trained and experienced investigators. The DIU has no training programmes for their investigators at this stage. It has also been found that the SIU has in-house training for their investigators, coupled with internship programmes as well as training provided by the University of Stellenbosch.

Best Practice Packages: It has been found that no best practice packages exist for the SAPS, DSO, DIU, AFU and the SIU.

How to report cases: It has been found that if a person wants to report a case to the SAPS, they simply go to the nearest police station. This is not possible for the DSO because they do not have offices throughout the country. It has also been found that the National Prosecuting Act does not provide procedures on how to report cases.

According to Malatjie (2006), cases at Correctional Services are reported by means of a toll-free number which is manned by the Public Service Commission. Neither the AFU nor the SIU have any procedures on how to report cases to them. The problem is that few people have access to a telephone.

Detention centres: It has been found that the SAPS makes use of its own detention centres and correction/prison facilities. The DSO has no such facilities. The National Prosecuting Authority Act does not provide guidelines on how the DSO can detain its suspects. Practically, however, they use police and correction/prison facilities.

The DIU does not detain its suspects because it does not effect arrest. Their detentions are carried out by either the SAPS or DSO which in turn hands the suspects to the SAPS or correction/prison facilities.

8.2.2 Research objectives

The first objective in doing this research was to alert South African politicians to the legislative ambiguities regarding the investigation of crime, within the Criminal Justice System. By means of this research, the researcher intended developing solutions to the stated problems.

The second objective of this research was to identify, analyse, interpret and explain the stated research problem. The third objective was to design an investigative model for the South African Criminal Justice System. Therefore, the following findings have been made:

- **Objective no.1:** Legislative ambiguities have been found in the Constitution, the Criminal Procedure Act and the Prevention of Organised Crime Act.
- **Objective no.2:** Five institutions within the South African Criminal Justice System have been analysed, as well as four international agencies. This was done in Chapters 5 and 6.

- **Objective no.3:** A prosecution-led investigation model has been designed. This was done in Chapter 7.
- **Objective no.4:** A comparative study with international agencies has been done (Botswana, Malawi, Nigeria and Hong Kong).
- **Objective no.5:** Contribution to the community. This was achieved by analysing five South African agencies and four international agencies, with the aim of developing a model for the South African Criminal Justice System.

8.2.3 Hypotheses

Hypothesis no.1: The structure of the South African Criminal Justice System could be described as an emerging federated system. This hypothesis has been proved by the fact that the analysis of federal and unitary States revealed that South Africa is a unitary State with strong federal characteristics. The use of a more accusatorial system is a strong inclination towards a unitary State, while a prosecution-led approach has a strong federal character.

This is attributed by the fact that the Constitution, the Criminal Procedure Act, the National Prosecuting Authority Act, the Prevention of Organised Crime Act, as well as the Special Investigating Unit and Tribunals Act, do not outline the use of an inquisitorial or an accusatorial system. The SAPS has shown that it is more an accusatorial than an inquisitorial system.

Hypothesis no.2: Divisions within the Criminal Justice System are the consequence of differing investigative mandates. It has been found that the five institutions use different mandates to investigate crime. However, such mandates tend to overlap with one another.

For example, it was found that the SAPS and the DSO have the same mandates. If this is the case why does South Africa have different agencies doing the same functions? It has also been found that the majority of functions of the DIU fall within the mandate of the SAPS. The fact that the SIU uses civil action to recover assets is similar to the process used by the AFU. Both the SIU and AFU use different pieces of legislation but they report to the same authority. This is not acceptable.

Hypothesis no.3: The investigation of organised crime and collective corruption requires a unitary approach. International experience has revealed that corruption, organised crime, fraud, and economic and financial crimes need a unitary approach. Countries such as Botswana, Hong Kong, Malawi and Nigeria have shown that the use of an agency to deal with these crimes is the preferred method.

8.3 RECOMMENDATIONS

After analysing all the five investigative institutions within the South African Criminal Justice System and international agencies, the following recommendations are proposed:

8.3.1 Establish a new single prosecution-led investigation agency

Countries such as Botswana, Malawi, Nigeria, and Hong Kong have gone the route of establishing a single agency that can dedicate its time and resources to fighting corruption, fraud and organised crime.

In this instance, it is recommended that South Africa should amalgamate the DSO, the Asset Forfeiture Unit, the Special Investigating Unit and the Financial Intelligence Centre into one formidable agency.

The new agency shall maintain the name “Scorpions” because of the legacy that they have created. The fact that the AFU and SIU deal with the tracing of assets which have been acquired through criminal acts means that the two agencies are duplicating functions.

In this case, the researcher believes that if the two units are combined to form one strong asset forfeiture unit in the new agency, South Africa can have one of the strongest asset recoveries in Africa, if not in the world. There is no reason why the Financial Intelligence Centre (FIC) should form part of the National Treasury. In Hong Kong the Financial Intelligence Unit forms part of the investigation units of the Independent Commission Against Corruption (ICAC).

Therefore, the researcher recommends that the FIC should form part of the new agency - which is in line with the Hong Kong model. It should be borne in mind that organised crime is an enterprise, not an event. Therefore, the researcher’s view is that there are enough reasons to justify the establishment of an independent agency to investigate and prosecute these crimes.

8.3.2 Redefine the mandate of the DCS Departmental Investigation Unit

Proper demarcation of functions for the DIU needs to be drawn up so that they should focus on aspects such as misconduct. The current functions of the DIU should be refined to give a proper jurisdiction, so that there is no duplication with the SAPS.

Corruption, fraud and theft investigations need to be removed from the DIU's mandate and handed over to the new agency or the SAPS. This will depend on whether the offence is less or more than R500 000.00.

8.3.3 Remove the Specialised Commercial Crimes Unit from the NPA

The Specialised Commercial Crimes Unit within the NPA was established in 1999 with the purpose of assisting the police in the investigation and prosecution of commercial crimes. According to the NPA Annual Report (2001/2002:34), this unit had a conviction rate of 88.6%. The researcher recommends that this unit be removed from the NPA and form part of the new agency as suggested in Chapter 7.

8.3.4 'Beef up' the Specialised Commercial Crimes Court

These courts were established in 1999, and their aims were to prosecute commercial crimes. Amazingly, these courts provide services to both the SAPS Commercial Branch and the DSO. According to the NPA Annual Report (2001/2002:35), some high profile cases tried during 2001 included: S v Albert Eksteen, a former senior police officer, S v Winnie Madikizela Mandela, ex-wife of the former president Nelson Mandela, and S v Tony Yengeni, former ANC Chief Whip.

Therefore, if these courts can be established in all the provinces, backlogs and postponements can be avoided. By so doing, these courts can focus on commercial crimes, thereby relieving other courts of a lot of pressure.

8.3.5 Build strong legislation to fight corruption, fraud, organised crime, financial and economic crimes

In order to fight corruption, organised crime, economic and financial crimes, South Africa needs strong legislation to assist the new agency. The success of the ICAC in Hong Kong, the DCEC in Botswana and the EFCC in Nigeria lies in strong legislation. New legislation needs to be designed to empower the new agency to conduct intelligence-driven investigations, seizures and prosecutions.

The new legislation needs to give a proper mandate to the new agency. By so doing, duplication of functions will be minimised. In Hong Kong the success of the ICAC lies with the clear demarcation of functions between the police and the ICAC.

8.3.6 Simplify the rank structure of the new agency

In order to ensure that the new agency discharges its mandate without any hindrances, the following rank structure, which is based on the ICAC and DCEC models, is suggested: Director General, Deputy Director General, Director, Chief Investigator, Principal Investigator, Senior Investigator, Investigator and Assistant Investigator. This flat rank structure will eliminate excessive ‘red tape’ and ensure maximum results.

8.3.7 Design a Case Management System (CMS)

The SAPS uses a Criminal Administration System (CAS) to record all cases at station level. It is therefore recommended that the new agency establish its own Case Management System (CMS), so that cases can be managed systematically. This is in line with the ACB, DCEC, EFCC and ICAC models. This process will also assist the Department of Justice and Constitutional Development to recognise cases dealt with by the police and those dealt with by the new agency.

8 3.8 Establish a centre for the safeguarding of exhibits

An exhibit is any property which comes into the possession of any investigator, which is relevant to the investigation. This exhibit provides evidence in relation to the investigation and will be produced in court. The researcher recommends that the new agency establish a safe and secure exhibit store to ensure that evidence is secured.

8.3.9 Establish a Forensic Science Laboratory

Whenever complex crimes are investigated, there is always a need for a forensic laboratory to examine evidence such as questioned documents, firearms, dead bodies, signature disputes and others. Currently, the SAPS have a huge backlog of cases which need to be proved by means of forensic evidence. The researcher would not like the SAPS to be burdened by the new agency's workload, and therefore recommends that the new agency establish its own forensic laboratory. In order to save money for rent, the laboratory can be accommodated in the same premises where the Training Academy can be built.

8.3.10 Remove the Criminal Record Centre from the SAPS

The recording of criminal convictions is vital for any country that subscribes to the rule of law. It is very important for the new agency to develop a system where cases investigated by them are clearly recognised. Currently, the Criminal Record Centre is an entity of the SAPS.

In countries such as the United States of America, such facilities do not belong to a particular department, but to the government. It is therefore recommended that the Criminal Record Centre be removed from the SAPS. This will ensure that any government institution will be able to use the Criminal Record Centre.

8.4. CONCLUSION

Corruption, fraud and organised crime are a serious problem in South Africa. It is clear that the SAPS is not coping in dealing with every crime that is reported. On the other hand, it is not helping South Africa to establish too many criminal investigative institutions with overlapping mandates. This is the time where South Africa needs to assemble its best resources to fight the scourge of corruption, fraud, organised crime, financial and economic crimes.

It is time to stop crisis management and start building an agency that will ‘stand tall’ amongst the best in the world. It is very important to ensure that private and public corruption is dealt with the same way as the ICAC in Hong Kong and the CPIB in Singapore.

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UNISA: College of Law, School of Criminal Justice.

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PUBLICATIONS

The role of Security in a riot situation: 1999. POLSA.

Poor infrastructure as an inhibiting factor in the implementation of Sector Policing at Calcutta Police Station in the Bushbuckridge Municipality: CRIMSA.2007.

An analysis of the implementation of the Public Service Coordinating Bargaining Council (PSCBC) Resolution 7 of 2002 by the SAPS: CRIMSA. 2007

CONFERENCES:

Transformation in the South African Police Service: A case of the Implementation of Affirmative Action and the Employment Equity in the South African Police Service. 5th Women in Policing Conference. Melbourne, Australia.2007.

CURRENT RESEARCH PROJECTS

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