PAUL HOFFMAN

COUNTERING THE CORRUPT

The what, who, where, why and how-to of countering corruption

KONRAD ADENAUER STIFTUNG

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Paul Hoffman

and

Konrad Adenauer Stiftung

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Dedication

For the Activists, the Whistle-blowers and all who suffer in places in which the rule of law is so fragile that human rights are violated by the corrupt.

Foreword

BY MR JUSTICE I G FARLAM

Corruption is one of the great scourges of our age. As this book makes clear, it is estimated that trillions of dollars are paid in bribes every year and that developing regions lose ten times more to corruption than they receive in foreign aid, with illicit outflows of the funds that they desperately need totalling more than 1 trillion US dollars per year. The reason for this is not a lack of laws prohibiting corruption in its various forms (there is no shortage of them) but the impunity enjoyed by those guilty of contravening them, resulting from their control of the institutions which are supposed to see to it that the law is enforced.

This book pulls together the themes discussed at four conferences on the topic which were held from 2014 to 2018 and which were organised by the Konrad Adenauer Stiftung and the Institute for Accountability in Southern Africa , which campaigns as Accountability Now and of which the author is a co-founder and a director. The book succeeds admirably in achieving its main aim, which is to provide, in what the author calls 'a digestible and easily accessible format', the gist of those discussions.

All persons with an interest in the combatting of corruption in its various forms will find much to inform them as to the nature and seriousness of the problem and as to how it may best be countered. They will be encouraged by the details which are given of countries where the necessary public will to vote a corrupt regime out of office has been created and where satisfactory measures have been, or are being, taken to root out corruption, to recover some at least of the proceeds thereof and to punish the offenders.

The book also contains an enlightening chapter on the protection of whistle blowers, by whose help many corrupt schemes can be frustrated and the miscreants responsible therefor punished. It is written by Cynthia Stimpel, herself a distinguished whistle blower, who saved SAA, and ultimately the South African taxpayers R256 million by courageously and to her own personal detriment disclosing a proposed illegal procurement transaction.

The book is being published at a very appropriate time because in June 2021 (unless the pandemic makes a postponement unavoidable) a special session of the United Nations General Assembly is to be held on corruption to deal with such issues as grand corruption, kleptocracy and state capture. Colombia has already given notice of its intention to propose the establishment of an International Anti-Corruption Court, modelled in some respects on the International Criminal Court, which was set up by the Statute of Rome. The book contains compelling arguments why this proposal should be accepted. A court based on the complementarity principle, as is the International Criminal Court, may prove, as the author says, to be

'the most elegant solution to the problem'. This is because '(c)ountries not desirous of having their leaders internationally prosecuted would accordingly be incentivised to impose the anti-corruption and integrity measures on the home front.' All persons involved in any way with the special session will be well-advised to obtain copies of the book. It will enable them fully to understand the issues at stake and to participate meaningfully in the debate.

A chapter which should prove of great assistance to those participating in the special session (whether or not they decide in favour of the establishment of an International Anti-Corruption Court) contains an account of a brilliant proposal by the Hon Kate O'Regan, a former justice of the South African Constitutional Court, that the sanctions scheme applied by the World Bank in respect of development projects funded by the bank should be followed and where necessary adapted by governments, lenders and procurers of goods and services when entering into procurement contracts.

The essence of the scheme as applied by the bank is that those to whom money has been lent have to account for every item of expenditure connected to the loan. If a credible and complete paper trail of the expenditure is not provided on a monthly basis, the bank simply stops advancing money and in the absence of an accountable explanation for the failure so to provide the borrower is blacklisted. This system of sanctions effectively stamps out corrupt activities because the contractors, as it is put, 'prefer the prospect of return business in future above the prejudice of being blacklisted'.

While this book records the joint conferencing efforts of Accountability Now and the KAS Rule of Law in Sub-Saharan Africa Programme, which is based in Nairobi, its relevance is global.

I G Farlam
(Retired) Judge of Appeal
South Africa

Preface

BY DR A. WULFF

It took 55 years of my life before I came into contact with corruption for the first time. It was in April 2014, and I had just spent a month in Kenya as the new head of the Rule of Law Program for Sub-Saharan Africa. The Project Advisor from our office had invited me to his home, and on a Friday evening my driver Jacob and I were on our way. It was already dark and raining in torrents. Shortly before we reached our destination, we were stopped along Ngong Road by a single policeman wrapped in a rain cape. He asked the driver for his driver's license, warning triangles, emergency aid kit and whatever else was needed for safe driving. After the driver was able to show the policeman everything, he came to my passenger side and knocked on the window. I lowered the window and greeted him. With a friendly smile he asked me for 'Soda'. Since I thought I knew what 'soda' meant, I reached out to the back seat and handed him a can of Red Bull. With shock written all over his face, he took the can, greeted me, wished me a good trip and disappeared. In the meantime, Jacob had put everything back in the trunk. He took a seat at the wheel and asked me what the policeman wanted. I told him the story about the 'soda' and my driver started to laugh heartily. Surprised, I asked him what was so funny about it. Jacob explained to me that in Kenya, 'soda' is euphemism for a bribe! They would also ask for 'chai or tea' or 'lunch'. So, the policeman wanted money from me, yet I just gave him a can of Red Bull, real soda. He seemed contented anyway, and I had my first 'corruption experience'.

This rather small incident coupled with widespread reports of grand corruption cases in Kenya, prompted me to hold the first anti-corruption conference of the Rule of Law Program in July 2014 in Entebbe, Uganda. Participants from various Sub Saharan African States described the corruption situation in their countries of origin, and lawyer, Patrick Loch Otieno (PLO) Lumumba, who is known far beyond Kenya's borders, gave a moving and memorable speech against corruption. From that moment on, it was clear to me how widespread the cancer of corruption in Sub-Saharan Africa had become and what a destructive effect corruption has on the rule of law. It not only hinders their development, but it destroys all trust in them. When people feel and realize that it is not the rule of law that shapes the framework of their daily lives, but greed, dishonesty, disloyalty and financial power, they turn away from this element that constitutes democracy and leave state power to those who can buy it.

As a result, the fight against corruption became an integral part of our work for democracy and the rule of law. Paul Hoffman, the author of this book, will discuss this in more detail. He, a Director of 'Accountability Now' in South Africa, knows how to inspire people to fight corruption and gives them hope. He not only knows

how to uncover cases of corruption but also knows how to present their effects. A special attribute of his is to develop ideas, both alone and with others, on how corruption can be curbed. This book describes and explains ways and means of doing so. The KAS' Rule of Law Program, Anglophone Sub Saharan Africa is very grateful to Paul Hoffman for his tireless fight against corruption and the fruitful cooperation of recent years. It has raised our awareness of this cancer that is destroying democracy and society and helped us to find allies in the fight against it.

One way of countering corruption that is not discussed in detail in this book, but which in my experience is quite effective, would be the establishment of an administrative justice system in the states of Sub Saharan Africa. This would make it possible for acts of administration at all levels, including the police and security forces, to be immediately reviewed for legality by a specialized jurisdiction. In Germany, there is not even a lawyer's requirement for these matters in the first instance and the costs are low. In addition, this branch of the court has the obligation to investigate on its own initiative. Thus, finding the truth is not left to the often, contradictory arguments of the parties in dispute. The possibility of having acts of sovereign authority reviewed, such as administrative orders, orders to pay fines or (granted or refused) permits not only contributes to the transparency of sovereign administration but also helps in curbing corruption. Further, it helps in building trust in society because citizens are granted the procedurally simple right to defend themselves against 'acts from above'. As a result, they can act on an equal footing with the state administration and do not see themselves as victims.

For clarification: I am aware that there will never be a total eradication of corruption. Man is too fallible for that. Or, as Pope Francis said only recently:

> 'Unfortunately, corruption is a recurring story. It repeats itself, then someone comes to clean it up, but then it starts again, and you wait for someone to come and put an end to this deformity'. ('Kurier' from 02.11.2020)

Only if that someone is all of us, we, the citizens of our respective states, will corruption be defeatable. We are all called upon to do so, regardless of our ethnic or religious affiliation.

By the way, when I had to renew my Kenyan work permit this summer, the process dragged on for an unusually long time. Although this could be attributed to the Corona pandemic, it reached a point even they could no longer explain the delay. So, I asked a confidante to ask at the immigration office when I could expect the renewal. He was told, orally of course, that if 'you pay 120 000 KES (the equivalent of about 1 100 USD) 'soda' you can get it at short notice'. I didn't pay, but I still got the work permit eventually.

I would like to thank all those involved for their efforts to make this publication possible. This applies first of all to Paul Hoffman, the author, but also to those who supported and helped him in his work and us in completing this book, the gratitude of the KAS Rule of Law Program to you all.

Finally: without the conferences organized by this program, this publication would not have been possible. One of the people who was always present and who

has significantly contributed to the realization of the conferences is the KAS Project Advisor Peter Wendoh. The book also expresses his commitment and gratitude to all in the fight against corruption.

Dr Arne Wulff
November 2020

The Director of the Rule of Law program
For Anglophone Sub-Sahara Africa, Nairobi
Until September 2020

Power does not corrupt. Fear corrupts …
perhaps the fear of a loss of power.

John Steinbeck

Contents

Abbreviations

1MDB	1Malaysia Development Berhad
ACPD	African Christian Democratic Party
ACTT	Anti-Corruption Task Team
ALPA-SA	Airline Pilots Association of South Africa
ANC	African National Congress
APRM	African Peer Review Mechanism
ASIC	Australian Security and Investment Commission
AU	African Union
BCI	Budget Control Institution
CICIG	Commission against Impunity in Guatemala
CNIL	National Commission for Data Protection and Liberties
COSATU	Congress of South African Trade Unions
Covid-19	Coronavirus Disease of 2019
CPI	Corruption Perception Index
CSO	Civil Society Organization
DPCI	Directorate of Priority Crime Investigation
DRC	Democratic Republic of Congo
DSO	Directorate of Special Operations
EC	European Commission
EU	European Union
FACTI	Financial Accountability, Transparency and Integrity
FBI	Federal Bureau of Investigation
FCPA	Foreign Corrupt Practices Act
FIFA	Fédération Internationale de Football Association
GDP	Gross Domestic Product
HLP	High Level Panel
HSF	Helen Suzman Foundation
IACA	International Anti-Corruption Academy
IACC	International Anti-Corruption Court
ICC	International Criminal Court
IFAISA	Institute for Accountability in Southern Africa
IFF	Illicit Financial Flows
III	Integrity Initiatives International
ISS	Institute for Security Studies
KAS	Konrad-Adenauer-Stiftung
KZN	Kwa Zulu Natal
MACS	Master in Anti-Corruption Studies
MDG	Millennium Development Goals

NCBC	Non-Conviction Based Confiscation
NDR	National Democratic Revolution
NEPAD	New Partnership for Africa's Development
NPA	National Prosecuting Authority
NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-operation and Development
OUTA	Organisation Undoing Tax Abuse
PACE	Parliamentary Assembly of the Council of Europe
PIDA	Public Interest Disclosure Act
POCA	Prevention of Organised Crime Act
PRECCA	Prevention and Combating of Corrupt Activities Act
SA	South Africa
SAA	South African Airways
SADC	Southern African Development Community
SAPS	South African Police Service Act
SDGs	Sustainable Development Goals
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TJN	Tax Justice Network
TI	Transparency International
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UN	United Nations
UNDP	United Nations Development Program
UNODC	United Nations Office on Drugs and Crime
UNCAC	UN Convention Against Corruption
UNGA	United Nations General Assembly
UNGASS	United Nations General Assembly Special Session
UNSDG	United Nations Sustainable Development Goals
UK	United Kingdom
US	United States
USA	United States of America
WJP	World Justice Project
WWI	World War I
WWII	World War II

Prologue

Here, dear readers, is an extract from an email the author wrote to the Konrad Adenauer Stiftung (KAS) Nairobi team on 2 April 2020. At the time he was locked down in Cape Town. The team were living under the Kenyan curfew due to the spread of the corona virus pandemic:

> I will draw on the materials generated at the conferences and will, in collaboration with authors who are so inclined update same where necessary. A critical approach is allowed. The book will be about 200–250 pages in the same style as 'Confronting the Corrupt'. The book is for general public consumption; …It is the intention to synthesise and to make more generally available and accessible the fruits of our combined labours over the years. We can consider the possibility of appendices of important treaties, judgements and laws.
>
> Working title: 'The 'What', the 'Who' and the 'How-To' of Countering Corruption

The conferences to which reference is made are all on one overarching theme: identifying corruption as the primary enemy of the rule of law. Grand corruption undermines delivery of human rights. Corruption with impunity is a foe which threatens the successful inculcation of a culture of human rights worldwide. This pernicious culture of impunity will make the UN Sustainable Development Goals (SDGs) difficult to achieve by 2030, as planned, or even at all.

There exists, in the deliberations of the conference delegates at all four gatherings, a rich vein of research results, the fruits of varied experience and the synthesis of great expertise. Allowing the valuable information emerging from the deliberations to be swallowed up and lost in dreary annual reports, contemporaneous press coverage and the anecdotes of those who attended, does not do justice to the work involved in preparations and presentations that went into the success of the conferences.

The working title swiftly became 'Countering the Corrupt' although 'Ending the impunity of the corrupt' came close. Giving a book a title before it is written is like naming a baby before it is born—a risky decision. Indeed, the writing of a book is rather like having a baby. The conception is enjoyable, the pregnancy seemingly interminable and ever heavier, the birthing process painful yet joyous and the delivery of the completed work a huge relief to all concerned.

So it is with this book, which is really the combined efforts of the members of the KAS Rule of Law Program for Sub-Saharan Africa based in Kenya and the staff of Accountability Now based in South Africa. We have gathered a posy of the flowers presented by others to the four conferences and at a workshop that followed on the complementary thorny topic of judicial corruption.

Every effort has been made to capture the best of the discussions and deliberations and, where appropriate or necessary, the sub-themes have been updated in the light of developments that occurred after the conferences were held. The

cut-off date for the updates in this book is September 2020. Countering the corrupt always involves working with a moving target.

This book appears as the UN General Assembly prepares itself for a special session on corruption scheduled for June 2021. The issues around corruption are also being critically scrutinised by the Financial Accountability, Transparency and Integrity Panel which will report to the UN early in February 2021. Its first interim report was published on 24 September 2020 and is available at www.factipanel.org. Much reliance is placed on technical feasibility and political viability in the interim report.

This book is accordingly timely and hopefully also accessible to the lay reader seeking enlightenment and information on countering the scourge of corruption. Let us make no mistake about the seriousness of the challenges posed. Corruption with impunity threatens peace that is secure, progress that is sustainable and prosperity which is equitably shared in the world. 'All we hold dear' is how a leading judgment put it. An awareness of the need to uphold the rule of law is fundamental to countering the corrupt.

Thanks are due to all who worked so hard under trying circumstances to see the baby conceived, nurtured and born on time in the pink of good health. You know who you are, take a bow.

CHAPTER 1

The Four Conferences

Over the five years between 2014 and 2018 four conferences were held at three venues in Africa, organised by two institutes. From the delegates' deliberations this book now emerges as the vehicle for pulling together the themes discussed during the deliberations of the conference delegates.

It is not without significance that this book is written in the time of the Covid-19 virus pandemic. This worldwide disaster has presented the kleptocratically inclined corrupt leaders and business-people with a rare opportunity to loot relief funding, the financing for restarting the world economy and the vulnerable public purse. The pandemic has also curtailed the usual activities of both institutes, the Konrad Adenauer Foundation organises over 2500 conferences per year and the Institute for Accountability in Southern Africa or Accountability Now has to observe a fierce and protracted lockdown in South Africa (SA) that has endured for more than six months.

The dislocation caused by the pandemic presents a golden opportunity for reflection and repurposing. The Chinese word for 'crisis' is a combination of 'danger' and 'opportunity'. Both are in plentiful supply as the world grapples with the lethal virus and the spread of the pandemic it has caused.

The oft-quoted statement that we must 'never waste a good crisis' is generally attributed to Rahm Emanuel, President Barack Obama's Chief of Staff, in response to the Wall Street meltdown of 2008, the world's previous big crisis. Many have made the same point and, in fact, the words can be traced back at least to Niccolo Machiavelli, the Italian Renaissance diplomat who died in 1547, He wrote, 'Never waste the opportunity offered by a good crisis.' Machiavelli understood that crises shake people out of their complacency, create opportunities to challenge conventional wisdom and give leaders some room to take on vested interests to achieve transformative change. It is accordingly not surprising that the expression 'never waste a good crisis' was also used by Sir Winston Churchill as he led Great Britain (as the United Kingdom was then known) to the victory of the allied forces in World War II (WWII).

Inevitably, those who would find such opportunities for change most threatening, those with vested interests in the current arrangements, will downplay the crises—'what crisis?'—or portray them as inevitable and beyond our capacity to manage or to prevent.

The low intensity but long-standing crises attributable to the spread of corrupt activities perpetrated worldwide with impunity are the fundamental reason behind the convening of the four conferences, all of which had themes relating to the topic of corruption.

The United Nations Organisation (UN) is alive to the effect of corruption on sustainable development in the world. In 2015 it devised and adopted the Sustainable Development Goals (SDGs) deliverable by 2030 and aimed at, *inter alia*, ending poverty, hunger and inequality. UN SDG #16 calls for 'Strong governance institutions'.

This book sets out to encourage action in those who are complacent about the harm that corruption does in the world and to the prospects of achieving the SDGs either timeously or at all. The intention is to treat the problems corruption poses as a threat to order in the world that requires a united and cohesive response if the UN SDGs (especially SDG #16—strong governance institutions) are to be scored timeously in open play rather than from the penalty spot in extra time.

The first conference was held in Entebbe at the Serena Hotel in July 2014. Its title was:

'Stakeholders Conference on Budgetary Controls, Corruption and Human Rights in Africa'

The emphasis of the conference was on the prevention and correction of corrupt activities through control measures designed to nip wrongdoing in the bud; an easier task than the unravelling of corruption in complex criminal proceedings in which the lawyers of the corrupt are all too often able to outgun or outwit the prosecutors set the task of securing a conviction from a court which, very properly, requires proof beyond a reasonable doubt.

Some tentative recommendations emerged at the end of the proceedings in Entebbe:

- For society as a whole: peace that is secure, progress that is sustainable and prosperity that is shared.
- For the judiciary: integrity that is unquestionable, independence that is guaranteed and impartiality that informs all decision-making.
- For the anti-corruption entities of Africa there were five criteria:
- Specialisation that involves the dedicated pursuit of the corrupt to the exclusion of all else;
- Training that equips personnel with the skills necessary to outwit and outgun the corrupt;
- Independence in structure and operations that empowers functioning without fear, favour or prejudice, free of political influence, executive control and interference by the powerful;
- Resourcing that is guaranteed and adequate to the tasks at hand; and,
- Security of tenure of office that entrenches stability and efficacy.

The second Conference held in Cape Town in November 2015 at the President Hotel was called:

'Stakeholders' Conference on Combating Corruption in Africa'.

At the end of the conference a more detailed and self-explanatory resolution was passed in the terms set out in Appendix 1 of this book. The resolution reinforced the recommendations of the first conference in Entebbe and made concrete suggestions for improved strategies for containing corruption.

Stakeholders' conference on activism against corruption.

The third conference, which focussed on activism against corruption, was held at Birchwoods in Boksburg (near Johannesburg) in November 2016, it too ended in an even more detailed resolution which is Appendix 2 to this book.

With this amount of material from the first three conferences at its disposal, the second meeting in Entebbe in October 2018 was dubbed a workshop rather than a conference and the delegates were put to work on the five themes of its title:

Workshop on the African Legal Frameworks for PREVENTING, COMBATING, INVESTIGATING, PROSECUTING AND PUNISHING THE CORRUPT.

The resolutions taken at the end of the workshop reflect the work done and are Appendix 3 to this book.

The main aim of writing this book is to pull together the common themes which emerged from the deliberations of the conference goers in a digestible format. This step will hopefully make the work done more easily accessible and available to a wider audience of those concerned about the scourge of corruption in African countries as well as elsewhere in the world. Not all of the conferences were attended by the same delegates. This enabled those who attended the later gatherings to elaborate on and refine the resolutions of their predecessors.

Advocacy of anti-corruption efforts is an inexact science and a hard row to hoe. Without the creation of the necessary political will to counter corruption there is little prospect of the culture of impunity for corrupt activities coming to an end or even being curtailed. A coherent and cohesive response to corrupt activities is required. As the FACTI Panel appointed to guide the UN deliberations on corruption has stated, technical feasibility and political viability are central. Turkeys who are kleptocrats do not vote for Christmas.

For these reasons it is important that as wide an audience as possible is alive to the dangers posed by corruption and is aware of the various strategies open to those who have endured enough. That is enough of the abuse of public office for private gain. Enough of the theft of public funds intended for the alleviation of the plight of the poor. As Justice Navi Pillay has tellingly observed in her role at the UN Human Rights Commission:[1]

'Make no mistake about it, corruption is a killer'.

CHAPTER 2

The Mission of the Konrad Adenauer Stiftung

Konrad Adenauer was one of the most remarkable and venerable leaders of the twentieth century. As recently as 2003 he was voted the most popular German leader ever in a television poll. He was born in Cologne in 1876 and lived in the Rhineland through the two World Wars of the twentieth century. As a devout Catholic he was opposed to communism and to Nazism, having come to the realisation, by early 1933, that discussions and any attempts at compromise with the Nazis were futile.

On 4 April 1933 he was dismissed as mayor of Cologne, a position he had held since 1917. With his bank accounts frozen and his home seized by the Nazis, Adenauer found himself without money, a home and a job. He was briefly imprisoned after the Night of the Long Knives in 1934. Benedictine monks gave him shelter until he succeeded in obtaining a pension. He lived in seclusion for some years until he was again arrested after the failed attempt on Hitler's life in 1944, but, in the absence of any evidence against him, was released in November 1944.

After the end of WWII, Adenauer was instrumental in the foundation of the Christian Democratic Union. His aim was to unite Catholics and Protestants into a political movement that could ensure that the dark days of Nazi rule in Germany would not be repeated. His anti-communism extended to socialism too and Prussianism was also frowned upon by him despite, or perhaps because of, the inclusion of his home turf, the Rhineland, in Prussia.

The 1949 Grundgesetz (Basic Law) of West Germany is, even after the 1990 reunification of Germany, still the basis of the form of enlightened constitutionalism which has been in place at his urging since 1949 in the parts of Germany that were under the control of the western allies at the end of WWII. He was the first post WWII Chancellor of West Germany.

The political thinking of Adenauer was informed by sound democratic values and a strong vision of market-based liberal democracy. He presided over the West German economic miracle in which the destruction of WWII was overcome. Today Germany has one of the leading economies of the EU and the world.

Adenauer always preferred sound patriotism to hateful nationalism. The latter is a spectre that still haunts the world and is in recent years in the ascendancy in some countries again. His experience of two world wars and in particular of the allied botching of the terms of the Treaty of Versailles at the end of World War I (WWI), which turned out to be a recipe for WWII, had Adenauer well placed to work against the evils of nationalism. These evils are best described in the words

put in the mouth of 'Madam Secretary' by three retired US Secretaries of State who made guest appearances in the television series of that name:

> What is an even greater threat than nuclear weapons?
>
> That which makes the use of them possible: hate. Specifically the blind hatred one group or nation can have for another. That is why I am convinced that nationalism is the existential threat of our time. I want to be clear. Nationalism is not the same as patriotism. It's a perversion of patriotism. Nationalism, the belief system held by those who attacked us, promotes the idea that inclusion and diversity represent weakness, that the only way to succeed is to give blind allegiance to the supremacy of one race over all others. Nothing could be less American. Patriotism, on the other hand, is about building each other up and embracing our diversity as the source of our nation's strength. 'We the people' means all the people. America's heroes did not die for race or religion. They died for the ideals enshrined in our Constitution. Look where isolationism has gotten us in the past: two world wars, seventy million dead. Never again can we go back to those dark times when fear and hatred, like a contagion, infected the world. That, as much as ending the threat of nuclear war, is what today is about. It is why we must never lose sight of our common humanity, our common values and our common decency.
>
> Today we call on all Americans and people everywhere to reject the scourge of nationalism. Governments can't legislate tolerance or eradicate hate; that is why it is up to each one of us to find the beauty in our differences instead of the fear. Listen instead of reacting. Reach out instead of recoiling. It is up to us, all of us.[1]

Konrad Adenauer would have nodded in agreement.

The lasting value of his type of enlightenment thinking is also reflected in the words of Henry Kissinger, former US Secretary of State and National Security Advisor, but also a foot solider in the US Army during the Battle of the Bulge in 1944 at the end of WWII. He was published in the Wall Street Journal on 5 April 2020, responding to the early stages of the corona virus pandemic sweeping the world. Kissinger wrote:[2]

> Safeguard the principles of the liberal world order. The founding legend of modern government is a walled city protected by powerful rulers, sometimes despotic, other times benevolent, yet always strong enough to protect the people from an external enemy. Enlightenment thinkers reframed this concept, arguing that the purpose of the legitimate state is to provide for the fundamental needs of the people: security, order, economic well-being, and justice. Individuals cannot secure these things on their own. The pandemic has prompted an anachronism, a revival of the walled city in an age when prosperity depends on global trade and movement of people.
>
> The world's democracies need to defend and sustain their Enlightenment values. A global retreat from balancing power with legitimacy will cause the social contract to disintegrate both domestically and internationally. Yet this millennial issue of legitimacy and power cannot be settled simultaneously with the effort to overcome the Covid-19 plague. Restraint is necessary on all sides—in both domestic politics and international diplomacy. Priorities must be established.
>
> We went on from the Battle of the Bulge into a world of growing prosperity and enhanced human dignity. Now, we live an epochal period. The historic challenge for leaders is to manage the crisis while building the future. Failure could set the world on fire.

Once again, Konrad Adenauer would have agreed.

The Konrad Adenauer-Stiftung (KAS) is a German foundation, established in 1955, which runs projects in over 120 countries worldwide. Named after the first post-WWII Chancellor of West Germany, the Foundation has a regional project operated from its Nairobi office called 'The Rule of Law Program for Sub-Saharan Africa.' Funded by the generosity of the German taxpayer, according to a formula that takes cognizance of the popularity of the Christian Democrats in modern day reunited Germany, the goals of the programme are the promotion of rule-of-law-structures and central institutional elements of the rule of law, the separation of powers, particularly a strong and independent judiciary, human rights, democracy and good governance. In recent years the programme has concentrated also on the scourge of corruption in Africa as it impacts upon governance and the lives of people living there. People who share the aspirations of all of humankind: for peace that is secure, progress that is sustainable and prosperity that is equitably shared. The four conferences discussed in this book are but a part of the anti-corruption work of KAS in Africa.

While the struggle for freedom from the yoke of colonialism in Africa has been won, all too often it has morphed into the struggle for power of rapacious elites led by 'Big Men' who may, or may not, pay lip service to the values of the rule of law, but who lead for the purpose of entrenching their power and enriching themselves, their families and their cronies in politics and business. This phenomenon is a curse of our times world-wide. Too few leaders enter politics to be of service to the people they lead. Too frequently when Need meets Greed in Africa a corrupt outcome ensues. The poor of Africa are the victims of this toxic mix in which billions of dollars, measured in hard currency, are diverted from addressing their needs. The diversion is into illicit activities that plunder public funds and the mineral and natural wealth of the continent in a perverse feeding frenzy. This approach to leadership is wryly explained by the well-worn phrase: 'It's our time to eat'.

It does not have to be so. Africa has the potential to be the continent of the twenty first century. It's sparse population, one in seven in the world, its unused arable land, its mineral wealth and water reserves; even its solar energy friendly deserts have vast, as yet untapped, potential. The young population of Africa may find itself well-placed to deal with the devastation wrought by the pandemic of Covid-19.

The Rule of Law Program for Sub-Saharan Africa of KAS is designed to inculcate a desire for good governance in the people of Africa. Good governance is one of the UN Sustainable Development Goals, namely that good strong institutions of governance be nurtured and improved. (UN SDG #16).[3]

The four conferences that are the subject matter of this book are part of the efforts of KAS to promote the rule of law, as is the book itself.

CHAPTER 3

The Objectives of Accountability Now

Constitutionally speaking, Southern Africa is an interestingly diverse geographical area. Accountability Now regards 'southern' as referring to any African country which is at least partially south of the equator. This area includes some countries which are not part of the Southern African Development Community (SADC) Customs Union, the oldest customs union in the world.

The variety of forms of government in Southern Africa ranges from the regular constitutional democracies of the twenty first century in place in most states, to the absolute monarchy in Eswatini (formerly Swaziland). The constitutional monarchy in Lesotho sees the King in a role not unlike that of Queen Elizabeth in the United Kingdom. The recently terminated kleptocracy in Angola saw its president's daughter become the richest woman in Africa. When he retired President José Eduardo dos Santos tried to secure immunity from prosecution for his entire family. His successor is having none of that. The dictatorship in Zimbabwe with its rigged elections and rampant hyperinflation and strange land policies (recently reversed) pays only the most perfunctory lip-service to the rule of law. Mozambique is in the process of recovering from the issuing of a post-independence government gazette which abolished the entire legal system in the country. In Zambia a Lancaster House post-independence constitution morphed into a one-party state that has since embraced multi-party democracy. Kenya has a 2010 constitution modelled on the miracle constitution that was put in place in South Africa when it ended apartheid almost peacefully and held the first elections in which all of its citizens and residents were able to participate in 1994. In Tanzania the socialist model of Julius Nyerere has also given way, somewhat tentatively to a multi-party system of constitutional democracy. It is in Botswana and Namibia, both large countries with small populations, as well as the Indian Ocean Islands that modern democracy has fared best in Southern Africa.

The region is a smorgasbord of systems sporting varied degrees of constitutionalism in action.

The Institute for Accountability in Southern Africa (IFAISA) which now campaigns as 'Accountability Now' was formed in 2009 and chose its name on the basis that no matter what form of governance is in place, a government which is accountable is always better, irrespective of the system, than one which is unaccountable to the needs of the people governed.

Based in Cape Town, Accountability Now seeks to exact accountability and to promote responsiveness to the needs of ordinary people in Southern Africa. Formed by a lawyer and a (now deceased) human resources manager, it has grown in size and in the scope of its activities over the years.

The month of February 2011 was devoted in large part to participation in the African Peer Review Mechanism (APRM) mission to Zambia, a mission which succeeded in informing constitutional amendments in accordance with the rule of law and the establishment of checks and balances on the exercise of executive authority.

Accountability Now provided the legal expertise to litigants who were, after two appeals, able to establish a general class action in the law of South Africa, not by legislation but by the responsible exercise of judicial power by the Constitutional Court, itself a creation of the 1994 changes. Class action litigation in respect of human rights infringements or threats to human rights is known in the Constitution itself, but a general class action had to be developed by the courts as the government did not want to give litigants a stick with which to beat it.

An application by activist Terry Crawford-Browne to compel the appointment of a commission of inquiry into the infamous 1999 arms deals negotiated by the new SA government with the arms dealers of several countries in Europe was run by Accountability Now. The case was eventually settled when the president capitulated and appointed the commission. Later its findings, which were far too executive-minded, were set aside on review.

Perhaps Accountability Now is best known for its role in the campaign of Johannesburg businessman Hugh 'Bob' Glenister to protect the independence of anti-corruption machinery of state in SA. Unlike any other public-interest litigant in history, he has approached the Constitutional Court on three separate occasions to fight his cause. First, and prematurely so, he tried to head off the dissolution of the effective Scorpions unit of the National Prosecuting Authority. It was closed down through the repeal of the relevant legislation mainly because it was a nuisance to crooked businesses and politicians. The court advised him to let the legislative process run its course and to come back if he was not satisfied with the new law. He was not so satisfied. Next, he succeeded in persuading the narrowest of majorities possible in the Constitutional Court (5 justices to 4) that the replacement for the Scorpions was not sufficiently independent in the form of a police unit called the Hawks, to counter corruption effectively and efficiently with an adequate degree of operational and structural independence. Finally, after the Hawks legislation was tweaked as little as possible, Glenister returned to question the placement of the Hawks within the police (he failed) and to challenge the inadequacy of the reforms ordered by the court (he succeeded in part).

The role of Accountability Now in devising, running and organising the *Glenister* trilogy attracted the attention of KAS; invitations to conferences and to co-host conferences followed and the 'Accountability and Anti-Corruption' programme of KAS has become a by-product of the strong relationship which has been built between Accountability Now and the KAS Rule of Law Program for Sub Saharan Africa based in its Nairobi office.

Accountability Now has become the champion in Southern Africa of the idea of establishing Integrity Commissions (or Independent Commissions Against

Corruption) in countries in which the inadequacy of the anti-corruption entities in place, irrespective of their fine sounding titles, presents a problem. This idea is based upon the best practice form of implementation of the victories won in the Glenister litigation. A country-by-country audit is needed of both the operations and structures of existing anti-corruption entities. From the audits, their reform should flow to comply with what have become known as the STIRS criteria laid down by the Constitutional Court of SA in the 2011 *Glenister* majority judgment. This acronym stands for Specialised, Trained, Independent, Resourced and Secure. We shall return to it in more detail.

In countries in which civil society and academia are strong it is feasible to conduct the audit internally, otherwise, an audit by those involved continent-wide in the work of the African Union's (AU) APRM is conceivable as part of the programme of the AU to address the rampant corruption that blights the sustainable development of the entire continent. Review of anti-corruption machinery is also possible under the terms of the UN Convention Against Corruption (UNCAC) article 5.

A trustee (Justice Richard Goldstone) and a director of Accountability Now (Paul Hoffman SC) serve on the board on Integrity Initiatives International, a Boston based Non-Governmental Organization (NGO) which is advocating the creation of an International Anti-Corruption Court to function against grand corruption, kleptocracy and state capture in much the same way as the International Criminal Court (ICC) tackles crimes against humanity and genocide.

It became necessary for Accountability Now to sue the government, always to good effect, to complain to the Public Protector (an Ombud body in SA) about maladministration, to lay criminal charges and to constantly hold the administration to account for its many and varied attempts to paint outside the lines of the Constitution. It is not without significance that the Constitution expressly provides that conduct or laws that are inconsistent with it are invalid.

The pattern of the behaviour of those with their hands on the levers of power in the South African government, both politically and administratively, is one that is oft repeated throughout Africa and elsewhere in the developing world. It is a pattern that is premised on the exercise of power for selfish gain, not the incumbency of office as a means of service to the people. It is instructive to compare what the Constitution requires with the way in which the Zuma administration was run.

This can best be demonstrated by comparing the constitutional-democratic way forward envisioned for South Africa at the time of the 1994 transition from apartheid dictatorship to non-racial democracy on the one hand, with the realities of the African National Congress (ANC) National Democratic Revolution (NDR) as they have emerged during the subsequent 25 years on the other. The NDR is an invention of Lenin shortly after the Bolshevik revolution in Russia. Its ideology has not succeeded anywhere it has been tried in the world.

Accountability Now has done a detailed comparison of the differences between constitutional values and the goals of the revolution.[1]

The recent Presidential declarations regarding upholding constitutionalism and the rule of law are going to be perceived to be no more than lip service by astute observers familiar with the diktats of the ANC NDR, the practise of ANC cadre deployment, and the supra-constitutional political and economic hegemony that has been entrenched in South Africa. The autocratic response to the pandemic of Coronavirus Disease of 2019 (Covid-19) by the SA government has revealed its longing for hegemonic control of all the levers of power in society.

New investment in SA would be greatly improved if the ANC were to announce that it has abandoned its revolutionary thoughts and praxis and instead is embracing the letter and spirit of the new Constitution without reservation. How best to implement the values and principles of the Constitution should be the committed business of our politicians and officials of all persuasions. Instead, the ANC NDR is imposed by sleight of hand and the struggle is not for Mandela's long walk to freedom, but rather for the exercise of power in a way that is aimed at securing a centralised, power-concentrating revolutionary 'hegemonic control of all the levers of power in society', to quote the strategy and tactics literature of the ANC.

The progress of the ANC NDR is fortunately being slowed somewhat by strategic public-interest litigation in which NDR steps that are inconsistent with the Constitution are sometimes struck down by the courts. How much better it would be for South Africa, if the NDR were to be abandoned by those who drive it. A new dawn of secure peace, sustainable social progress and shared prosperity would be possible were that to happen. Elsewhere in the world, honesty, a pragmatic approach to ideology, and merit-based appointments have worked wonders in governance, socio-economic development and human progress, so why not in South Africa?

It can been seen from this overview of the state of affairs in South Africa that the work of any institutions seeking to exact accountability, uphold the Constitution and promote the rule of law is plentiful, varied and urgent.

It is fortunate that in SA there are many civil society and faith-based organisations working toward a more accountable dispensation than that at present in place. As SA is one of the leading countries in the region, the world looks on anxiously as the aspirations of the people are dashed on the altar of ideology from a bygone age. The future success of the Sub-Saharan region is tied up in the success of constitutionalism both in SA and further afield in Africa and the world. This book and the other work of Accountability Now are but small contributions to resetting the compass to steer a truer more rule of law friendly course into the future.

CHAPTER 4

The Purpose of Writing this Book

From the preceding pages of this book the reader, if reading in the manner recommended by Maria von Trapp in *The Sound of Music* (by starting 'at the very beginning, it's a very good place to start'), will know that in five years, four anti-corruption conferences were held in 3 African cities by two institutes with one over-arching aim—to counter the corrupt. In 2019 a complementary workshop was held on the thorny topic of corruption in the judiciary in Durban, South Africa. A special excursus chapter on that workshop appears at the end of the book.

The resolutions and recommendations made at the conferences are set out in chapter 1 above and provide insight into the topics that came up for discussion, the themes that were explored and the expertise that was brought to bear. There can be no doubt that worldwide corruption presents a problem capable of thwarting the achievement of the UN Sustainable Development Goals by 2030. Corruption is a threat to the enjoyment of peace that is secure, progress that is sustainable and prosperity that is equitably shared.

The extent of corruption in 2020 has been remarked on by Judges Goldstone and Wolf in their advocacy of the establishment of an International Anti-Corruption Court. They note, in an article published in the *Boston Globe* that:

> Corruption has devastating consequences for human health. As the United Nations High Commissioner for Human Rights said in 2013: 'Corruption kills … The amount of money stolen through corruption is enough to feed the world's hungry 80 times over… Corruption denies them their right to food, and in some cases, their right to life.[1]

One-third of the funds allocated in 2014 by Sierra Leone to combat Ebola could not be accounted for, although some funds were found in the bank account of an individual involved in the effort. Similarly, the minister of health in the Democratic Republic of Congo was found to have embezzled more than $400 000 from that country's Ebola response funds.[2] In 2015, Saudi Arabia suspended contracts worth $266 million for the prevention of infection by the MERS virus because, due to corruption, the required work was not being done. About $176 million had already been spent.[3]

The close connection between grand corruption and harm to human health is vividly demonstrated by the experience of Angola. President José Eduardo dos Santos, who held office for 38 years until 2017, made his daughter Isabel the head of the national oil company and the wealthiest woman in Africa — worth more than $2 billion.[4] At the same time, Angola has had the highest percentage of children of any country who do not live to the age of 5. Despite Angola's vast natural resources and wealth, more than half of the country's population has no access to health care. There will be no treatment for them as the coronavirus hits Angola.

Grand corruption does not flourish because of a lack of laws. There are 187 nations party to the United Nations Convention Against Corruption. Almost all of them have laws prohibiting extortion, bribery, money laundering, and misappropriation of national resources. They also have an international obligation to enforce those laws against their corrupt leaders. However, kleptocrats enjoy impunity in their own countries because they control the administration of justice. They will not permit the prosecution and punishment of their collaborators and themselves.'

Their sentiments echo the majority judgment in the second and most famous *Glenister* case, an appeal heard by the Constitutional Court in SA in which it was held that:

> There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. 'It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society are put at risk.'[5]

The main purpose of this book is to tease out from the deliberations of conference goers, from the presentations of learned judges, academics and civil society leaders, that which is of relevance to the ordinary reader in the battle that needs to be waged against the corrupt, wherever they may be found and no matter what their station or rank in society.

The cancer that is corruption is eating the life-force out of constitutionalism and accountability. It diverts funds, meant to alleviate the lot of the poor and disadvantaged, to those who greedily prefer to fritter their loot away on fast cars, slow horses and loose living.

Corruption is a force of destruction. It is not a sustainable activity. No matter how nervous politicians or public servants may be about the security of their position, there ought to be no excuse and no reason for acting corruptly to feather one's own nest at the expense of the poor. Politics and a career in the public administration or state-owned enterprises are meant to be opportunities to serve the public good with honour and diligence. Instead, too many choose their careers as if the profit motive of the worlds of business and commerce, industry and mining is the be all and end all. Those who have a desire to profit from their work have no place in public service in the broadest sense; they should go into business instead because their role is service to the public, not profit-making.

When KAS celebrated the tenth anniversary of its Rule of Law Programme for Sub-Saharan Africa in 2016, Gail Washkansky, the Operations Officer of Accountability Now (as she then was), made a speech in which she remarked:

> 'As long ago as March (2nd–8th) 2013, a leading article in the Economist made this plea: 'Only if Africans raise their ambitions still further will they reach their full potential. They need to take on the difficult jobs of building infrastructure, rooting out corruption and clearing the tangle of government regulation that is still holding them back. And

> they should hurry.' The problem identified in March 2013 was referred to in a leading article in the Economist again in April (16th-22nd) 2016: ' … African governments need to keep up the hard slog of improving the basics. Bad roads, grasping officials and tariff barriers still hobble trade between African countries, which is only 11% of total African exports and imports. Improving that means investing in infrastructure, fighting corruption and freer trade. Africa's past has long been defined by commodities, but its future rests on the productivity of its people. By 2050 the UN predicts that there will be 2.5 billion Africans—a quarter of the world's population. Given good governance, they will prosper. The alternative is too dire to imagine.' It can be seen from the recurring reference to corruption in the commentary of this publication that progress in dealing with corruption in Africa has been slow. This is unfortunate because corruption has the potential to derail a peaceful, prosperous, progressive future for the continent

Later in her speech Washkansky says:

> Poverty reduction is at the heart of the UN's Sustainable Development Goals (SDGs). The first SDG target is to 'eradicate extreme poverty for all people everywhere.' Goal 16 introduces a framework for improving governance. New Institute for Security Studies (ISS) research tests the impact of better governance on reducing poverty and improving human development in Africa. Results show that by 2050, 60 million fewer people could be living in poverty compared to the current development trajectory. Improving governance also creates significant gains in Gross Domestic Product (GDP), GDP per capita and reductions in infant mortality. The oft-identified and so called 'triple threats' (or threatening troika) facing Africa and South Africa have been named as 'poverty, inequality and unemployment'. Inequality is perpetuated and exacerbated as a by-product of poverty. In the present context, in which the effect of corruption on poverty is under examination, it is perhaps more appropriate to define corruption in the public sector more simplistically as 'theft from the poor'. This is because corrupt activities have the effect of depriving the poor of the finances and resources that are diverted into corrupt activities whether directly or indirectly as a consequence of the inordinate amount of official energy that has to be expended on covering up past corrupt activities and engaging in them at present. Whilst it is true that much of the corruption in the private sector does not impact directly on the poor and on poverty alleviation strategies and practices, the indirect effect of private sector corruption is a smaller fiscal catchment area, less tax recovery by government and accordingly fewer resources can be financed out of the fiscal pool.

Washkansky concludes that:

> Combating corruption and fighting poverty are in many ways two sides of the same coin: the better the results on the former, the rosier the prospects for the latter. Even if only tender fraud and corruption are eliminated, this would free up R30 billion a year in South Africa to be spent on more worthy causes than the feathering of the nests of the corrupt among us. One of the tenets of Amartya Sen's capability approach is the distribution of opportunities within society. It emphasises functional capabilities ('substantive freedoms', such as the ability to live to old age, engage in economic transactions, or participate in political activities); these are construed in terms of the substantive freedoms people have reason to value. Poverty is understood as capability-deprivation. Sen is particularly concerned with those opportunities that are strongly influenced by social circumstances and public policy. The poor are most frequently forced to resort to corrupt practices where marginalisation and political, economic and social exclusion are highest thereby severely limiting their substantive freedoms and capability. Combating poverty

> and corruption means addressing and overcoming the barriers that stand in the way of citizen engagement and a state's accountability…
>
> Corruption is destroying Africa's future because it is a symptom of governance that is lacking in integrity, accountability and responsiveness to the needs of ordinary people. Corruption is a crime and needs to be dealt with by the state through effective and independent anti-corruption machinery of the kind ordered in the Glenister litigation. The Glenister cases are Accountability Now's gift to all Africans who seek to end the culture of impunity that invariably accompanies corruption in high places and to build a peaceful, progressive and prosperous future for our continent.

The situation in Africa and the world has not improved since 2016 when Washkansky spoke.

Similarly, as regards corruption in general, the need to counter the corrupt is at the heart of the work that went into this book. Making the parameters clearer and offering strategies for countering corruption are the first steps toward the proper realisation of the UN SDGs, especially SDG #16 which is concerned with the promotion of strong institutions and good governance.

Bringing the possibility of countering the corrupt to the public consciousness is a first step in the creation of the groundswell of political will necessary to achieve a world in which corruption does not disfigure every effort for good that is made.

The purpose of this book is to arm engaged and participative citizens everywhere with the knowledge that enables them to counter the activities of the corrupt in every aspect of their lives. Stimulation of the political will to counter the corrupt is at the heart of the endeavour.

CHAPTER 5

Toward a Definition of Corruption

Corruption comes in many shapes and forms. The corrupt are continuously and deviously devising fresh ways of satisfying their greed and lack of regard for the promotion of the common good. Legislatures seek to counter this propensity by passing ever more complex laws to rein in corrupt activities of all kinds. Prosecutors, on the other hand, prefer to stick to the tried and tested: fraud, theft and embezzlement charges which they find easier to prove than to bring a new case within the parameters of a complex new definition as yet untested by the courts in criminal litigation.

Proving the commission of the crime of corruption is a difficult task. Corruption is conducted in secret and the victims of the crime all too often do not even know that the crime has been committed. The harm done all too often manifests itself long after the crime is completed. This truism does not imply that corruption is a victimless crime. Far from it; as Judge Navi Pillay, former UN Human Rights Commissioner, has said, 'corruption kills'.

Very properly, the onus of proof of the crime of corruption is set at the 'beyond a reasonable doubt' standard. An acquittal follows an explanation by those accused that is 'reasonably possibly true'. It is easy then to see why prosecutors prefer the traditional common-law charges rather than the formulation of charges conforming to convoluted definitions contained in legislation.

A working definition of corruption that is widely used by those who study corruption is: 'The abuse of public office for private gain.' This definition would cover anything from state capture and kleptocracy on the one hand to a traffic officer asking for 'cool-drink money' at a roadblock on the other hand.

Some prefer to put emphasis on the role of the most frequent victims of the crime by calling corruption 'theft from the poor'. The advantage of doing so is that it introduces into public discourse the notion that it is the poor who suffer when corruption is left unchecked by the criminal justice administration. This is particularly the position in states that should know better than to allow impunity to grow within their borders. As public money is often diverted from serving the public weal to the pockets of the corrupt, it is fair to regard this form of crime as 'theft from the poor' because resources intended for their benefit are lost.

The sociology of a culture of impunity is interesting. Studies show that in any large population there is always a section of the population that is absolutely incorruptible no matter what the conditions on the ground are at any given time. These 'incorruptibles' make up around 10% of the population. At the other end of the scale are those who are always corrupt—the sociopaths, the psychopaths and

those too prone to giving in to their greed. This group is also around 10% of the population.

The 80% in between could go either way, depending on the conditions and circumstances in society. The thought of getting caught and punished for corrupt activities is enough to keep most on the straight and narrow path. The spectre of more and more people getting away with their corrupt activities tends to encourage those in the large middle group to join the corrupt. The argument goes: 'Others are enjoying their impunity from any consequences, they are reaping the ill-gotten rewards of their wrongdoing, why should we not join them?' The wavering middle group asks this in justification of a move toward the criminality of corruption based on the notion that it is too easy to get away with it in given circumstances.

It is the knowledge that if one acts corruptly one has committed a crime that the state will indubitably investigate, prosecute, try and punish using the full might of the law to do so, that keeps folk honest. If that knowledge is the lived experience of a society; if the criminal justice administration is working as it should; and if those convicted are suitably punished and held up as examples to deter others from straying from the proverbial 'path of righteousness'; then all or most of the 80% joins the incorruptible group while a functioning criminal justice administration is in place.

For many, although corruption is a crime, punishable by law; corruption with impunity is a political problem rather than a legal or criminal one. The characterisation of corruption with impunity as a political problem derives from the will of society to see to it that the corrupt do not enjoy impunity from the consequences of their actions. Well protected whistle blowers, skilled investigators, keen prosecutors as well as judges and jailers who uphold the law are the surest way to end corruption with impunity—the freedom from punishment which allows corruption to grow exponentially as those with the opportunity to do so succumb to the temptation to migrate from the group in the middle of the spectrum to the group which is incorrigibly corrupt.

The problem is best described as a political one because the political will to allocate sufficient resources to combating corruption is the first and most basic ingredient of any effort to end impunity. Without specialist investigators and prosecutors, the criminal dockets cannot be made trial ready. Without courts with the 'Three 'I' qualities' of Independence, Integrity and Impartiality and without jailers who effect punishment and administer correctional services properly, the political will is lacking; the opportunities for impunity are present; and the temptation to migrate from the large middle group to the corrupt one is an ever-present temptation.

For the countering of corruption to succeed, it is necessary that adequate resources be made available for all involved in the various functions necessary to detect, investigate, prosecute, try and punish the corrupt. In Hong Kong, for example, there is no debate around the budgetary allocation. It has long been agreed that a set percentage of the budget is for anti-corruption efforts and that amount

is made available. Accordingly, countering corruption is effectively and efficiently carried out in Hong Kong. Its Independent Commission against Corruption has had notable success on the island which was once known as a hotbed of corruption. It is living proof that it is possible to reverse the gains of the corrupt, provided the political will to do so is available.

Some would have it that corruption should be categorised according to its seriousness. Petty corruption among the lower ranking civil servants is regarded as being not as serious a problem as grand corruption involving powerful politicians and wealthy captains of business and industry. State capture is the corrupt process according to which the state is repurposed to serve the interests of those who capture it instead of the public interest. It is arguably the most virulent form of corruption and the type of corruption most difficult to counter.

At the other end of the scale is the traffic officer, underpaid and tired at the end of his shift, who asks at a roadblock for 'cool-drink money'. Surely a form of corruption that is easily dealt with if whistle blowers come forward with their cell-phone recordings of the transaction proposed by the traffic officer.

The truth is that all corruption is a crime and that a zero tolerance approach of the kind instituted in New York by its former Mayor Rudolph Giuliani is applicable. Under Giuliani, appointee Police Commissioner Bill Bratton, adopted an aggressive enforcement and deterrence strategy based on James Q. Wilson's 'Broken Windows research'. This strategy involved crackdowns on relatively minor offences such as graffiti, turnstile jumping, and aggressive 'squeegeemen,' on the principle that this would send a message that order would be maintained and that the city would be 'cleaned up.' The Mayor declared and decided that not a single broken window pane should be left unattended in New York in order to demonstrate that crime would not be tolerated or condoned on his watch. The strategy worked and life in New York improved considerably.

So too with corruption, certainly at the level of the state, it is possible, using a properly structured criminal justice administration, vigilant parliamentary oversight, well-resourced and well-trained officials of the criminal justice administration, operating with public buy-in, to deal with the crime of corruption within the confines of the national criminal justice administration.

It is with kleptocracy, grand corruption and state capture that problems can and do arise. If those involved in these forms of corruption are able to take control of the levers of power in the criminal justice administration, then impunity abounds and the capacity of the state to do anything to counter it is holed below the waterline.

The problem is neatly summed up by Judges Goldstone and Wolf in their article published in the *Boston Globe* in April 2020. They point out:

> Grand corruption does not flourish because of a lack of laws. There are 187 nations party to the United Nations Convention Against Corruption. Almost all of them have laws prohibiting extortion, bribery, money laundering, and misappropriation of national resources. They also have an international obligation to enforce those laws against their corrupt leaders. However, kleptocrats enjoy impunity in their own countries because

> they control the administration of justice. They will not permit the prosecution and punishment of their collaborators and themselves.[1]

For these reasons they advocate the establishment of an International Anti-Corruption Court that is able to end the impunity of those involved in grand corruption, kleptocracy and state capture.

Sometimes the political will to counter corruption is expressed in ways that are counter-productive. The passing of laws with convoluted requirement and weird presumptions does not signal an end to the impunity of the corrupt.

What, for example, is a prosecutor preparing a charge sheet to arraign a corrupt civil servant, a politician and a businessman meant to make of a definition such as that in the Prevention and Combating of Corrupt Activities Act (PRECCA) passed by the SA parliament in 2003?

This Act creates the general offence of corruption:[2]

> Any person who, directly or indirectly—
> (*a*) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
> (*b*) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,
> in order to act, personally or by influencing another person so to act, in a manner—
> (i) that amounts to the—
> (*aa*) illegal, dishonest, unauthorised, incomplete, or biased; or
> (*bb*) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
> (ii) that amounts to—
> (*aa*) the abuse of a position of authority;
> (*bb*) a breach of trust; or
> (*cc*) the violation of a legal duty or a set of rules,
> (iii) designed to achieve an unjustified result; or
> (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,
> is guilty of the offence of corruption.

These words have been very thoughtfully and helpfully deciphered by civil society organisation Corruption Watch, which maintains that they mean:

> The general offence of corruption under PRECCA is giving or offering to give someone in a position of power gratification to act in a certain manner. What does gratification mean?
> - Money
> - A donation
> - A vote
> - A service or a favour
> - Employment etc.

It should come as no surprise to learn that in the authoritative work *The Law of South Africa* the criminal law volume contains a description and discussion of the statutory offence of corruption and its wordy 'general offence of corruption'. There

is not a single decided case in which this definition has come up for debate or discussion. The prosecution service appears simply not to be using the Act.

Whether corruption is given a complex definition or is regarded as 'theft from the poor' or 'the abuse of public office for private gain', the fact remains that corruption with impunity is a scourge of our times. It requires decisive action if it is to be prevented from causing the collapse of civilization, whether through stray viruses or in some other way.

When it comes to defining corruption, it is possible to sympathise with Justice Potter Stewart in the United States (US) Supreme Court 1964 decision concerning the definition of obscenity. He wrote:[3]

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ['hard-core pornography'], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

It is important that the general public should know corruption when it sees it, and, more importantly, when it identifies the need to counter it effectively and efficiently.

CHAPTER 6

The Effects of Petty Corruption

Corruption is a crime. The definitions, whether complex or simple, all include petty corruption within their ambit. While it may be less difficult to bring the perpetrators of petty corruption to book than is the case with the 'royal game' involved in grand corruption, the effect of petty corruption on the workings of governance in modern states is profound. It is also troubling for the preservation of constitutionalism under the rule of law.

Petty corruption usually involves lower-level members of the public administration or operatives in the state-owned enterprises. They see their jobs as an opportunity to exploit the members of the public, whether in their business or in their private capacity, by extracting a 'gratification' or gain of the kind detailed in the previous chapter from them.

The example of the traffic officer at the roadblock seeking his 'cool-drink money' is legendary. Clerks at departments of state whose task it is to deliver licenses, permits, passports, identity documents and the like seek remuneration for themselves over and above such official fees as may be payable by those seeking the official documents concerned. At border posts customs and immigration officials notoriously show a preparedness to turn a blind eye to deficiencies in documentation if their palms are greased by the hapless traveller passing through the control point. Officials in courts are able, for a fee, to make court files or evidence in them disappear. Those in charge of appointing teachers and other civil servants have been known to 'sell' available posts to the highest bidder. The litany of forms of petty corruption is endless and exasperating. New forms of malfeasance are constantly been invented in an exercise designed to circumvent the efforts of honest law enforcers.

The societal harm done by the perpetuation of petty corruption is that it tends to make citizens cynical about the state, about democracy and about all the fine sounding words that go with the form of constitutionalism at least theoretically in place in countries wracked with petty corruption.

The democratic notion of government 'of the people, by the people and for the people' is undermined by the corrupt. The acceptance of a position of employment in the public sector or the election to public office in politics ought to be viewed as an opportunity to advance the interests of the public through loyal service to 'the people'. Instead of espousing this ethos, the corrupt in government view their role as an opportunity for them. An opportunity in which their greed, self-enrichment and the misappropriation of public funds and property are the order of the day. Enhancing the patrimony of crony cabals replaces the notion of service to

the people. The cronies try to amass as much as possible before they are caught or before the next election.

The electorate is often disgusted by the petty corruption which it is required to endure. Fewer and fewer voters go to the polls at election time. In SA those who did not vote outnumber the total of votes gleaned by the governing alliance in national politics. While there may be many reasons for the low turnout, the fact that voters are grumpy or disaffected is demonstrated by the increasing number of service delivery protests that are mounted, some of them violent and destructive of public property like schools, libraries, trains and other official buildings.

While the direct cost of petty corruption is impossible to measure, its effect on the fabric of society is negative.

One way of encouraging an end to the culture of petty corruption is to encourage a zero-tolerance approach. Record the corrupt activity, blow the whistle and engage with the authorities to put a stop to it. This is the task of every active and participative citizen who values freedom and the enjoyment of human rights. This should mean everyone, but, sadly does not.

A second strategy is to get those who work in the civil service and in state-owned enterprises to sign a pledge that reminds them of the 'rules of the game' according to which they should work. What follows is a pledge based on the 'rules of the game' of public administration in SA. It is possible to adapt the pledge to suit the circumstances in any constitutional democracy.

Pledge by the Members of the Public Administration of South Africa

[The sections of the Constitution referred to in this pledge are preceded by the prefix C]

We, the public administration staff of the Republic of South Africa, including employees of state-owned enterprises, proudly pledge to the nation and to all who inhabit and visit our Republic that:

1. We will promote and maintain the highest standards of professionalism and ethics in all we do in our official capacity, with ubuntu and Batho Pele as our ever-present watchwords. [C 195 read with policy and the spirit of the Constitution (C)]
2. We will strive without end for the most efficient, economical and effective use of resources, including human resources, in our places of work. [C195]
3. We will at all times remain development oriented in our work in the public administration. [C 195]
4. We will act impartially, fairly, equitably and without bias in our provision of services to the people in South Africa, forever showing responsiveness to their needs as communicated to us through the public participation processes in place. [C 195 read with C 33]
5. We will act accountably, by always explaining our actions reasonably and by justifying our decisions properly. [C 195 and C 1]
6. We will, within the limits of the law, provide the public with timely, accessible and accurate information in the interests of transparency in all we do. [C 195 read with C 1 and C 32]
7. We will cultivate good human resource management and career development practices so that human potential is maximised, on the basis that the public administration remains broadly representative of the South African people. [C 195]

8. We will respect, protect, promote and fulfil the rights guaranteed to all in the Bill of Rights. [C 7(2)]
9. We will at all times uphold the foundational values of the Republic as they apply to human dignity, equality and freedom; the advancement of non-racialism and non-sexism; the supremacy of the Constitution and the rule of law; responsiveness to peoples' needs and openness in the public administration. [C 1]
10. We will, in our loyal execution of the lawful policies of the government of the day, be forever vigilant to ensure that we act in a manner consistent with the Constitution, its values, tenets and principles. [C 197 read with C 2] We will, in particular, procure goods and services in accordance with a system that is fair, equitable, competitive, transparent and cost-effective [C 217] and perform our obligations diligently and without delay [C 237]

In offering this pledge, we affirm our belief that South Africa belongs to all who live in it, united in our diversity. We further affirm that we are working ceaselessly to build our multi-party, democratic and open society in accordance with the rule of law, so as to reflect the resolve of the nation to live in peace and harmony, to be free from fear and want and to seek a better life, thus earning its rightful place for South Africa in the family of nations. [Preamble to the Constitution (C) read with C 1 and C 198]

If every official, upon entering public service was required to sign the pledge, a signed copy could be kept on file by the human resources personnel of the state for use in the event of the signatory breaching, infringing or violating the provisions of the pledge.

In this way, not only is the public service made aware of the need to comply with the Constitution, the public, alive to the existence of the pledge, also has a tool to use to ensure that those officials who paint outside the lines are brought to book.

CHAPTER 7

The Effects of Grand Corruption

A kleptocracy is that form of government which has corrupt leaders. They use their power to exploit the people and the natural resources under their control in order to extend their personal wealth and political powers. Typically, this system involves embezzlement of funds at the expense of the wider population. A kleptocrat is a person who participates in this form of government. Participation can be in politics, public administration, or business. Business can be of both the private and state-owned kinds.

Grand corruption is a favourite activity of kleptocrats.

According to the United Nations research grand corruption occurs when:

> A public official or other person deprives a particular social group or substantial part of the population of a State of a fundamental right; or causes the State or any of its people a loss greater than 100 times the annual minimum subsistence income of its people; as a result of bribery, embezzlement or other corruption offence.

The United Nations research provides amplification:

> Explanatory Notes:
>
> Transparency International has developed this legal definition of grand corruption to encourage advocates, scholars, lawmakers, and others to seek ways to enhance accountability of high-level public officials and others whose corruption harms their citizens egregiously and too often with impunity. The definition gives legal relevance to the harms and voice to the victims. Grand corruption is a human rights crime and deserves adjudication and punishment accordingly.

The effect of kleptocrats operating with impunity is that the prospect of failure of the states upon which they prey is brought into sharp relief. In the absence of an International Anti-Corruption Court there is at present no credible threat to the activities of kleptocrats. Their impunity is guaranteed by their seizure of control of the levers of power in the criminal justice administration of the country upon which they prey. As no other country or foreign court has general jurisdiction over the kleptocrats, there is no means available to bring them to book. International obligations to extradite kleptocrats are notoriously difficult to enforce.

The American Foreign Corrupt Practices Act (FCPA) does allow the United States of America's (USA) authorities to hold corporations and individuals who do business in the USA to account for their corruption in foreign climes. For example the Hitachi Corporation was fined in the USA for involving itself in a corrupt deal with the ANC in SA via the latter's investment arm, Chancellor House, in the supplying of boilers to large new power stations via a public procurement process over which the ANC-led government presided. The ANC does not do business in the USA and escaped scot-free.

The experience of Zimbabwe affords a good illustration of the current conundrum. An attempt to bring kleptocrats in Zimbabwe to justice for misappropriating land led to the disbandment of the SADC Tribunal, which was seized with the matter, and the continuation of the impunity of the kleptocrats in the government of Zimbabwe. Worse than that, without a SADC Tribunal other kleptocrats in its area of jurisdiction took advantage of its disbandment to indulge their own propensities for grand corruption. Today Zimbabwe is an extremely fragile or failed state plagued by hyper-inflation, joblessness and its inability to secure finance from the World Bank, The International Monetary Fund and any but the most bold of lenders.

The Zuma era in SA was marked by a state capture project which he and his associates in politics, public service and business embarked upon to the detriment of the common good. The work of a Commission of Inquiry into state capture in SA is incomplete at this stage, but, the evidence it has been receiving speaks of widespread kleptocracy which involved, and still involves, capture of parts of the state and state owned enterprises.

The first and main advantage to kleptocrats of capturing the state is that it enables them to act with impunity as they repurpose the state to feather their nests. As state capture is a form of grand corruption, it follows that its effect is to undermine the very basis upon which the social contract contained in the laws and constitutions of countries are contained.

It is important to note that capture of the state by kleptocrats is illegal and criminal. However, the classical definition of state capture refers to the way formal procedures (such as laws and social norms) government bureaucracy and also policy-making are manipulated by private individuals and firms so as to influence state policies and laws in their favour. This classical form of state capture seeks to influence the formation of laws, in order to protect and promote influential private interests. In this way it differs from most other forms of corruption which instead seek selective enforcement of already existing laws.

State capture may or may not be illegal, depending on determination by the captured state itself, and might be attempted through private lobbying and influence. The influence may be through a range of state institutions, including the legislature, executive, ministries and the judiciary, or through a corrupt electoral process. It is similar to regulatory capture but differs in the scale and variety of influenced areas and, unlike regulatory capture, the private influence is never overt. The private influences cannot be discovered by lawful processes since the legislative process, judiciary, electoral process, and/or executive powers have been subverted.

A distinguishing factor from corruption is that, while in cases of corruption the outcome (of policy or regulatory decision) is not certain, in cases of state capture the outcome is known and is highly likely to be beneficial to the captors of the state.

Further, in cases of corruption (even rampant) there is plurality and competition of corruptors to influence the outcome of the policy or distribution of resources. However, in state capture, decision-makers are usually more in a position of agents to the principals, i.e., the captors, who function either in monopolistic or oligopolistic (non-competitive) fashion. Where a head of state is a capturer of the state or a captive of the kleptocratic capturers of the state, then grand corruption is inevitable. The survival of the state is then put in issue.

What then, is a failed state?

To answer that question, here is a lightly edited revision of an extract from an article the author, in collaboration with Professor David Welsh, a political scientist, wrote in 2013:[1]

> In its terminal form, a state fails when it implodes, leaving only a shell. Max Weber defined the state as the entity that possesses 'a monopoly on the legitimate use of force'. This is a vital part of any definition of the state, but modern usage stretches the definition to incorporate the idea of sovereignty over a territory.
>
> Others insist that the idea of the state embodies a commitment as the 'institutional representation of the people's will'. The more limited notion of the state would exclude, as failed states, countries such as North Korea or Zimbabwe, where the state is intact, possesses a monopoly of force, but lacks the essential ingredient of legitimacy. Somalia is one of several cases where the central government has imploded and controls only a small part of the country.
>
> South Africa, the Zuma state capture project notwithstanding, is far from such extreme situations. There is no threat to its territorial integrity, no threat of a violent overthrow of the government or even of a conflict that threatens to get out of hand. It enjoys democratic institutions (however poorly they perform), the rule of law and protected civil liberties.
>
> There are, however, some disquieting signs. State failure occurs along a continuum: dysfunctional institutions, popular protests (such as the regular service delivery protests in SA), illegal and often violent strikes and the evident growing alienation of young, urban dwellers, who face a lifetime of unemployment. Other symptoms will be obvious to anyone who studies the demographic landscape.
>
> It is generally reckoned that constitutions that survive for 20 years have put down roots that render them resistant to destruction. But there are exceptions. A danger South Africa faces is less the abolition of the constitution than its being hollowed out, that is, its key (supposedly) independent institutions being staffed by politically 'reliable' people. The judiciary may be a prime candidate, followed by the public protector. We should never forget the wise warning in The Federalist Papers that a constitution is a 'mere parchment barrier'.

From the 2018 Index, the top 10 most vulnerable states included:

- South Sudan
- Somalia
- Yemen
- Syria
- Central African Republic
- Democratic Republic of Congo
- Sudan

- Chad
- Afghanistan
- Zimbabwe

On the flip side, states with the lowest scores were found to be the least vulnerable and less at-risk for conflict or collapse. The top state based on the 2018 Index was Finland with a score of 17.9. Norway came in second place with a score of 18.3, while Switzerland came in next with a score of 19.2.

The states that appear at the bottom of the Index of 2018 and thus are less vulnerable to conflict or collapse include:

- Finland
- Norway
- Switzerland
- Denmark
- Iceland
- Ireland
- Luxembourg
- Australia
- Sweden
- New Zealand

By 2020 six African states could be found in the bottom ten countries on the index while the top ten remained unchanged, save that Kuwait replaced Ireland in the top ten. This table reflects the bottom ten fragile states as measured by the Foundation for Peace:

Table 1
Bottom ten fragile states

Country	Fragile States Index	Population
Yemen	113.5	29 825 964
Somalia	112.3	15 893 222
South Sudan	112.2	11 193 725
Syria	111.5	17 500 658
DR Congo	110.2	89 561 403
Central African Republic	108.9	4 829 767
Chad	108.5	16 425 864
Sudan	108	43 849 260
Afghanistan	105	38 928 346
Zimbabwe	99.5	14 862 924

Source: Bottom Ten Fragile States according to the Foundation for Peace

The score of South Africa on this index is 71.1, a better score than 85 lower-ranked countries.

In economic terms it is the cost of grand corruption that is reason for alarm. Educated estimates suggest that the cost of corruption overall is more than 5% of the global GDP which was measured at just under $85 trillion in 2018. Developing regions are the most vulnerable. They lose ten times more to corruption than they receive in foreign aid. Illicit outflows of funds from the developing world total more than $1 trillion per annum.

The achievement by 2030 of the United Nations Sustainable Development Goals remains a worthy ambition of most nations. However, it is plain to see that grand corruption, kleptocratic rule and the success of state capture stand in the way of this worthy achievement.

The UNSDGs have been summarised by the UN as follows:

Figure 1
Sustainable Development Goals

Source: United Nations

These SDGs are the goals of the members of the United Nations envisioned in 2015 for delivery by 2030. The agenda is to use 'a holistic approach to achieving sustainable development for all' as the UN website puts it.[2]

Without what is envisioned by SDG #16 it will be impossible to effect delivery of all of the other goals. Those who hold office to enrich themselves will see to that.

The Angolan example bears mention. After independence this mineral rich oil exporting country was ruled for 38 years by Jose Eduardo dos Santos. His daughter, Isabel, is today worth $2 billion and headed the state oil company during her father's reign. When he left office he tried, without success, to secure immunity from prosecution for his entire family. The statistics reveal that under his leadership Angola had the highest percentage of any country in the world of children

who did not live to the age of five. Half of the population of Angola did not have access to healthcare, another of the UN SDGs.

Until all in public office are in place to serve the common good and not to indulge in grand corruption in all its forms the effect will be failure of weaker states, the exacerbation of human misery with concomitant hunger, poverty and inequality.

When all states respect, protect, promote and fulfil the human rights of their people via clean, accountable, responsive and transparent governance, the corrupt will have been countered effectively.

CHAPTER 8

The Need for Effective and Efficient Anti-Corruption Machinery of State

The acronym STIRS is a handy way of describing the main attributes of anti-corruption entities that are able to counter corruption effectively and efficiently. These criteria are required to achieve compliance with international obligations under the United Nations Convention against Corruption (UNCAC) and other treaties. Applying the criteria accords with respect for the human rights of those governed.

In short:

- **Specialised** denotes an entity that is dedicated to dealing with corruption and corruption only. The corrupt are a wily lot who are forever seeking new ways of relieving the unwary of assets and funds. It is a full-time job to keep up with and counter the innovative thinking of the corrupt, hence the need for specialisation. Some call this feature an entity dedicated to anti-corruption work to the exclusion of all other types of crime-busting.
- **Trained** refers to the state of readiness and expertise of corruption-busters to do their work properly.
- **Independent** is the requirement that the entity be above political influence and interference from the powerful whether in government or in corrupt networks so that it can function without fear, favour or prejudice.
- **Resources** that are sufficient, and the provision of which is guaranteed, to enable the entity to do its work
- **Security** of tenure of office is required so that unpopular decisions made do not turn out to be career threatening or limiting.

Researchers employed by the Organisation for Economic Co-operation and Development (OECD) have for many years worked on a variety of criteria that should be expected in anti-corruption machinery of state. The output of their research, as it stood in 2010, was placed before the South African apex court, its Constitutional Court, in the course of argument in a matter in which judgment was handed down on 17 March 2011. The justices considered the various criteria in the OECD research and picked on the STIRS criteria as those identifying anti-corruption machinery of state that is effective and efficient at countering the corrupt.

The result of this selection process is that while all of the criteria set out in the OECD research are informative and instructive, five criteria have the force of binding law in SA. These criteria are accordingly available for use in argument elsewhere in the world as persuasive authority emanating from the highest court in SA. The cogency of the court's choice is so compelling that the STIRS criteria ought to

serve as a useful starting point in any serious consideration anywhere of what it is that identifies the best of anti-corruption machinery of state. It is on this basis that the analysis that follows is offered as a guide to those involved in the important work of countering the corrupt.

Speaking in Cape Town on the occasion of his election as President of the Conference of Constitutional Jurisdictions of Africa on 26 April 2017, the Chief Justice of South Africa, Mogoeng Mogoeng, pointed out that corruption is a key element hampering the alleviation of poverty in Africa. He told delegates at the conference that:[1]

> We enjoy the singular honour, as judges of courts on this continent, of eradicating corruption. But we can only do that if we are not corrupt. It takes the uncorrupted to deal effectively with those who are corrupt.

Pointing to the need to develop an 'African best practice' for upholding constitutions so that Africa could one day become the stronghold of the rule of law around the world, he said:

> If only we can be united in the vision that has long been waited for: the vision of demonstrating to all that African people have what it takes to take their continent to the greatest heights that it was once known for.

The centrality of the success of countering the corrupt in the constitutional projects around Africa is succinctly expressed by the Chief Justice: the corrosive effects of corruption are seen by him as an ever-present threat to people-centred progress and shared prosperity in Africa.

The Constitutional Court in South Africa has been at the forefront of developing the jurisprudence necessary to achieve the eventual eradication of corruption. It has sat through a trilogy of cases initiated by a Gauteng businessman, Hugh 'Bob' Glenister, who has steadfastly endeavoured, through the use of 'lawfare', to secure efficient, effective and adequately independent machinery of state to combat the corrupt.

The *Glenister* cases have spawned imaginative judicial interventions based on the notion that failure to take appropriate measures to combat corruption is regarded as a violation of human rights in South Africa. This notion has been developed by the Constitutional Court because it regards the justiciable obligations of the state under the Bill of Rights, which is Chapter Two of the Constitution, as matters affected by corruption. Delivery of many of these rights, in particular the socio-economic rights, is an expensive exercise in the provision of basic education, access to housing, health care and social security, *inter alia*. It accordingly behoves the state to establish the necessary machinery to deal decisively with corrupt activities wherever they manifests themselves. By so doing the state is enabled to ensure that public funds are spent for the public good and are not frittered away by the corrupt.

The manner in which the Constitutional Court, the highest court in South Africa, views the concept of corruption has been encapsulated in the words of the

majority (*per* Moseneke DCJ and Cameron J) in the seminal decision of 17 March 2011 in *Glenister II*.[2]

> [166] There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law, and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence, and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.

This far-reaching dictum eloquently identifies the nature of the problem posed to society by corruption's corrosive effects. In *Glenister III* heard together with a less ambitious matter brought by the Helen Suzman Foundation, the poetic words quoted above were fortified by a larger majority of the court in the opening words of the judgment penned by the Chief Justice:[3]

> [1] All South Africans across the racial, religious, class and political divide are in broad agreement that corruption is rife in this country and that stringent measures are required to contain this malady before it graduates into something terminal.
>
> [2] We are in one accord that South Africa needs an agency dedicated to the containment and eventual eradication of the scourge of corruption. We also agree that that entity must enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate. And this in a way is the issue that lies at the heart of this matter. Does the South African Police Service Act (SAPS Act), as amended again, comply with the constitutional obligation to establish an adequately independent anti-corruption agency?

The Constitutional Court has also, in interpreting the concept of corruption as a malady with potentially terminal effects, had regard to the international obligations assumed by the government of South Africa insofar as combating corruption is concerned. The majority in *Glenister II* found that the international law obligations undertaken by South Africa at UN, AU and even SADC level bound the state to have an anti-corruption entity that is effective and adequately independent to honour the international obligations so undertaken.

Let us examine the limits and scope of the implementation of these jurisprudential gifts to good governance in Africa, and indeed worldwide in constitutional democracies, bestowed by the judgments in the Glenister cases.

It is inescapable that even the best substantive laws against corruption are only as good as the manner in which they are implemented. Dysfunction in the South African criminal justice administration, acknowledged by then Deputy Minister of Justice, Advocate Johnny de Lange, in the August 2008 parliamentary debate on the dissolution of the Directorate of Special Operations (or Scorpions as they were popularly known), continues to dog the enforcement of the common and statutory laws against corruption. Capture of the leadership of the South African Police Service (SAPS) and National Prosecuting Authority (NPA) by feral members of the

political elite during and even before the Zuma administrations had exacerbated the malady.

Efficient and effective machinery of state that is able, using a high standard of ethics, to deal accountably with the scourge of corruption is required by section 195 of the Constitution of South Africa.

The actual work of preventing and combating corruption is currently that of the Directorate of Priority Crime Investigation (DPCI) or Hawks unit of the SAPS which works in conjunction with the NPA. The NPA has no legislated investigative capacity in respect of corruption since the demise of the Scorpions; it prosecutes the cases brought to it by the Hawks. The constitutionality of locating within the NPA an 'investigative directorate' to look into state capture is questionable as its proclamation by the president contradicts the will of the legislature in the laws that disbanded the Scorpions and created the Hawks. An informal Anti-Corruption Task Team (ACTT) exists but does not really function as a team or with any degree of cohesion, effectiveness and efficiency. The very notion of an ACTT contradicts the court-prescribed requirement of a single entity to combat corruption. In this regard the wording used in the passage quoted above from *Glenister III* is instructive. The three fundamental structural and operational requirements are 'an agency' which is 'dedicated' and 'specialises' in combating corruption. The DPCI is not dedicated to combating corruption; its mandate extends to all forms of 'priority crimes'. The multi-agency approach to the thorny task of combating corruption has not found favour in the jurisprudence of the courts. By persisting with its dysfunctional ACTT, the executive continues an approach that is not sanctioned by the courts. The apex court has so ruled in a manner which is binding on the state.

In reaching its important conclusions on combating corruption the majority in *Glenister II* examined the criteria according to which the effectiveness and autonomy of anti-corruption entities are characterised in the work of the experts within the OECD who have long studied the issues around combating corruption. The majority, five of the nine justices seized of the matter, found that specialisation, training and independence; resources that are guaranteed and security of tenure of office are the criteria which are the hallmarks of an effective anti-corruption entity of state. These criteria have, in subsequent argument and discussion of the issues in *Glenister II* and later litigation discussed below, become known as the STIRS criteria, a useful acronym that has saved a great deal of printers' ink.

These criteria have been developed by the court because of its abhorrence of corruption and its willingness to give substance to the obligations of the state to respect, protect, promote and fulfil the rights guaranteed to all in the Bill of Rights. This may be regarded as an expansive approach to the problems posed by corruption. The approach is justified and is supplemented by the treaty obligations undertaken by the South Africa government, principally UNCAC, which also obliges signatory states to keep adequately independent anti-corruption machinery of state. The necessity for autonomy in effective anti-corruption machinery is well

illustrated by phenomena such as state capture, a 'silent coup' and the hijacking of state-owned enterprises, all of which are beyond the scope of this chapter.

The Constitutional Court is well-informed on the issues at hand and the need to regard corruption as a threat to the essence of constitutional democracy as it relates to the ordinary citizen. The 'better life' sought in the Constitution through the enjoyment of the human rights guaranteed to all in the Bill of Rights cannot be achieved if corruption is rife or the state is captured. In its effect, state capture is corruption on a grand scale; those states that do fall captive to feral elites swiftly degenerate into failed states, as has happened in Zimbabwe, Somalia and elsewhere in Africa. In failed states the poor suffer terrible deprivation and the pensions of public servants are not paid. The STIRS criteria of the majority in *Glenister II* have to be properly implemented and taken seriously by the executive and legislative branches of government if the descent to destruction is to be avoided. The public administration, especially the criminal justice administration (and specifically the prosecution service) have to be up to the task at hand. If key functionaries, especially those in the criminal justice administration, are corrupt and captured then the prospects of combating corruption successfully are dealt a death blow.

It is plain from the passages in the judgments, quoted above, that the courts do regard corruption as a serious threat to the constitutional dispensation. The fealty of the courts to the rule of law remains steadfast.

While best practice solutions to the failure of the executive to implement the STIRS criteria properly are beyond the scope of this chapter, it is strongly arguable that the establishment of an Integrity Commission under Chapter Nine of the Constitution of SA is the best way in which to convert judicial decision-making on STIRS into the lived reality in governance.

In *Glenister II* the successful applicant was able to persuade the narrowest possible majority of justices in the Constitutional Court that the Hawks, in their original legislated incarnation, were not an adequately independent entity to be an effective corruption-busting unit in the legislative framework and operational regime contemplated by the scheme of the legislation passed to give effect to the resolution of the ANC, taken at Polokwane in December 2007. This was a resolution which called for the urgent dissolution of the Scorpions and their replacement with what became the Hawks. The motivation for the resolution was far from pure: The Scorpions were wont to investigate too many politically well-connected people.

The majority of the court found that the human rights commitments of the state undertaken in the Bill of Rights necessitated the creation and maintenance of an adequately independent anti-corruption entity of state to prevent and combat corruption. The majority also found that the international law obligations undertaken by SA at UN, AU and even SADC level bound the state to have an anti-corruption entity that is effective and adequately independent to honour the international obligations so undertaken. This finding has implications in all jurisdictions in which similar treaty obligations have been undertaken.

The majority in *Glenister II* identified the STIRS criteria as the critical characteristics of adequately independent and effective anti-corruption machinery of state. These criteria are of universal application in constitutional democracies under the rule of law. Comparative research reveals that compliance with them is an indicator of state competence in combating corruption, while the converse also applies.

The work of the experts within the structures of the OECD who have long studied the issues around combating corruption informed the decision reached on what have become known as the STIRS criteria.

Specialisation of an institution means that its staff complement has to be dedicated to one function and one function only. In this case, it means dealing with the corrupt decisively as a full-time job, not part of a job that has other features and functions. A dedicated and single-minded approach is required that is quite the antithesis of a priority crimes unit that deals with diverse crimes deserving priority attention from time to time. The Hawks work on poaching, drug dealing, human trafficking and a host of other 'priority crimes' that leave corruption languishing at the bottom of the piles of their pending workload.

Training of the personnel in the intricacies of anti-corruption work is an obvious essential. The Scorpions, when they were formed, were taken to the Federal Bureau of Investigation (FBI) and to Scotland Yard for specialised training by the Serious Frauds Office and the corruption specialists in the FBI. This has not been replicated in the case of the Hawks who are regarded as a police unit in their structure and operations.

Independence, the ability to act without fear of the powerful, favour to the friendly or prejudice to the public, is the defining characteristic of a truly effective anti-corruption entity. The wherewithal to withstand political interference, nefarious influences and all attempts to derail investigations is at the core of successful corruption busting. The Hawks are not appropriately equipped or located to operate at the same level of independence from the executive as the Scorpions were able to achieve. This difference is due to the contrasting ethos of a police unit and particularly to the Scorpions reporting lines in the NPA ending at the office of the NDPP, (an independent functionary), while those in SAPS end with the Minister and the National Commissioner of Police, neither of whom is independent or even legally required or politically expected to be so. The Commissioner is the accounting officer of the Hawks. This feature of the structure tends to undermine the independence of the latter.

The guaranteeing of resources for the anti-corruption entity is required in order to prevent feral or venal elites from cutting off or limiting funding to the anti-corruption entity by adjusting its resources, infrastructure, personnel complement and accommodation. Proper resourcing is clearly a *sine qua non* of success. The Hawks leadership has complained to parliament that the offices occupied by the Hawks are not fit for human habitation. *Esprit de corps* and the necessary will to take on the corrupt are difficult to generate in any under-resourced or demoralised anti-corruption entity. The existence of numerous vacancies within the ranks of

the Hawks exacerbates its inefficiency and ineffectiveness while also undermining *esprit de corps*.

Given the history of the dissolution of the Scorpions, the last of the STIRS criteria, security of tenure of office, is particularly important in SA. Without security of tenure for all of its key personnel, the anti-corruption entity is vulnerable to attack or even closure. Protection of personnel who take on powerful people who are alleged to be involved in corrupt activities is essential to the survival of any anti-corruption entity worth its salt. Quite the opposite has occurred in the cases of General Anwa Dramat, who was eased into a severance package after he took an interest in obtaining the Nkandla dockets and General Johan Booysen, the former head of the Hawks in KwaZulu-Natal (KZN). The latter has accepted an early retirement package after a long and exhausting battle to retain his position.

By fashioning the research of the OECD into the STIRS criteria the Constitutional Court has developed the jurisprudence concerning the combating of corruption in a remarkable way that holds lessons for the entire world and in particular in emerging constitutional states in which corruption is a real and present danger to the survival of the state. The 'strong institutions' UN Sustainable Development Goal is dependent upon STIRS compliance in all countries that aspire to the achievement of the SDGs.

The operative orders in the *Glenister II* appeal to the Constitutional Court were that the Hawks legislation was not constitutionally compliant in that the Hawks were not an effective and adequately independent anti-corruption entity as required by the international obligations of the country and its constitutional commitment to upholding human rights by respecting, protecting, promoting and fulfilling the rights guaranteed to all in the Bill of Rights. Parliament was given 18 months to take appropriate remedial action to address the unconstitutional aspects of the structural and operational features of the Hawks.

The court was not prescriptive about the steps required. Showing due deference to the other branches of government and with proper regard to the doctrine of the separation of powers, the court asked only that parliament make the decision of a reasonable decision-maker in the circumstances.

Some of the relevant circumstances are encapsulated in the STIRS criteria; others have to do with the state of play in society at any given time. A calm and quiet society in which the incidence of corruption is rare obviously requires different anti-corruption machinery of state to one in which corruption is a national pastime of crippling proportions. Sledge-hammers are not used for killing fleas, but, on the other hand, knives ought not to be taken to gunfights.

It was clear to all involved in the process of preparing remedial legislation to give effect to the ruling in *Glenister II* that the political will to rethink attitudes toward fighting the corrupt properly with appropriate machinery of state is lacking. Instead, as little as possible was done to make the Hawks constitutionally compliant in a process that involved the 'tweaking' the legislation relating to the Hawks as minimally as possible. They remain in the SAPS, their accounting officer

is still the National Commissioner of Police and the opportunities for executive influence and interference patent in the structure of the bill are left unaddressed. Objections to its constitutionality fell on deaf ears in Parliament, the Presidency, at the Human Rights Commission and at the Office of the Public Protector.

The supposedly remedial bill was an attempt to do as little as possible to the existing structure and functioning of the Hawks while paying lip-service to compliance with the binding effect of the judgment of the Constitutional Court in *Glenister II* and its introduction of the STIRS criteria into the law of the land. Despite energetic tweaking during the parliamentary process, the remedial act retained many features that were not STIRS compliant.

This inadequate response by government was not acceptable to the Helen Suzman Foundation (HSF) and to Glenister himself. Both moved to impugn the constitutionality of the amending legislation immediately it was made law. Glenister objected to the location of the Hawks within the SAPS in the circumstances in which the Hawks, the SAPS and the executive branch of government found themselves at the time of the passage of the legislation through the law-making process. He adduced expert evidence which expressed the opinion that corruption is endemic in the executive, the police and the Hawks. HSF took a narrower and more technical approach by not assailing the location of the Hawks in SAPS but by comparing the provisions of the new legislative dispensation for them with the STIRS requirements laid down in *Glenister II*—points also made by Glenister.

Working separately, both the HSF and Glenister initially made applications for direct access to the Constitutional Court. Their approaches were rebuffed without a hearing on the basis that it was not in the interests of justice to give direct access.

Still working separately, they then applied to the Western Cape High Court for urgent relief aimed at challenging the constitutionality of the new legislation and at making the anti-corruption machinery of state constitutionally compliant. Their matters were heard together on the semi-urgent roll by three judges. HSF met with limited success in that court, while Glenister's case was dismissed and his efforts to introduce evidence of the relevant circumstances militating against keeping the Hawks within the SAPS were struck out with punitive costs awarded against him. The Court regarded the opinion evidence pertaining to the circumstances described above as vexatious and irrelevant.

None of the parties were satisfied with the judgment and all appealed to the Constitutional Court; the HSF also sought confirmation of the invalidity orders it had won. Government persisted in defending the constitutionality of the new legislation, contending that it was compliant with the Constitution and with the STIRS requirements laid down in binding fashion in *Glenister II*.

It is necessary to look to the language employed in the majority judgment in *Glenister II* to determine whether the amending legislation, which was impugned for its lack of constitutionality in *Glenister III*, met the required STIRS standards.

There are three passages in the majority judgment which require careful examination:

1. 'The creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was not *in itself* unconstitutional and thus the DPCI legislation cannot be invalidated *on that ground alone*' (emphasis supplied).

The phrases 'in itself' and 'on that ground alone' should be read to have meaning. The Constitutional Court does not drop meaningless phrases into serious judgments it hands down on topics as fraught as the highly contested adequacy of the Hawks as an appropriate anti-corruption entity. These phrases suggest, so it was argued by Glenister, that, in the current circumstances in which corruption has infested both the criminal justice system and the executive branch of government, the police is not a legally appropriate institution in which to house the anti-corruption machinery of state. Somewhat presciently, the argument was that if the police and the Hawks are working for a feral elite, then the STIRS criteria, especially independence, cannot be met.

Subsequent allegations of state capture and the suborning of police leadership would appear to bear out the argument raised, without success, by Glenister.

2. 'Now plainly there are many ways in which the State can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This court will not be prescriptive as to what measures the State takes, as long as they fall within the range of possible conduct that a reasonable decision-maker *in the circumstances* may adopt. A range of possible measures is therefore open to the State, all of which will accord with the duty the Constitution imposes, *so long as the measures taken are reasonable*' (emphasis provided).

Glenister regarded the words 'in the circumstances' and 'so long as the measures taken are reasonable' as pregnant with meaning. He argued that O'Regan J had illustrated the position definitively in her judgment in the matter of *Rail Commuters Action Group* when she wrote:

> What constitutes reasonable measures will depend on the circumstances of each case. Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer—the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result.

This important dictum of a unanimous court were not properly taken into account and applied, as it should have been, in the judgments in *Glenister III*. In *Glenister II* it was footnoted with approval.

3. 'This court has indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. This was said in connection with the appointment procedures and security of tenure of magistrates. By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the

> public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for its independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence'.

Glenister argued that the Constitutional Court in this passage had made it clear that public belief in the independence of the corruption-fighting entity was a prerequisite for a finding that the entity was in fact independent.

Measured against the STIRS requirements spelt out by the Constitutional Court for a properly independent anti-corruption authority, Glenister was concerned that the amending legislation had not solved significant problems in the establishment of the Hawks, and set out to address these issues in his founding papers filed of record in *Glenister III*. He laid particular emphasis on the question of public perception of the independence of the Hawks.

In pursuit of his argument that the entire scheme of the amending legislation failed the appropriate test of independence, Glenister set out to illustrate that the scheme did not fall within the range of possible conduct that a reasonable decision-maker could adopt *in the circumstances*, and that accordingly, parliament had not adopted *reasonable measures* to respect, protect, promote and fulfil the rights in the Bill of Rights. He did so by reference to a host of incidents and events that evidenced corruption, and by reference to expert testimony premised upon evidence of corruption, and public perception thereof. The respondents who opposed the application had chosen not to respond to this evidence, but requested the High Court to strike it out. The High Court had done so with a punitive costs award, and the striking-out order formed part of the subject matter in Glenister's application for leave to appeal.

Early in the Constitutional Court hearing of argument in *HSF/Glenister III*, there were indications in questioning from the bench that at least an element of the bench saw the judgment in *Glenister II* quite differently from the way in which Glenister had interpreted it. The difference in interpretation of what the express terms of the judgment meant, is starkly illustrated in a comparison of the judgment of the majority in *Glenister III*, penned by Mogoeng CJ, and a minority judgment written by Froneman J. Extracts from the majority judgment that portray its interpretation of *Glenister II* are enlightening:

> The allegations in the struck-out material amount to reckless and odious political posturing or generalisations which should find no accommodation or space in a proper court process. The objective appears to be to scandalize and use the court to spread political propaganda that projects others as irredeemable crooks who will inevitably actualise Mr. Clem Sunter's alleged projection that South Africa may well become a failed state. This stereotyping and political narrative are an abuse of court process. A determination of the validity of the DPCI legislation does not require a resort to this loose talk.
>
> These assertions or conclusions are scandalous, vexatious or irrelevant. Courts should not lightly allow vitriolic statements of this kind to form part of the record or as evidence.

> And courts should never be seen to be condoning this kind of inappropriate behaviour, embarked upon under the guise of robustness.

In dealing with Glenister's well-reasoned attack on the location of the Hawks within the police service as being incompatible with the independence requirement laid down in *Glenister II*, the judgment is equally strident:

> Mr. Glenister seeks to rely on evidence of public perception of corruption sourced from the TNS statement of 22 October 2012. At that time the public perception of corruption existed for a period of over six years, although there had since been a marginal improvement. Reliance is also placed on the ISS monograph which was published five months after the delivery of *Glenister II* and could not therefore have been based on public perception that only came into being after *Glenister II*. That means that when *Glenister II* was decided in 2011, the high levels of corruption Mr. Glenister now seeks to inform the court about were already an established fact. The inescapable consequence of the age of these high levels of corruption in the private and public sectors, including SAPS, is that this court failed to have due regard to the public perception of corruption in SAPS at the time we decided *Glenister II*. Its decision that the mere location of the DPCI within SAPS cannot invalidate the DPCI legislation was in effect wrong. *Glenister II*'s decision on location is on this logic not one that 'a reasonable decision-maker in the circumstances may adopt'. Mr. Glenister can therefore only be understood to be suggesting that the decision about the location of the DPCI in *Glenister II* was wrong.

The majority upheld the striking-out of the evidence sought to be adduced by Glenister, and with it, the basis for his attack on the location of the Hawks within the police service. A new ground for striking out was created: 'Odious political posturing'. It accordingly dismissed his application for leave to appeal against the order dismissing his main application to have the amending legislation declared unconstitutional, and the striking out of the evidence he sought to adduce.

Froneman J, on the other hand, in his minority judgment in *Glenister III* adopted a more nuanced approach to the case sought to be presented on behalf of Glenister:

> The main judgment finds that *Glenister II* foreclosed both the constitutional challenge that Mr Glenister sought to bring against the SAPS Amendment Act, as well as the evidence that he sought to adduce to sustain that challenge. I disagree. *Glenister II* does neither. If that decision needs to be revisited it must be done appropriately with reasoned discussion and justification for any change. It should not be done by a reinterpretation of its meaning that narrows its original scope without explaining the necessity for the change.

With reference to the manner in which *Glenister II* had dealt with the constitutional obligation to establish an anti-corruption authority, Froneman J recorded the following:

> The judgment does not state that the creation of a separate corruption-fighting unit within SAPS will withstand any constitutional attack. It says that something else will be needed in order to sustain that kind of constitutional challenge. Mr. Glenister sought to show that the additional factor was that the current extent of corruption in our body politic was of the kind that showed that the location of the DPCI within SAPS was not a possible option for a reasonable decision-maker. In other words, he contended that this evidence showed that locating the DPCI within SAPS meant that it could not have

> 'sufficient attributes of independence to fulfil the functions required of it under the Bill of Rights'.
>
> His attempt to do so fell squarely within the range of approaches left open by *Glenister II*.

Froneman J summed up his assessment of the dicta in *Glenister II* as they applied to the case presented in *Glenister III* as follows:

> To sum up: *Glenister II* did not hold that there could be no challenge to the location of the DPCI within SAPS, only that the mere fact of its location within SAPS was not sufficient to sustain a constitutional challenge. Nor did it lay down that no evidence may be adduced to support a constitutional challenge that was based on something more than the fact of DPCI's location within SAPS. *Glenister II* does not preclude the presentation of evidence of the context within which the range of possible options open to a reasonable decision-maker should be assessed. Nor does it prohibit evidence about the public perception of corruption within that context. Mr. Glenister sought to introduce additional evidence of corruption in our body politic and the public perception of the extent of that corruption in order to bolster his constitutional challenge that, currently, it is not a reasonable option to locate the DPCI within SAPS. *Glenister II*, I repeat, allowed him to do that.
>
> The main judgment finds that the evidence of public perception that Mr. Glenister sought to present showed that the perception already existed at the time of *Glenister II* and hence this evidence takes the matter no further than what that judgment already decided. I disagree. First, the evidence presented in this matter is not all the same as that which was before the court in *Glenister II*. Second, the challenge here is predicated on what *Glenister II* decided. The legal ground for the challenge here was created by *Glenister II* and thus the challenge is not precluded by the application of some kind of res judicata principle.
>
> It is one thing for this court to find that the case Mr. Glenister presented was not convincing, but quite another to say that he is prevented by our past decision from doing so. If there are aspects of *Glenister II* which need to be revisited or clarified it must be done explicitly, not through a reinterpretation that is at odds with what the judgment actually says.

It is perplexing that two judicial interpretations of the same judgment of the Constitutional Court made by justices of that court could be so diametrically opposed, particularly when it is considered that the majority judgment in *Glenister II* was penned by Moseneke DCJ and Cameron J, with whom Froneman J amongst others concurred, while Moseneke DCJ concurred with the majority judgment in *Glenister III, and* Cameron J concurred with Froneman J's minority judgment.

Remarkably, but perfectly properly so, the Chief Justice, who wrote the majority judgment in *Glenister III*, was in the minority in *Glenister II,* a minority which had no difficulty with the constitutionality of the original legislation creating the Hawks. Regrettably for the effective combating of corruption and for Glenister, he failed to persuade the majority with his argument that an independent corruption-fighting entity in SA had, in the prevailing circumstances, to be situated outside of the police service.

The manner in which the majority in *Glenister III* has gone about interpreting the passages quoted from *Glenister II* in the preceding section does not stand up to

legal or logical scrutiny. It is perhaps informed by a sense of protectiveness toward the executive, an underlying executive-mindedness or possibly judicial unwillingness, as at November 2014, to face the fact that the body politic in SA is indeed seriously corrupt. Subsequent allegations of state capture, The Public Protector's *State of Capture* report and the exposure of ever more skulduggery in high places via the so-called '#Guptaleaks' would suggest that the majority may now regret its unwillingness to engage with the hard facts included in the 'odious political posturing' it perceived back then. Had the *Nkandla* judgment, for example, preceded the hearing in *Glenister III,* the expert testimony put up by Glenister may not have fallen on such barren ground.

The approach of the minority, as encapsulated in the passages from the judgment of Froneman J quoted above, is preferable because it does not have the effect of possibly painting the court into a corner as the majority judgment does.

Justice Van der Westhuizen, who sat only in *Glenister I and III,* placed an endnote on his separate dissenting judgment:

> *End note*
>
> [220] Corruption threatens the very existence of our constitutional democracy. Effective laws and institutions to combat corruption are therefore absolutely essential. It is the task of the courts — and this court in particular — to ensure that legal mechanisms against corruption are as trustworthy and tight as possible, within the demands and parameters of the Constitution.
>
> [221] But courts can only do so much. A corruption-free society can only develop in the hearts and minds of its people — particularly the ones occupying positions of political and economic power. We need dedication to the spirit and high aspirations of the Constitution. Institutions are tools designed to help people realise their ambitions. Much dedication is required on the part of those handling the tools.
>
> [222] Of course the structure of our institutional watchdogs must be made as immune to corruption as possible. But even the most sophisticated institutional design will require the exercise of discretion and therefore integrity on the part of — and trust in — the office bearer. Thoroughly closing all perceived loopholes will guarantee little. The more procedures and processes we put in place to safeguard against corruption, the more plausible the deniability we give to a corrupt actor if all the technical boxes have been ticked. Generally, abstract institutional designs cannot be corrupt. As we know, people can be.

The task of ensuring that legal mechanisms are as tight and trustworthy as possible cannot be achieved if the court closes its eyes to 'the circumstances' as envisaged in *Glenister II* and ignores the perceptions of the public which are regarded as critical in the same judgment. The oversight functions of the legislature and its constitutional duty to hold the executive and Chapter Nine Institutions to account should be harnessed in the interests of creating the climate in which the public can indeed trust the effectiveness of the STIRS criteria because they are rigorously in place, and not because minimal lip-service is paid to them.

The current work rate of the Hawks is considerably below that of the Scorpions and even the Hawks themselves in the early years of their existence. The Hawks do not comply properly with a single element of the STIRS criteria laid down by the

constitutional court in *Glenister II*. The attempt in *Glenister III* to render the legislation as amended constitutionally compliant has been a failure given the matters that have arisen and the developments that have occurred since the judgment was delivered in November 2014.

The necessary sapiential authority or 'clout' is simply absent in the leadership and operations of the Hawks. The Hawks are not specialised, they have not received appropriate training, their independence is highly questionable, they are not properly resourced, The experiences of Dramat, Sibiya (also controversially implicated in the Zimbabwean rendition case) who were hounded out of leadership positions in the Hawks and Booysen, persecuted into early retirement by false charges that he led a 'death squad' in Durban, show that they do not enjoy security of tenure of office. Even the fate of Dramat's successor Ntlemeza and his professional demise are indicative of this weakness in the legislation. The abusive manner in which the Hawks have participated in the persecution of the former Minister of Finance, Pravin Gordhan, and others is, deplorably so, proof of their lack of independence.

In short, the Hawks currently do not comply with any of the criteria laid down in *Glenister II* for their effective structural and operational performance requirements. Hindsight is an exact science: with the benefit of hindsight, the Constitutional Court majority in *Glenister III* and those in the minority who did not consider that the gravity of the situation was a circumstance justifying the removal of the anti-corruption authority from the SAPS, ought surely to be concerned that their positions need to be revisited. It is also up to the legislature, as the oversight body which holds the executive accountable, to bring the situation into line with what the law requires which is a STIRS compliant anti-corruption entity that no self-respecting democracy should be without.

A private members' bill to remediate the legislation is a possibility, as is a favourable report to parliament by the Constitutional Review Committee of the National Assembly. Lobbying and advocacy to achieve the goal of a STIRS compliant anti-corruption entity are the business of all who seek a corruption-free world.

CHAPTER 9

The Criteria by which to Evaluate Anti-Corruption Structures and Operations

Corruption is often, somewhat inaccurately, called a 'victimless crime'. As we have seen, corruption that involves misappropriation of public funds and assets can best be described as 'theft from the poor'. This position appertains because projects for the uplifting and support of the poor are delayed or abandoned when corruption is rife. Nevertheless, corruption is a killer and the extent to which it is present in the world does need to be measured, as accurately as possible. This measurement is in order to assess the size of the challenge it poses and to organise counter-measures against the corrupt that are equal to the task at hand.

Because corruption is effected stealthily, and its victims are often unaware of its perpetration, it is a phenomenon that is difficult to measure as well as to counter effectively. There are however institutions that make it their business to measure corruption and the prevalence of corruption is always a way of gauging the success of anti-corruption operations and structures.

We have already encountered the Fragile States Index in this book, in the context of failure of the state being the ultimate effect of corruption that is rife in society.

Transparency International is based in Berlin and has chapters in over 100 countries. It is the mission of Transparency International (TI) to rid the world of corruption. The Transparency International Corruption Perception Index (CPI) is a comprehensive measure used to rank 180 countries and territories around the world by their perceived levels of public sector corruption. The Index relies on the perceptions of business-people and experts. The 2019 analysis shows corruption is more pervasive in countries where big money can flow freely into election campaigns and where governments listen only to the voices of the wealthy and the well-connected.[1]

The Transparency International Corruption Perceptions Index 2019 reveals a staggering number of countries are showing 'little' to 'no improvement' in tackling corruption. The TI analysis also suggests that reducing big money in politics and promoting inclusive political decision-making are essential to curb corruption.

According to its Executive Summary, the 2019 CPI scores 180 countries and territories by their perceived levels of public sector corruption, according to experts and business-people. 100 is very clean and 0 is highly corrupt

TI points out that in the last year, anti-corruption movements across the globe gained momentum as millions of people joined together to speak out against corruption in their governments. Protests from Latin America, North Africa and Eastern Europe to the Middle East and Central Asia made headlines as citizens

marched in Santiago, Prague, Beirut, and a host of other cities to voice their frustrations in the streets. From fraud that occurs at the highest levels of government to petty bribery that blocks access to basic public services like health care and education, citizens are fed up with corrupt leaders and institutions. This frustration fuels a growing lack of trust in government. It further erodes public confidence in political leaders, elected officials and democracy. The current state of corruption speaks to a need for greater political integrity in many countries. To have any chance of curbing corruption, governments must strengthen checks and balances, limit the influence of big money in politics and ensure broad input in political decision-making. Public policies and resources should not be determined by economic power or political influence, but by fair consultation and impartial budget allocation according to the views of TI.

Its commitment to 'strengthening checks and balances' is one that is consonant with the theme of this book. A STIRS compliant anti-corruption entity in every state would be the realisation of UN SDG #16 insofar as countering corruption is concerned. In reality, the world has a long way to go to reach that point.

The top countries on TI's latest index have scores in the range of 85 to 87/100: they are, not unexpectedly, Denmark, New Zealand, Finland, Singapore, Sweden and Switzerland.

At the other end of the scale the usual suspects gather with scores between 9 and 16/100 on the index: Venezuela, Yemen, Syria, South Sudan and, bottom, Somalia.

Perhaps the most thorough measure of what it calls 'the absence of corruption' is to be found in the work of the World Justice Project (WJP), a Washington-based, Gates-Foundation-sponsored but independent initiative to promote the rule of law in the world. The definition of the rule of law used by the WJP is an instructive one that is worthy of repetition.

According to the WJP, the rule of law has four main elements:

1. *Accountability*
   The government and private actors are accountable under the law.
2. *Just laws*
   The laws are clear, publicised, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.
3. *Open government*
   The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient.
4. *Accessible and impartial dispute resolution*
   Justice is delivered timeously by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the make-up of the communities they serve.

The *World Justice Project Rule of Law Index* claims to be the world's leading source for original, independent data on the rule of law. It covers 128 countries and jurisdictions and is accordingly not as broad as the work of TI. The Index relies on national surveys of more than 130 000 households and 4 000 legal practitioners and experts to measure how the rule of law is experienced and perceived worldwide.[2]

The index is based on eight factors, the second of which is called 'absence of corruption' by those who compile the index. This is how they explain their approach:

2. Absence of Corruption

Factor 2 of the WJP Rule of Law Index measures the absence of corruption in government. The factor considers three forms of corruption: bribery, improper influence by public or private interests, and misappropriation of public funds or other resources. These three forms of corruption are examined with respect to government officers in the executive branch, the judiciary, the military, police, and the legislature.

2.1. Government Officials in the Executive Branch do not use Public Office for private gain.

This factor measures the prevalence of bribery, informal payments, and other inducements in the delivery of public services and the enforcement of regulations. It also measures whether government procurement and public works contracts are awarded through an open and competitive bidding process, and whether government officials at various levels of the executive branch refrain from embezzling public funds.

2.2. Government Officials in the Judicial Branch do not use Public Office for private gain.

Measures whether judges and judicial officials refrain from soliciting and accepting bribes to perform duties or expedite processes, and whether the judiciary and judicial rulings are free of improper influence by the government, private interests, and criminal organizations.

2.3. Government Officials in the Police and the Military do not use Public Office for private gain.

Measures whether police officers and criminal investigators refrain from soliciting and accepting bribes to perform basic police services or to investigate crimes, and whether government officials in the police and the military are free of improper influence by private interests or criminal organizations.

2.4. Government Officials in the Legislative Branch do not use Public Office for private gain.

Measures whether members of the legislature refrain from soliciting or accepting bribes or other inducements in exchange for political favours or favourable votes on legislation.

The Absence of Corruption Factor in The WJP 2020 Rule of Law Index shows some worrying trends. Over the past year only 21% of countries were able to show an improvement, while 40% of countries declined. Over the past five years the comparable figures were 42% and 49% respectively. This indicates that too many countries are treading water and too few are improving their position in the world when it comes to measuring the absence of corruption.

Perhaps the most useful and user-friendly aspect of the work that goes into the WJP Rule of Law Index is the publication of spider graphs that are created to give a

'snapshot' of the situation in any given country in any given year. The size of the 'spiderweb' in any spider graph is a compelling indicator: the larger the web, the better off the health of the rule of law in the country concerned, the smaller the web, the worse. One of the points on each web is inserted in the web to show the level of absence of corruption in the country under consideration.

While fewer countries are surveyed by the WJP, its work is more comprehensive and detailed than that of the TI's CPI. The results are very much the same; the identical countries occupy places in the top and bottom ends of the scale even though there are more countries in the TI survey.

The trends and scores will vary from year to year. Recent trends suggest that there is no room for complacency when it comes to countering the corrupt. Three google searches on 'fragile states index', 'corruption perception index' and 'Rule of Law Index' will enable the reader to engage with the most recently available research into measuring corruption and thereby the efficacy of steps taken to counter it in the various countries that are the subject matter of the research.

It is widely believed in the world of business that: 'If you can measure it, you can manage it'. Applied to the countering of corruption, it is prudent to suggest that the absence of corruption is a measure worth pursuing until the mission of TI is achieved and the Rule of Law spider graphs are all of healthy proportions.

The FACTI Panel Interim Report published on 24 September 2020 gives the most up to date measurements as:[3]

Estimates of the drain on resources

- $500–$600 billion corporate tax revenue a year lost from profit-shifting by multinational enterprises
- $7 trillion of private wealth is hidden in haven countries
- 10% of world GDP may be held in offshore financial assets
- $20–$40 billion a year estimates in bribes received
- 2.7% of global GDP in money laundering by criminals

A great deal of work is required to reduce these estimates.

CHAPTER 10

To Be or Not to Be—an International Anti-Corruption Court

It is necessary to post a disclaimer at the start of this chapter. The NGO which promotes the idea of establishing an International Anti-Corruption Court (IACC) is called Integrity Initiatives International (III) and is based in Boston. Both Justice Richard Goldstone, a trustee of Accountability Now, and the author are on the Board of III. We are accordingly firmly in the camp that favours the creation of the IACC as a companion institution to the International Criminal Court (ICC). KAS remains sceptical about the chances of creating the political will to set up a viable IACC. That will was mustered for the ICC which was formed pursuant to the adoption of the Rome Statute which has been in force since 2002.

The ICC has international jurisdiction, on the basis of the doctrine of complementarity, over crimes against humanity, war crimes, aggression and genocide. Its structure, statute and style of operation could easily be used and adapted as a superb precedent for the statute creating the IACC. The workings of the ICC have recently been reviewed; the lessons to be learned from that review can obviously be used to get the IACC up and going in a manner that seeks to avoid some of the pitfalls that may have been part of the history of the ICC. As the mandate of the ICC is so very different to that of the proposed IACC, it is not thought prudent or even expedient to expand the jurisdiction of the ICC to encompass the crimes involved in grand corruption.

The burning question is whether the necessary political appetite for the establishment of an IACC can be generated in a world in which the achievement of the UNSDGs seems ever more remote as the coronavirus pandemic sweeps the world in a way that is likely to be history changing. The leadership of III was quick to point out that the pandemic would lead to a feeding frenzy on the part of the corrupt in high places and that impunity is the likely outcome of the frenzy. Writing in the *Boston Globe* Judges Wolf (the founder of III) and Goldstone point out:[1]

> Very little is certain about the coronavirus, and we are only judges, not prophets. However, we can confidently predict that the response to the pandemic will be a bonanza for kleptocrats — an opportunity for the corrupt leaders of many countries—to further enrich themselves.
>
> Governments are poised to provide trillions of dollars to counter the pandemic, without even the usual, often ineffective, safeguards to assure that the funds are properly spent. The coronavirus will, therefore, provide additional compelling proof that the world needs an *International Anti-Corruption Court* to punish and deter kleptocrats who enjoy impunity in the countries they rule.
>
> Corruption has devastating consequences for human health. As the *United Nations High Commissioner for Human Rights said in 2013*: 'Corruption kills … The amount of

> money stolen through corruption is enough to feed the world's hungry 80 times over … Corruption denies them their right to food, and in some cases, their right to life.[2]

After recounting the history of malfeasance around previous health crises they continue:

> Grand corruption does not flourish because of a lack of laws. There are 187 nations party to the *United Nations Convention Against Corruption*.[3] Almost all of them have laws prohibiting extortion, bribery, money laundering, and misappropriation of national resources. They also have an international obligation to enforce those laws against their corrupt leaders. However, kleptocrats enjoy impunity in their own countries because they control the administration of justice. They will not permit the prosecution and punishment of their collaborators and themselves.
>
> Therefore, an IACC is essential to serve as a court of last resort, providing a forum for enforcing existing national laws, or new uniform international counterparts, against kleptocrats. The IACC would be staffed by expert investigators and receive evidence from private companies that are often employed to trace illicit assets. It would employ prosecutors experienced in developing and presenting international cases, and judges with the demonstrated ability to preside in complex criminal proceedings. In addition to incarcerating kleptocrats, it would recover the ill-gotten gains laundered in countries that join the IACC.
>
> The IACC would operate on the principle of complementarity. This means that the IACC would exercise its authority to prosecute only if a country was found to be unable or unwilling to prosecute its leaders itself.
>
> In essence, the IACC would assure that there is a court in which kleptocrats will be punished. Imprisonment of corrupt leaders will create opportunities for them to be replaced by honest officials who are dedicated to serving their citizens. It will also deter other kleptocrats tempted by greed to commit crimes of corruption. One of [former Angolan] President dos Santos's last acts before leaving office was to give immunity from prosecution to his family and himself, demonstrating that kleptocrats fear being punished and, therefore, are capable of being deterred.
>
> The proposed IACC is gaining support at an accelerating rate. *Colombia* and *Peru* are leading a campaign to have the United Nations commit to creating the court at a 2021 special session on corruption. Other supporters include a Nobel Peace Prize laureate, members of the US Congress, leading nongovernmental organizations, and courageous young people whose indignation at grand corruption has ousted kleptocrats in Ukraine and other countries.
>
> It is unfortunate that the IACC does not yet exist to deter kleptocrats from profiting from the coronavirus pandemic. When their crimes are eventually discovered, their impunity will prove to be intolerable and unsustainable. There is, therefore, reason to hope that one of the few positive things to emerge from the pandemic will be the creation of the IACC.

It was not the III leadership which first introduced the notion of an IACC to the conference goers whose deliberations provide the inspiration for this book. At the Johannesburg conference which ended on 24 November 2016, Mary-Jane Ncube, then serving as the Executive Director of TI-Zimbabwe, first spoke of the need for an IACC by relating a tale from Uganda in the following terms:

> 'Untouchables.' Come rain, come shine, they're never going to court, not while there's somebody close to them in power. That's because of the politics involved.
>
> The words of a Prosecutor in the Anti-Corruption Court, Uganda, May 21, 2013

This Court is tired of trying tilapias when crocodiles are left swimming.

The observation of Justice Bosco Kautsi, former head of the Anti-Corruption Court, Uganda, during a ruling convicting an engineer during the Commonwealth Health Heads of Government Meeting scandal, June 29, 2010.

Grand corruption perpetrated by the elite protected by or involving political actors needs an international response because it undermines human rights, by unlawfully interfering with resources that should be available to realize fundamental rights such as the right to health, education, food, water and energy. Grand corruption occurs when politicians and state agents mandated to make and enforce the law in the name of the people, are misusing this authority to sustain their power, amass and protect ill-gotten wealth and status. Whether it is grand corruption through illicit appropriation for private gain or petty corruption that renders access to services costly for ordinary citizens because of bribes, corruption has disastrous consequence on the exercise of fundamental rights. In addition, it breeds impunity that is in direct defiance to the rule of law and accountability because it undermines the very institutions created to eradicate it, such as law enforcement and the judiciary.

At the second Entebbe conference which ended on 19 October 2018, Justice Richard Goldstone spoke on the IACC. What he said has been adapted by him and edited for this book and has been brought up to date by his thoughts on the impact of the current pandemic on kleptocrats and state capturers busy in the field of grand corruption:

Global anti-corruption initiatives

At the outset, I should state that I am a member of the board of an NGO established in 2016 that is supporting the establishment of a permanent International Anti-Corruption Court. It would have similarities to the International Criminal Court, but be quite separate from it. The NGO is called Integrity Initiatives International (III).

I should also mention that Paul Hoffman, an organizer of this conference in Entebbe, is a member of the International Committee of III.

I doubt that any nation is free from corruption. However, what III is concerned about is Grand Corruption, i.e. the abuse of public office for personal gain. It is also goes under the name of kleptocracy. It sometimes takes the form of state capture, a term of art that vividly describes the effect of rampant Grand Corruption.

In the great majority of cases those leaders involved in all forms of Grand Corruption enjoy immunity because they control the police, the prosecutors and the courts—or at least, some of them.

In 2016, more than 40 countries met in London for an Anti-Corruption Summit. They endorsed a Global Declaration Against Corruption that commits each of them to the proposition that 'the corrupt should be pursued and punished.' The Declaration emphasized the 'centrality' of the United Nations Convention Against Corruption ('UNCAC'), in which 181 countries have pledged to enact laws criminalising corruption and to enforce them even against their nation's leaders. Implicitly recognising that existing institutions and efforts have not been adequate, the participating governments committed themselves to 'exploring innovative solutions' to combat corruption.

Judge Mark Wolf, a senior Federal judge in Boston is the chairman and founder of III. In a recent article published in the Magazine *Daedalus* Judge Wolf said:

> 'It is estimated that trillions of dollars are paid in bribes annually and that the cost of all forms of corruption is more than 5% of global GDP. Developing regions lose ten times more to corruption than they receive in foreign aid. Illicit outflows of funds that developing countries desperately need total more than $1 trillion a year.'

The cost of corruption is not limited to poorer countries. For example, in 2011, Russia had the third largest outflow of illicit capital in the world. Bribery, theft, kickbacks, and corruption had cost the country $427 billion from 2000 to 2008.

Much to my regret, my own country, South Africa, in recent years, has suffered grievously from kleptocracy and state capture. That appears to be in the course of being reversed by the new administration of President Ramaphosa. A Commission of Inquiry into state capture, headed by the Deputy Chief Justice Zondo, has already heard hair-raising evidence on the machinations of the infamous Gupta brothers in collusion with former President Zuma and some members of his Administration.

Judge Wolf also quotes the United Nations High Commissioner for Human Rights, Navi Pillay, as saying in 2013 that:

> 'Corruption kills … The money stolen through corruption every year is enough to feed the world's hungry 80 times over … Corruption denies them their right to food, and, in some cases, their right to life.'

Nicholas Kristof of the *New York Times* reported in 2015 that:

> 'Grand corruption also has fatal consequences in other ways. In Sierra Leone one-third of the funds allocated to combat Ebola in 2014 could not be accounted for, although some of those funds were found in the bank accounts of health officials administering the program.'

I was staggered by my experiences some fourteen years ago with the corruption associated with the United Nations Oil for Food Program. That Program was set up to maintain the strong sanctions against the regime of Saddam Hussein whilst maintaining minimum standards of health and nutrition for the people of Iraq. The Program required that all the proceeds from the sale of Iraqi oil be paid into a bank account controlled by the UN. Those proceeds could only be used by Iraq to purchase humanitarian goods for its people and expressly no goods that could be used in the production of weaponry of any kind. The Program lasted for seven years, from 1996 until the US led invasion of Iraq in 2003. It involved some $110 billion of sales of Iraqi oil and the purchase with the proceeds of humanitarian goods—all under UN surveillance.

It was the largest effort to provide humanitarian relief in the history of the United Nations.

Many thousands of people were specially employed to work for the Program. Some were based in difficult circumstances in Iraq. Others were employed for a special new UN agency set up within the UN Secretariat in New York.

All of this was above the competence of the organization. The managerial weaknesses and lack of discipline were not uncommon within the Organization.

There were also the only too common demands for illicit payments and too many countries turning a blind eye to those practices. As the Program ran, so reports and rumours began to emerge of surcharges and kickbacks (i.e. bribes). And, so too, there were allegations of administrative failures and corruption, within the UN itself.

In the early part of 2004, the then Secretary-General of the UN, Kofi Annan felt obliged to set up a UN inquiry into the allegations. Paul Volcker was chosen to head the inquiry. I was one of the three members of the Committee.

We made it clear to the Secretary-General that it was bound to be an intrusive inquiry and that we would have to have access to all UN sources including his own. The

Secretary-General was in full agreement and remained true to his word. In the end we had a staff of over 70 people from 28 countries around the world.

From the beginning, Saddam Hussein abused the program. By 2000 he had insisted on a secret 'surcharge' of between 10 and 50 cents a barrel. The proceeds went to his account. Then, greater kick-backs were demanded for the purchase of humanitarian goods. Some of these payments were transported to Baghdad in $100 bills. Meticulous records were kept by the Iraqi Oil Ministry officials—no doubt to save their own lives. Some 4500 companies were involved—2200 of them paid bribes. The largest bribe was paid by the Australian Wheat Board. $420 million. In return, they received $1.2 billion worth of wheat contracts.

It is in that broad context that the NGO III is promoting the idea of an International Anti-Corruption Court. Like the ICC, it would be governed by complementarity. If countries investigated corruption in their own States, the Court would have no jurisdiction.

It is hoped that the least such a Court would achieve is pressure on countries to investigate allegations against their own leaders and so keep them from the Court.

Let me end this contribution to the conference by stressing that grand corruption is not only a problem on our Continent. It is a world-wide practice and it is more than time for appropriate action to be taken to contain it.

Updating my presentation to the 2018 Entebbe conference in 2020, I am pleased to report that the issues raised by III have not been still-born. A debate between the unpersuaded sceptics and those converted to the notion of the establishment of an International Anti-Corruption Court continues, both in the corridors of power and in the halls of academia. The optimum way of keeping up with the developments on this front is to visit the website of III which is www.integrityinitiatives.org.

Richard Goldstone
Former Justice of the Constitutional Court of South Africa

There is no good argument against bringing an end to the impunity of the powerful, those who enter politics to give vent to their greed. Whether this is done from grassroots level upward by voters who vote for politicians who serve the people rather than enrich themselves or by international pressure to create the IACC or indeed by both strategies, it is plain that the world will be a better place if the culture of impunity for kleptocrats is ended. If this can be achieved in individual countries by reforming anti-corruption machinery of state to render it STIRS compliant in both its structure and its operations, all well and good. If this is a bridge too far, the international community can and should bring pressure to bear on kleptocracies to submit themselves to the jurisdiction of an IACC on pain of being excluded from donor funding, World Bank and IMF loans and the benefits of being a member of the international community of nations in good standing.

It ought to be the ambition of every nation to take its rightful place in the community of nations. The political viability of that ambition is stunted mainly by the attitude of kleptocrats who persist in their corrupt ways.

CHAPTER 11

Identifying the Perpetrators of Corruption

In every corrupt transaction there are at least two parties, sometimes many more. Those involved can be classified as corruptors and corruptees. Those who propose the corrupt transactions are the corruptors and those who allow themselves to be corrupted by accepting the gratification involved in the crooked transaction are the corruptees.

Corrupt transactions, due to the wide nature of the definition of corruption as the abuse of public office for private gain, are, in effect, limitless in their ambit. Those involved in corruption are endlessly devising new and more imaginative ways of behaving corruptly so as to keep ahead of the efforts of law enforcement agencies and to challenge the imagination of courts called upon to try the corrupt for the crimes the investigators and prosecutors seek to pin on them. The dishonesty of the corrupt is of the essence of the crime that they commit.

Who then are the perpetrators of petty corruption?

Usually petty corruption occurs at the instance of an official seeking private gain from the abuse of the official power she or he holds by reason of employment in the public sector.

This is not to say that the corruptee is exempt from initiating the corrupt transaction. When the official is encouraged to cut corners, speed up processes or turn a blind eye to deficiencies in the process concerned, then the corruptor role is taken by the member of the public who offers an inducement to the official.

Conversely, when the official makes it clear, usually subtly so, that to get 'well lubricated' service a lubricant (usually in the form of money or some other form of gratification) is required, then the corruptor is the official and the corruptee the person who greases his or her palm.

Those involved in the lubrication activity that is generally classified as petty corruption are selfishly advancing their own agendas, but they are not deliberately subverting the order of the day in the state in which their transaction takes place. For this reason, those involved in petty corruption are not regarded by some analysts as being as dangerous as the kleptocrats and state capturers involved in grand corruption which has the potential of completely undermining the established order in the state in which it is perpetrated. So, for example, Professor Robert Rotberg, author of 'The Corruption Cure' has recently written on this subject:[1]

> There are two kinds of corruption—grand (or venal) and petty (or lubricating). The latter is more easily seen and experienced…
>
> Grand corruption is much more serious for citizens writ large, and for the fate of whole countries, even when individuals are less aware of their pockets being picked by officials of the state.

Professor Rotberg places kleptocrats among the venal, the grand corruptors:

> Kleptocracy destroys countries from within. Kleptocrats turn sometime democracies into criminal states that plunder national resources and national patrimonies, depriving citizens of their rights, their tax revenues and their ability to determine policy priorities.

The opportunities for petty corruption are limitless. They arise at the interface between citizen and public servant and can be most prevalent in situations in which an administrative discretion is exercised by the public servant. So, for example, a test for a driver's licence can be turned into a series of failures that only end when the palm of the testing official is 'lubricated' irrespective of the skill or lack of skill at driving of the person taking the driving test. The perpetrators of the well-worn 'cool-drink money' request at roadblocks have reached legendary status in Africa and elsewhere in the world.

Grand corruption most often finds expression in the efforts of kleptocrats to repurpose the state for their selfish and greedy purposes. The work of kleptocrats takes many and varied forms as is illustrated by the range of corrupt activities that have been exposed in recent years. Kleptocrats come in many guises: the pscyhopaths and sociopaths are joined by the venal and unprincipled; all of them share the belief that they can enjoy impunity by reason of the power they think they wield.

Transparency International celebrated 25 years of existence by compiling a list of its top twenty-five corruption scandals. The details of each scandal are available on the website of TI; this list may include items of particular interest to specific readers and was last updated by TI on 21 August 2019:[2]

> **Introduction**
>
> Twenty-five years ago, when Transparency International was founded, corruption was seen as the necessary price of doing business and something so deeply ingrained that exposing and fighting it was regarded as futile and even harmful.
>
> We live in a different world now: citizens, media and politicians across all regions actively condemn abuses of power. Such attitude change is partly due to exposure to past scandals and their consequences.
>
> We compiled a list of some of the biggest corruption scandals over the last 25 years that inspired widespread public condemnation, toppled governments and sent people to prison.* These scandals involve politicians across political parties and from the highest reaches of government, staggering amounts of bribes and money laundering of epic proportions.
>
> In the wake of many of these scandals, many governments and international bodies committed to or implemented anti-corruption reforms, counted and, in some cases, recovered losses.
>
> While much progress has been made to improve accountability, raise awareness about how corruption happens and change norms and perceptions, we still have a long way to go to learn from these scandals and fight corruption effectively.

After listing each scandal in no particular order TI provides the following taste of each of them:

Siemens: Corruption made in Germany

Did you know that certain bribes paid abroad were technically tax deductible for German companies until 1999? They could simply categorise them as 'useful expenditures', as long as those expenses were not incurred in Germany and there were no foreign state officials involved.

In 2006, however, it became clear that Siemens, one of Germany's biggest companies, was taking corporate bribery to a whole new level. For over a decade, it paid bribes to government officials and civil servants around the world, amounting to approximately US$1.4 billion. While corrupt decision makers profited, citizens in the affected countries paid the costs of overpriced necessities such as roads and power plants.

The company's transactions eventually caught the interest of authorities in several countries, including the US and Germany, which launched investigations and ultimately secured a historic sanction of US$1.6 billion.

Draining Nigeria of its assets

Sani Abacha was a Nigerian army officer and dictator who served as the president of Nigeria from 1993 until his death in 1998. His five-year rule was shrouded in corruption allegations, though the extent and severity of that corruption was highlighted only after his death when it emerged that he took between US$3 and $5 billion of public money.

In 2014, the US Justice Department revealed that it froze more than US$458 million in illicit funds that Abacha and his conspirators had hidden around the world. For years, Nigeria has been fighting to recover the stolen money, but companies linked to the Abacha family have gone to court to prevent repatriation.

Encouragingly, the secretive British tax haven of Jersey recently announced it was putting US$268 million, which had been stashed in a Deutsche Bank account, into an asset recovery fund that will eventually return the cash to Nigeria.

Fujimori's Peru: Death squads, embezzlement and good public relations

How does a former president get approval from two-thirds of his citizens while standing trial for human rights violations? Peru's Alberto Fujimori partly managed this by using over 75 per cent of the National Intelligence Service's unsupervised budget to bribe politicians, judges and the media.

Fujimori presented a clean image to the public during his presidency while he used death squads to kill guerrillas and allegedly embezzled US$600 million in public funds. After fleeing to Japan in 2000, he became the first elected head of state to be extradited to his home country, tried and convicted for human rights abuses.

With a sentence of more than 30 years in prison, Fujimori joins a long line of former Peruvian presidents who have been investigated or jailed for corruption.

Kadyrov's Chechnya: Bikers, boxers, bribes

Imagine having to pay a bribe to keep your job. Chechens have to do exactly that, every month. In Chechnya, everyone earning a wage pays an unofficial tax to an opaque fund controlled by the head of the republic, Ramzan Kadyrov.

While the fund helped build homes and mosques and provided international aid to Somalia, it also allegedly paid for Kadyrov's lavish 35th birthday party and the celebrities that attended it, a US$2 million boxing session with Mike Tyson and 16 motorbikes that Kadyrov very publicly gifted to a nationalist biker gang.

Some Chechens lose half their income to this fund, which collects US$648 to 864 million a year, roughly the equivalent of two thirds of Chechnya's budget. Kadyrov is also said to help himself to that national budget whilst committing human rights abuses that have led to sanctions from US authorities.

Shutting down competition in Tunisia

There are no Big Macs in Tunisia. That's because the McDonald's franchise was awarded to a business that didn't have connections to the ruling family and the government stopped the fast food chain from entering the country.

From 1987 to 2011, President Ben Ali created laws that meant companies needed permission to invest and trade in certain sectors.

This allowed him to shut competition out whilst letting 220 family businesses monopolise numerous industries, including telecommunications, transport and real estate. In 2010, these businesses produced 3 per cent of Tunisia's economic output, but took 21 per cent of the private sector profits. Unsurprisingly, the Ben Ali family amassed US$13 billion.

Tunisians paid a heavy price for this and missed out on employment opportunities, while new entrepreneurs and unconnected investors continued to fail.

Ben Ali fled the country in 2011 and his assets were auctioned off, but few restrictive laws have been repealed, and questionably-connected firms with privileged access continue to reinforce and profit from inequality.

Ukraine's Missing millions

A golf course, ostrich farm, private zoo and full-size Spanish galleon replica were just some of the attractions at Mezhyhirya, the multimillion dollar 137-hectare estate of Ukraine's former President Viktor Yanukovych.

Yanukovych and his family fled to Russia in February 2014 after civil unrest sparked deadly conflict claiming over 100 lives, including by sniper bullets. Three years after these tragic events, a Ukrainian court found Yanukovych guilty of high treason and sentenced him to 13 years in prison in absentia.

As he fled, Yanukovych left behind documents that showed how he financed a life of luxury at the expense of his citizens. Using nominees as frontmen in a complex web of shell companies from Vienna to London to Lichtenstein, Yanukovych allegedly concealed his involvement while syphoning off Ukrainian public funds for personal benefit.

In February, Swedish public broadcaster SVT reported that Yanukovych's shell company with a Swedish bank account received a US$3.7 million bribe in 2011 and executed two transactions with a total worth of US$18 million in 2007 and 2014.

Former President Viktor Yanukovych and his associates allegedly made US$40 billion in state assets disappear. So far, the Ukrainian government has recovered just US$1.5 billion.

Ricardo Martinelli's spy-game in Panama

Violation of privacy laws, embezzlement, abuse of authority and illicit association—former Panamanian President Ricardo Martinelli was facing a variety of charges in his home country, after the United States extradited him in 2018.

While in office from 2009 to 2014, Martinelli allegedly rigged tenders for public contracts, including those for meals and school bags, under Panama's largest social welfare scheme. Most notably, he is accused of having used public funds to monitor the phone calls of more than 150 people, including politicians and journalists.

A Panamanian court recently cleared him of all charges, after disallowing the evidence presented by prosecutors on a technicality. The court decision shows the extent of the judicial crisis the country is facing and raises serious concerns about judicial independence. The victims and the prosecution have stated their intention to appeal the verdict.

The 1MDB Fund from Malaysia to Hollywood

Authorities estimate that more than US$4 billion was embezzled in what is one of the world's biggest corruption schemes, 1MDB.

In 2009, the government of Malaysia set up a development fund, 1Malaysia Development Berhad (1MDB). Chaired by the former prime minister, Najib Razak, the fund was originally meant to boost the country's economy through strategic investments. But instead, it seems to have boosted the bank accounts of a few individuals, including the former prime minister himself, a fugitive financier and a US rapper.

Through a network of shell companies and layers of transactions, billions of dollars of development money was allegedly spent on luxury real estate in New York, paintings and gifts for celebrities, among other things.

More than US$700 million may also be held in Razak's private account, despite his claims that the money was a 'donation' from a Saudi prince. Razak is currently facing charges for misappropriation of public funds.

The Russian Laundromat (with a little help from Moldova)

According to a recent study, more than one-fifth of Russia's population lives in poverty, while 36 per cent are at risk of poverty. The Russian Laundromat, a massive money laundering scheme that siphoned off somewhere between US$20–80 billion in fraudulent funds away from public services and the citizens who need them most, could be one of the reasons why.

To move the money out of Russia, UK-registered shell companies issued fictitious loans to each other and Russian companies, fronted by Moldovan citizens, guaranteed them. Once the debtors failed to 'pay back' these loans, corrupt Moldovan judges fined Russian companies and ordered them to transfer funds to accounts in a Moldovan bank. From there on, the money flowed into Latvia and other EU banks where it was ultimately cleaned.

Formal investigations are currently underway in several countries and the banks involved—Moldindconbank, Danske Bank, Deutsche Bank and HSBC—are in hot water for failing to comply with anti-money laundering rules.

Spain's largest corruption scandal: Gürtel

Over the last 10 years, the Gürtel case has grown into to the biggest corruption scandal in Spain's democratic history, reaching all the way up to the president's office. At the centre, the complex scheme funnelled illicit donations and bribes to the then-ruling party in exchange for rigged government contracts.

If the name Gürtel doesn't sound very Spanish to you, that's no coincidence: it's the German translation of the surname of the businessman at the heart of the scandal, Francisco Correa, meaning 'belt' in English.

Correa eventually received a 51-year jail sentence, while a close ally and former treasurer of former president Mariano Rajoy was fined nearly US$50 million.

The scheme was discovered thanks to the help of Ana Garrido Ramos, a whistleblower who was also a key witness in this case, contributing to the collapse of the Rajoy government in June 2018.

Venezuela's Currencies of corruption

Less than 20 years ago, Venezuela was South America's richest country. Today, it's facing one of its worst political and humanitarian crises—and corruption has a key role in it.

The plundering of the state-owned oil company, PDVSA, is exemplary of the widespread corruption at the highest levels of government. Once the basis of Venezuela's wealth, the country's vast oil reserves ultimately filled the pockets of a small group of individuals.

With help from European and US banks, a group of Venezuelan ex-officials allegedly siphoned off US$1.2 billion from PDVSA to the US, exploiting the country's complicated currency exchange system that only allows certain people and companies to exchange currencies at the official, hugely inflated rate. Officials bought Venezuelans Bolivars on the black market, at an exchange rate of ca. 1:100 (in 2014). That means they could have bought 100 million Bolivar for $1 million. They then exchanged this money back at the official rate of 1:10, meaning they would get back $10 million—a tenfold increase. Two people involved in the scandal pleaded guilty last year, and investigators are currently looking into more details of the money laundering scheme.

The Panama Papers

Following a huge leak from the Panamanian law firm, Mossack Fonseca, the Panama Papers exposed the darkest secrets of the financial secrecy industry. The Panama Papers showed that Mossack Fonseca created 214 000 shell companies for individuals who wanted to keep their identities hidden. Behind the shell companies hid at least 140 politicians and public officials, including 12 government leaders and 33 individuals or companies who were blacklisted or on sanction lists by the United States government for offences like trafficking and terrorism.

Since the scandal erupted, several heads of government have resigned or faced prosecution, at least 82 countries launched formal investigations and Mossack Fonseca closed. As a result of the Panama Papers, several countries committed to ending financial secrecy, with at least 16 countries or international bodies achieving at least one substantial reform and approximately 23 countries recovering at least US$1.2 billion in taxes.

Maldives: Paradise lost

In the Maldives, tourism is the largest contributor to the economy—it's where the money is. So it should come as no surprise that the country's biggest corruption scandal is also linked to tourism. In 2016, Al Jazeera revealed that approximately US$1.5 billion was laundered through fake tourism investments in a scheme of astounding simplicity.

The money was allegedly transported to the Maldives in cash, approved by the financial authority and transferred to private companies, where it appeared as clean profits from tourism investments.

That's not the only case of dodgy tourism deals in the Maldives. Another scandal that came to light in 2018 saw more than 50 islands and submerged coral lagoons leased out to tourism developers in no-bid deals. At least US$79 million from the lease fees was embezzled into private bank accounts and used to bribe politicians. The scandal implicated local businessmen and international tourism operators as well as former president Abdulla Yameen, who allegedly received US$1 million in funds.

Teodorín Obiang's #LuxuryLiving in Equatorial Guinea

Teodorín Obiang's Instagram account celebrates #LuxuryLiving, showing off his mansions, million dollars' worth of Michael Jackson memorabilia and supercars. However, Obiang funds this lifestyle by embezzling funds from Equatorial Guinea where he serves as vice president to his own father.

This oil-rich country has the highest per capita income in Africa, but about three-quarters of its population lives in poverty. Since 1979, the ruling Obiang family, along with their cronies, have stolen billions of dollars from the people.

As the most conspicuous and international spender in this kleptocracy, justice caught up with Teodorín Obiang several times. In 2014, the US Department of Justice prosecuted him for money laundering and seized US$30 million worth of assets. In 2017, French authorities found him guilty of embezzlement and confiscated his assets worth US$35 million, while Switzerland seized 24 of his supercars. This is some progress, but

still a drop in the ocean compared to the flood of ill-gotten money that has flowed out of the country.

How the Gupta family captured South Africa through bribery

In what's been described as a 'modern coup', the Gupta family took control of South Africa. Through allegedly bribing politicians, giving lucrative jobs to President Zuma's children and other ways of buying influence, Ajay, Atul, and Rajesh Gupta captured the state.

The Gupta family took as much as US$7 billion in government funds, including a US$4.4 billion supply contract with South Africa's rail and port company. The Guptas also hired and fired government ministers, while the president fired tax officials and intelligence chiefs to protect them from investigation.

In 2016, when a deputy minister went public about the US$45 million that the Gupta family offered him to fire treasury officials, the Guptas fled the country. President Zuma has since lost government office and faces corruption and money laundering charges. His successor, President Ramaphosa, vowed to clean up the country, however, many officials from the previous administration remain in power. In the meantime, South Africa's economy struggles and the country continues to face high levels of inequality.

Lebanon's garbage: The stench of corruption

Sometimes dirty money can lead to filthy cities. Since 2015, Lebanon has had a garbage crisis that's seen streets and beaches covered in rubbish bags, extreme stench and water contamination. This threat to public health came about when Beirut and Mount Lebanon's main waste disposal company, Sukleen, stopped collecting garbage.

The company—which had a monopoly since the 1990s—was forced to close an overflowing landfill which was used for 12 years longer than scheduled. Lacking the infrastructure to dispose of the garbage elsewhere, the company let the rubbish bags pile up.

How did a single company monopolise a key public service? It had strong connections with two of Lebanon's prime ministers. Lebanon also has a culture of patronage, where government contracts are often won through political connections and bribes.

The scandal provoked a popular movement called 'You Stink', which called for the government to clean up its streets and its corruption problems.

Fifa's Football parallel universe

The indictments on 27 May 2015 of nine current and former Fédération Internationale de Football Association (FIFA) officials on charges of racketeering and money-laundering changed the sporting landscape overnight. Suddenly a system of 'rampant, systemic and deep-rooted corruption' was brought starkly into global focus.

The surprising re-election of FIFA president, Sepp Blatter, who presided over a culture of impunity, exposed just how much football exists in a parallel universe without accountability. It is easy to understand why public trust in FIFA fell to an all-time low.

In 2017, Transparency International and Forza Football, a football fan opinion platform with more than 3 million subscribers, completed a survey of 25 000 fans from over 50 countries to find out what they thought. At the time, 53 per cent of fans had no confidence in FIFA and only a quarter of fans globally thought that newly re-elected president, Gianni Infantino, restored trust in FIFA.

Myanmar's dirty jade business

Myanmar is a tragic example of how rich natural resources are often exploited by the corrupt while causing social and environmental disasters that affect ordinary people.

In 2015, a report revealed that corrupt military officials, drug lords and their cronies, had been illegally exploiting jade mines in northern Myanmar and smuggling the stones to China.

In total, more than US $31 billion in jade stones were extracted in 2014 alone—the equivalent of half of Myanmar's GDP that same year. Yet, the majority of people living in the mining regions and working in the mines did not see any of this money and as much as US$6.2 billion was lost in taxes.

At the same time, areas rich in jade have been shaken by armed conflicts, while aggressive exploitation has led to environmental damages and mining accidents that have cost hundreds of lives. Despite efforts of the Myanmar governments to rein in the illicit jade business, mining still poses a serious risk to the environment and the people living in the region.

Fighting impunity in Guatemala

Approximately 90 per cent of crimes in Guatemala go unpunished, so taking action against impunity should be a priority. At least that's what the International Commission against Impunity in Guatemala (CICIG), backed by the UN, has been doing successfully for the past 12 years.

In 2015, thanks to the efforts of the CICIG, the former president of Guatemala was forced to resign because of a corruption investigation that ultimately led to his conviction. Since then, the commission has been investigating dozens of high-level corruption cases and enjoys strong popular support.

But when the CICIG started investigating current president Jimmy Morales and his family in 2017, Morales unilaterally revoked the agreement with the UN which underpins the ability of the CICIG to operate in the country. Over the past years, the president has been leading a fight against anti-corruption efforts in Guatemala, ignoring rulings of the Guatemalan Constitutional Court.

Turkey's 'Gas for gold' scheme

In a real-life version of House of Cards, Turkey found itself embroiled in a massive corruption scandal in 2013. Turkish police officers raided several homes, including two belonging to the families of the ruling Turkish elite. During the investigation, police confiscated some US$17.5 million in cash, money allegedly used for bribery.

At the heart of the scandal was an alleged 'gas for gold' scheme with Iran, involving businessman Reza Zarrab. Zarrab was reportedly involved in a money-laundering scheme as part of a strategy to take advantage of a loophole in US-led sanctions on Iran. All 52 people detained were connected with the ruling Justice and Development Party (AKP).

President Erdoğan remains defiant about the scandal, dismissing or reassigning thousands of police officers and hundreds of judges and prosecutors, including those leading the investigation, and passed a law increasing government control of the judiciary.

The Azerbaijani laundromat

Some governments make genuine efforts to improve their human rights records and strengthen democracy. Others may try to clean up their reputation by bribing foreign politicians.

Azerbaijani leaders allegedly bribed the Parliamentary Assembly of the Council of Europe (PACE) delegates to talk up Azerbaijan's human rights record and water down critical election monitoring reports. The US$3 billion slush fund used four British shell companies with accounts in Denmark's biggest bank to pay bribes, launder money and buy luxury goods.

While real accountability is yet to come for the culprits that undermined Europe's core human rights organisation, there have been some consequences. An independent PACE investigation found several delegates engaged in corrupt and unethical behaviour, resulting in sanctions for these individuals. Transparency International Germany also recently filed a criminal complaint against German MPs who allegedly took bribes.

Danske Bank is under investigation for this and other money laundering scandals, and was forced to shut its branch that handled the dirty money.

Paradise Papers: Where the rich and powerful hide their money

Countries lose around US$500 billion per year in corporate tax and further billions from individuals. That's enough to pay for the UN's aid budget twenty times over and bring many nations out of poverty.

In 2017, a major investigation exposed a vast, secret parallel financial universe based on a huge leak of documents from the Bermuda-based elite legal firm, Appleby. Dubbed the Paradise Papers, the investigation shed light on the widespread use of secretive tax havens by 120 politicians, royals, oligarchs and fraudsters.

The Paradise Papers shows how corporations use these havens to reduce their taxes drastically, and in some cases, commit crimes. For example, offshore secrecy put the commodities giant, Glencore, in a position to bribe the former president of the Democratic Republic of Congo, Joseph Kabila, while it negotiated for mining licenses.

The leak helped expose this and other criminal investigations, accelerated EU action against tax havens and inspired citizens around the world to demand an end to the paradise havens that make life difficult for ordinary citizens.

Operation Lava Jato: Clean cars, dirty money

What began in 2014 as the Lava Jato investigation, or 'Operation Car Wash', involving a network of more than 20 corporations—including Brazilian oil and construction giants, Petrobras and Odebrecht—has since grown into one of the biggest corruption scandals in history.

This case has it all: dirty money, foreign bribery, illicit financing of political parties, criminal networks, fraudulent business executives, crooked politicians and a system of corruption embedded so deeply within Brazilian politics and business that exposing one piece started a chain reaction.

Involving nearly US$1 billion in bribes and more than US$6.5 billion in fines, it's difficult to find a region of the world unaffected by Lava Jato's reach. The case extends across at least 12 countries in Latin America and Africa, more than 150 politicians and business people convicted in its wake, including one president, and indirectly, two successors.

The Troika laundromat

Half of Russia's wealth is allegedly stashed in offshore tax havens. Leaked data from Troika Dialog—once Russia's largest private investment bank—shows that the bank created at least 75 shell companies in tax havens around the world. When opening accounts in European banks—such as now-defunct Ukio bankas in Lithuania, Raiffeisen in Austria and Commerzbank in Germany—the real owners hid behind the paperwork of unwitting Armenian seasonal workers.

These companies channelled at least US$26 billion between 2006 and 2013. Some of this money flowed out of the Troika Laundromat and into the global financial system as clean cash. As a result, Russian oligarchs and politicians secretly acquired shares in state-owned companies, bought real estate both in Russia and abroad, purchased luxury yachts and hired music superstars for private parties.

Andrej Babiš: Conflict of interest in Czechia

In early June 2019, almost thirty years after peaceful protests led to the fall of communism in former Czechoslovakia, people in Prague, Czechia, took to the streets again. This time, they were calling on Prime Minister Andrej Babiš to resign. The protests gathered momentum after the European Commission (EC) confirmed that Babiš had significant conflicts of interest regarding his private businesses. The EC was following a complaint from our national chapter in Czechia, which revealed that one of the Prime

Minister's many companies, Agrofert, had received more than US$19 million in EU agricultural subsidies.

In 2017, Babiš put the company into two trusts, but remained the ultimate beneficiary of these funds, hiding behind an additional layer of secrecy. In Czechia, 'beneficial owners' like Babiš are not publicly known, but in neighbouring Slovakia, owners must disclose who they really are when bidding on public contracts.

Thanks to Slovakian law and some good detective work from TI Czech Republic, the EU recently ruled that Agrofert must repay the money it took from taxpayers over the past two years.

Whether the corrupt become involved in petty or grand corruption in all of their respective forms, the flaw in the character and the propensity for dishonesty are latent in those who succumb to the allure of corrupt activities. Some do so out of necessity because they are in dire financial need, others are motivated by pure greed and by the expectation that they can get away with their corrupt activities because the state is not up to the task of holding them accountable.

Either way, those who are corrupt are criminals and should be regarded as such by those who value their freedom under the rule of law.

CHAPTER 12

Corruption as a Human Rights Violation

The United Nations Organisation (UN) was set up in the aftermath of WWII for the purpose of securing peace and stability in the world. The horror of war, the death and suffering that is engendered by war and most of all the indignity of violent conflict impelled the representatives of all nations to seek a better world. The thinking behind the establishment of the UN Charter in the course of 1945 is revealed in its Preamble:[1]

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom,

One of the first projects of the UN was to draft and agree the terms of the Universal Declaration of Human Rights (UDHR). The text was prepared by representatives with different legal and cultural backgrounds from all regions of the world. The Declaration was proclaimed by the United Nations General Assembly (UNGA) in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected and it has been translated into over 500 languages.

The Preamble of The Declaration is a vivid reflection of the philosophy that motivated its adoption:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
>
> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,
>
> Whereas it is essential to promote the development of friendly relations between nations,

> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,
>
> Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,
>
> Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,
>
> Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

It can be seen from these fine words that while tyranny and oppression are singled out as enemies of human rights, there is no express reference to corruption as a factor in the project of rolling out universal human rights so as to promote equality and dignity. This omission is significant. The closest The Declaration comes to identifying corruption as a problem for or challenge to promoting human rights is the sentiment that human rights should be protected by the rule of law.

As we have noted in an earlier chapter, the definition of the rule of law developed by the World Justice Project does make it clear that absence of corruption is a factor in measuring the health of the rule of law. Corruption is accordingly a factor which should be considered in relation to the protection of the human rights. Inherent human dignity and equality are at the forefront of those rights.

There are two articles in The Declaration that have bearing on this discussion of corruption as a human rights issue. The first is the article dealing with property, Article 17, which reads:

> (1) Everyone has the right to own property alone as well as in association with others.
> (2) No one shall be arbitrarily deprived of his property.

The second is part of Article 29:

> (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The protection of property rights also features in the World Justice Project definition of the rule of law while 'meeting the just requirements of morality…' can obviously not be achieved in any nation in which corruption is countenanced. State capture and grand corruption involve illegal interference in property rights while all forms of corruption cannot possibly pass the test of the 'just requirements of morality'.

The guarantees of life, liberty, equality and security contained in The Declaration implicitly protect people and nations against the abuse of power by the corrupt.

The UN eventually processed a Convention Against Corruption (UNCAC) in the period 2001 to 2003, the opening words of its Preamble reveal the concerns and the intent of the States Parties to the Convention:[2]

Preamble

The States Parties to this Convention,

Concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,

Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money laundering,

Concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States,

Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential,

Convinced also that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively…

The purposes of the Convention Against Corruption are spelt out in its opening words of Chapter One, Article 1:

The purposes of this Convention are:

(*a*) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

(*b*) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

(*c*) To promote integrity, accountability and proper management of public affairs and public property.

Arguably, the most important undertakings in the UNCAC are those set out in Article Five which deals with the prevention of corruption. All too often these commitments are honoured in the breach by the state's parties to the Convention.

Article 5

Preventive anti-corruption policies and practices

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.
2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.
3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

In his Foreword to the Convention then Secretary General of the UN, Kofi Annan remarked that:

> … the Convention is the culmination of work that started many years ago, when the word corruption was hardly ever uttered in official circles. It took systematic efforts, first at the technical, and then gradually at the political, level to put the fight against corruption on the global agenda. Both the Monterrey International Conference on Financing for Development and the Johannesburg World Summit on Sustainable Development offered opportunities for Governments to express their determination to attack corruption and to make many more people aware of the devastating effect that corruption has on development. The Convention is also the result of long and difficult negotiations. Many complex issues and many concerns from different quarters had to be addressed. It was a formidable challenge to produce, in less than two years, an instrument that reflects all those concerns. All countries had to show flexibility and make concessions. But we can be proud of the result.

Corruption, now broadly viewed as a human rights issue, has been discussed in detail by conference delegates who heard the presentations made by Prof Max du Plessis at the Cape Town Conference and Gareth Newham of the Institute for Security Studies at the Johannesburg Conference which ended on 24 November 2016 with the declaration that is Appendix 3 to this book. Their contributions reflect the progress that has been made since the adoption of UNCAC and its entry into force in December 2005. As at February 2020 there are 187 states parties to UNCAC.

After the UNCAC was adopted, the legislature in South Africa was not slow to take up the cudgels in relation to corrupt activities. It passed the Prevention and Combating of Corrupt Activities Act in 2005 (PRECCA), creating the gateway for the courts to regard corruption as a human rights violation. The words used in the first few lines of the Preamble to the Act reveal the thinking of the legislature:[3]

> **PREAMBLE**
>
> WHEREAS the Constitution enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
>
> AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil all the rights as enshrined in the Bill of Rights;
>
> AND WHEREAS corruption and related corrupt activities undermine the said rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime;
>
> AND WHEREAS the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, ethical values and the rule of law;

The Supreme Court of Appeal, in the 2005 appeal to it in the corruption prosecution of Jacob Zuma's former financial advisor, Schabir Shaik, emphasised that corruption is a threat to the rule of law, good governance, democracy, and fundamental human rights. It put, in emphatic terms, the scope of these threats in the trenchant findings it made against Shaik. He had subverted his friendship with Zuma into a relationship of patronage; his purpose was designed to achieve power and wealth; he had behaved aggressively and threateningly, using Zuma's name to intimidate people into submitting to his will; he had sought out people eager to

exploit Zuma's power and influence and had colluded with them to achieve mutually beneficial results.

The court held that the seriousness of the offence of corruption could not be overemphasised. It offended against the rule of law and the principles of good governance. It lowered the moral tone of the nation, and it threatened the constitutional order.

As to the merits of the appeal, the court held no fault could be found with the reasoning of the trial Court that no substantial or compelling circumstances existed that would justify the imposition of a sentence other than the prescribed minimum of 15 years' imprisonment. In the result, all the sentences imposed by the trial Court stood.

Shortly after he was imprisoned Shaik was able, by devious means, to negotiate medical parole on the basis that he was terminally ill. He is still alive and is often seen playing golf in his hometown, Durban. The case against Zuma, based on the same factual matrix, has been delayed for years due to its withdrawal, reinstatement after protracted judicial review proceedings which included appeals and a challenge to the reinstatement, but is likely to proceed during 2021 after the lockdown for the virus called Covid-19 ends. Undue political pressure was brought to bear on an acting appointee to withdraw the charges against Zuma.

The official opposition challenged the withdrawal in court by way of review proceedings which became bogged down inside issues over access to documents and tape recordings of telephone calls. The delays suited Zuma—his defence counsel let it be known that the strategy in the litigation was a Stalingrad strategy—fighting house by house and street by street.

In the Glenister litigation the human rights aspect of the countering of corruption received careful attention from the SA Constitutional Court. The second Glenister case was the first opportunity that the Court had to give detailed consideration to the interplay between corruption and human rights. It did not disappoint. Using the preamble of PRECCA as an indication of legislative intent to couple corruption with the non-delivery of human rights guaranteed to all in the Bill of Rights, the Court was decisive in its analysis. Inasmuch as section 7(2) of the Constitution records that the state is obliged to respect, protect, promote and fulfil all of the rights guaranteed in the Bill of Rights, it is a short and logical step to the conclusion that a failure to deliver because of the looting involved in grand corruption is prejudicial to the obligations of the state under section 7(2). From the perspective of the ordinary citizen, the Bill of Rights is the jewel in the crown of the post-liberation constitutional order in SA because of its commitment to the creation of a new order in which inherent human dignity, equality and freedom are to become the order of the day. The socio-economic rights set out in the Bill of Rights are expensive to deliver. Rights to healthcare, social security, housing and education as well as access to food and water involve the state, via the taxpayer, in a great deal of expenditure.

If the state is functioning in a manner that turns a blind eye to funding required for the delivery of human rights being diverted into the pockets of the corrupt, then the connection between corruption and human rights is made plain. Corruption is allowed to 'fell at the knees all we hold dear' in this scenario as explained in the joint majority judgment of Deputy Chief Justice Moseneke and Justice Cameron.

It was on the basis of the constitutional need to uphold human rights and the international obligation to maintain effective and efficient anti-corruption machinery of state that the Court found the initial incarnation of the Hawks, a mere police unit, was inadequately independent to acquit itself of the task at hand. Parliament was directed to come to the decision of a reasonable decision-maker in the circumstances in revising the legislation that was successfully impugned by Glenister.

In the process of so doing, Glenister was able to explore the intricacies of the relationship between corruption and human rights as well as the fulfilling of international obligations undertaken in terms of UNCAC.

As there are many countries in Africa and around the world which have a justiciable Bill of Rights, the obligation of these states to guard against corruption is fair game for adjudication in public-interest litigation that may be required. The litigation will be needed if only lip service to the rule of law is in evidence in any particular country in which a public-interest litigant follows in the footsteps of Glenister.

Those countries which have domesticated their international obligations have the additional duties set out in Article 5 of UNCAC. It is open to a public-interest litigant to challenge any lack of compliance with the said article. The expense involved necessitates *pro bono* counsel, contingency fee arrangements and public fundraising—if not a combination of all three strategies.

Human rights activists have elevated respect for human rights to the point where it is possible to litigate when corruption can be seen to stymie the delivery of human rights. It is the task of anti-corruption activists to tackle the levels of corruption that will make the realisation of the UN SDGs difficult to achieve, whether by 2030 or later. Rights to health care, housing, independent candidates being allowed to stand for election and the right to adequate anti-corruption machinery of state have all been successfully litigated in SA.

The chaos and disruption wrought by the Covid-19 pandemic has brought into sharp focus the need to have a world in which corrupt activities are not countenanced. Those involved in corrupt pandemic related procurement have been likened to hyenas and murderers. It is to be hoped that the necessary focus and political will can be generated by the hardships of living through the pandemic to create a new world order which is not prepared to accommodate or allow corrupt activities to the extent that they have been tolerated in the past. That would be a 'new normal' to look forward to and to be embraced by all who value the rule of law.

CHAPTER 13

Corruption as a Crime Against the State and the Poor

At the 2016 KAS/Accountability Now conference held in Boksburg, Mary-Jane Ncube, then executive director of the Transparency International-Zimbabwe Chapter, related some statistics to delegates that still make interesting reading today:

> Various internationally acclaimed surveys from reputable institutions tell us that:
> - the developing world loses $10 through corruption for every $1 in aid (UNDP)
> - $1 trillion is paid in bribes per year (World Bank)
> - $2.1 trillion of assets are illegally moved across borders (UNODC)
> - $ 3.1 trillion is lost through tax evasion and other evasions to tax havens (TJN)
> - $ 50-$80 billion a year is lost in illicit financial flows (Report of HLP on IFF from Africa)

While the numbers are obviously important, the impact of corruption on the state and on its ability to deliver services to the poor are often not regarded as factors which compound the gravity of the situation that is brought about by the combined effect of corruption of all forms. There is a myth that corruption is a victimless crime. Nothing could be further from the truth as the research in the field reveals.

According to the World Economic Forum in 2018, cited with approval by the UN Secretary General:[1]

> Corruption breeds disillusion with Government and governance and is often at the root of political dysfunction and social disunity,' Secretary-General António Guterres told the 15member [Security] Council, which bears the mandate for the maintenance of international peace and security.
>
> Noting that corruption can also be a driver of conflict, upon which it thrives, and is linked to such forms of instability as illicit trafficking in arms, drugs and people, terrorism and violent extremism, he stressed that the problem is present in all nations — rich and poor, North and South, developed and developing. Citing estimates by the World Economic Forum, he said the global cost of corruption is at least $2.6 trillion, or 5 per cent of the global gross domestic product (GDP), adding that, according to the World Bank, businesses and individuals pay more than $1 trillion in bribes every year.

A collaborative effort between Transparency International and Afrobarometer in 2019 is also instructive. TI briefed Afrobarometer to conduct a scientific survey of the African experience of corruption in 35 countries around the continent. The results of the survey were published in mid-2019.[2] Over 47 000 interviews were conducted among scientifically selected sample populations. The outcome of the survey does not make for pleasing reading. Nevertheless both organisations should be commended for shining light into the darker recesses of the lived experience of Africans.

According to a carefully crafted media report published by Legal brief on the survey it:

> [R]eveals that more than one in four people who accessed public services during the previous year had to pay a bribe. A majority of citizens surveyed in 35 African countries think that corruption is getting worse and that their government is doing a poor job of fighting it, the report indicates. The 10th edition of the barometer is the largest and most detailed survey of citizens' views on bribery and other forms of corruption in Africa. It highlights that corruption disproportionately affects the poorest citizens, who have to pay bribes twice as often as the richest to access public services such as health care and police assistance. It found that more than half (55%) of all citizens think that corruption in their country increased in the previous 12 months. Only 23% think it declined. And just one in three citizens think their government is doing a good job at fighting corruption, while 59% rate their government's performance as bad.
>
> *It should be noted that the survey is not merely of the perceptions of corruption but also of the lived experience of Africans.*

As many governments in Africa have committed themselves to achieving the sustainable development goals set by the United Nations, it is clear that there is work to be done on the building and nurturing of strong institutions of state that can be used to prevent and combat the corrupt. SDG #16 contemplates strong institutions of state.

Many, indeed most, African states are committed to the UN Convention against Corruption, which obliges them to establish and maintain adequately independent institutions to tackle corruption.

It can be seen from successive iterations of the Rule of Law Index produced by the World Justice Project that no country it surveys is immune from corruption. The 'Absence of Corruption' factor never reaches a perfect score. The lower the score on this factor the poorer the quality of life of citizens in countries in which corruption is particularly rife or at least very 'present'. It does not have to be so if properly thought through strategies are developed to counter the corrupt.

The IMF in a 2019 report has observed that:[3]

> Corruption corrodes the government's ability to help grow the economy in a way that benefits all citizens.

The primary way in which most governments generate funding is through the collection of taxes. The ability to do so effectively and efficiently is affected by the levels of corruption in the world. Less corrupt countries collect taxes more efficiently than their more corrupt counterparties at the same level of development.

The IMF researchers have revealed, through empirical research conducted that:

> We analyse more than 180 countries and find that more corrupt countries collect fewer taxes, as people pay bribes to avoid them, including through tax loopholes designed in exchange for kickbacks. Also, when taxpayers believe their governments are corrupt, they are more likely to evade paying taxes.
>
> We show that, overall, the least corrupt governments collect 4 percent of GDP more in tax revenues than countries at the same level of economic development with the highest levels of corruption.

> A few countries' reforms generated even higher revenues. Georgia, for example, reduced corruption significantly and tax revenues more than doubled, rising by 13 percentage points of GDP between 2003 and 2008. Rwanda's reforms to fight corruption since the mid-1990s bore fruit, and tax revenues increased by 6 percentage points of GDP.

The prevalence of corruption in any country prevents its people, particularly poor people, from benefiting fully from the exploitation of natural resources such as oil and minerals. Exploration of oil and mining are activities which generate huge profits. These mega-profits create the temptation for corruption. The example of the daughter of the president of oil-rich Angola, Isabel dos Santos, becoming the richest woman in Africa shows that the temptation was irresistible for her. Countries lucky enough to be blessed with oil and mineral reserves tend to have weaker governance and higher levels of corruption.

The way in which public expenditure is conducted in less corrupt states is far more efficient than in those that are more corrupt. The public procurement process is bedevilled by kick-backs, bribes, inefficiencies and the bloating of budgets to swell amounts diverted to the corrupt.

The IMF estimates that the most corrupt emerging market economies waste twice as much in monetary terms as the least corrupt ones. This wastage is not to the advantage of the poor.

Finally, the IMF researchers remark on the effect of corruption on the efficiency of public expenditure:

> Corruption also distorts government priorities. For example, among low-income countries, the share of the budget dedicated to education and health is one-third lower in more corrupt countries. It also impacts the effectiveness of social spending. In more corrupt countries school-age students have lower test scores…
>
> Curbing corruption is a challenge that requires persevering on many fronts, but one that pays huge dividends. It starts with political will, continuously strengthening institutions to promote integrity and accountability, and global cooperation.

It is possible, some might say optimistic, to view the UN SDGs as an embryonic manifestation of the political will to get to grips with the debilitating effects of grand corruption in all states. Certainly, those goals that aim to reduce poverty and hunger and address inequality will be more readily achieved in a world in which strong institutions are able to put an end to the culture of impunity. This culture is currently enjoyed by far too many kleptocrats who are undeterred by the measures to counter corruption now in place in countries afflicted by it.

The poor, who are killed and prejudicially affected by the ravages of corruption, can only benefit from the generation of the political will that is required to hold the corrupt to account with success. In a better post-pandemic world, it is to be hoped that the UN SDGs aimed at eliminating poverty and hunger and at addressing inequality will be achieved. This goal is possible if strong institutions of government (UN SDG #16) are put in place to counter the drain on public resources that kleptocracy causes at present. Those resources thus freed up can then be used to address hunger, poverty and inequality.

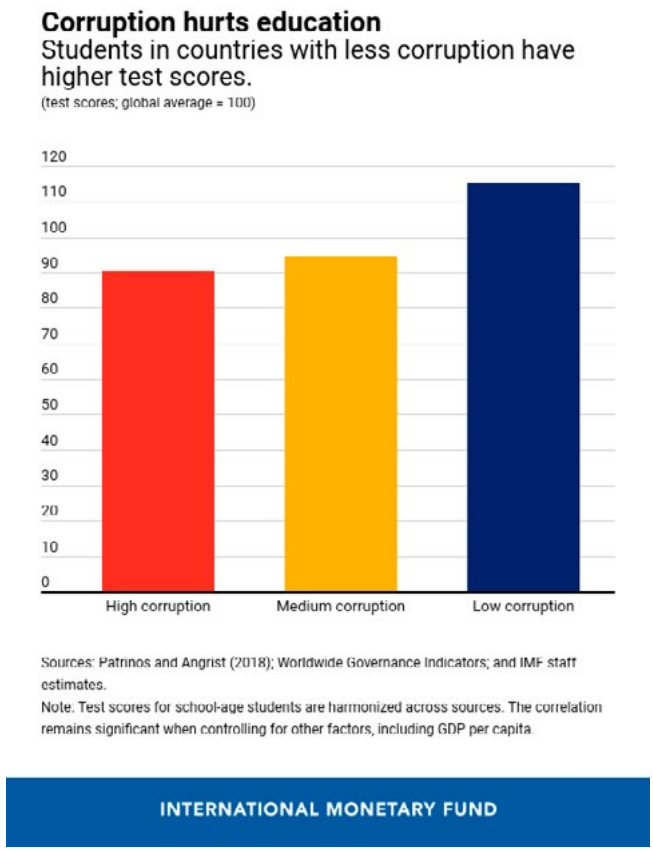

Figure 2
Corruption Hurts Education — Student Test scores
Source: IMF — Patrinos and Angrist (2018)

CHAPTER 14

The Protection of Whistle Blowers

INTRODUCTION

Cynthia Stimpel is the Chief Operations Officer of Accountability Now. Like Justice Richard Goldstone, a trustee of Accountability Now, she has kindly agreed to help with this book by contributing a chapter; hers is on the controversial topic of whistle blowing.

From her experience as Group Treasurer of South African Airways (SAA), Cynthia is well placed to give an insider's perspective. She worked for SAA for 10 years, firstly in the capacity as Head Financial Risk Management, and then for the last two years as Group Treasurer. Key focus areas included managing the debt portfolio and cash flow for SAA, while analysing the hedging portfolio and cost savings for SAA. As Group Treasurer, Cynthia participated in Board Meetings as an invitee. It was in this role that she discovered, exposed and whistle blew on a procurement transaction which actions saved SAA, and the people of SA R256 Million. As Group Treasurer she chaired some of the meetings in the absence of the Chief Financial Officer (CFO).

The experiences around the whistleblowing led to her retirement from SAA and to giving evidence at the State Capture Commission of Inquiry chaired by Deputy Chief Justice Raymond Zondo in Johannesburg. Cynthia is currently teaching Yoga to Adults and Children, serves as a board member at the Johannesburg Children's Home, as Chairperson of the TAG Board with Amnesty International (South Africa) and as a board member of Health-E News.

On 20 March 2019, Cynthia received the Citation of Integrity Award from the Airline Pilots Association of South Africa (ALPA-SA). She is well placed, due to her personal experiences and background, to write on whistleblowing.

Cynthia disclosed and resisted a corrupt and fraudulent procurement transaction approved by the SAA Board to pay a small service provider called BnP Capital (Pty) Limited (BNP) an amount of R256 Million for sourcing funds for SAA, which would normally have cost SAA a fraction of that sum, through sourcing the funds via the banking system.

Cynthia challenged the process of using an unknown entity, which won the tender as the 'Transaction Advisor', with no experience in sourcing of funds, through the connivance of Interim Chief Financial Officer Phumeza Nhantsi. Cynthia was told that it was the Board's function to make the decisions and not her's. She reported the matter to both of the Executive Managers and to the Chief Risk Officer who did not do anything about it. Then she reported the matter to

National Treasury officials and they too did not do anything about it. On the advice of an SAA Executive Manager who, like her was also suspended, she reported the matter to the Organisation Undoing Tax Abuse (OUTA), a CSO, which immediately acted by sending a letter of demand to SAA to stop the transaction, failing which it would be interdicted in court. SAA ignored the demand, sent by attorneys Webber Wentzel. Cynthia then worked together with Webber Wentzel to interdict the BNP Transaction, which was done at the Johannesburg High Court on 21 July 2016.

During this period the Interim CEO Phumeza Nhantsi and the CEO Musa Zwane, requested approval from the SAA Board to allow a payment of R49 Million to BNP Capital as a cancellation fee, on 7 July 2016. The letter of demand also happened to reach SAA on 7 July 2016. Fortunately, with the interdict in place, SAA had to stop the transaction. This action saved SAA, a state-owned enterprise, R256 Million which would never otherwise have been recouped. Furthermore, the Chairperson Ms Dudu Myeni, together with her Board, Yakhe Kwinana, Dr. John Tambi, Mr Musa Zwane (Acting CEO), and Ms Phumeza Nhantzi (Interim CFO), proceeded to recommend and approve on 7 July 2016, an amount of R49.9 Million as a 'Cancellation Fee' for BNP Capital. Fortunately this payment was stopped because of the whistleblowing and the media hype.

Trumped up charges of misconduct, speaking to the media, and insolence were levelled at Cynthia. After 10 months of stress and upon the advice of her lawyer, Cynthia took early retirement from SAA, as she was 6 months from turning 60. SAA paid her salary for those 6 months.

Cynthia is the Founder of Citizens of Conscience, supporting the rights and plights of Whistle Blowers. She is also a Motivational Public Speaker, speaking on her story as a Whistle Blower, and 'making a difference where you are'.

That is the story about Cynthia, here, below, is her analysis of whistle blowing.

Whistle blowing

The term 'whistle blower' is drawn from the sporting arenas in which referees blow the whistle when players break the rules. Players as well as the supporters can hear the whistle once it is blown. Depending on which rule has been broken, the player must abide by the rule and the sanction meted out to that respective player.

What is a 'Whistle Blower'? Defined by the *Oxford Dictionary* as the following:

> To blow the whistle (on)—
> (*a*) to inform on;
> (*b*) to bring a stop (to).

According to Edward Snowden, in his book *Permanent Record*, he suggests the following definition:

> In layman's terms, a whistle blower is one who has disclosed on something they have found to be unethical, or unlawful, or contravening policies and procedures.

However, whistle blowing is perceived with negative connotations globally. Descriptive pejorative words are used for whistle blowers such as 'impimpi' in

South Africa. Other words are 'snitch', 'informer', 'tattletale', 'disloyal', 'betrayer', 'Judas' are just a few.

Ironically though, is when the whistle is blown on a corrupt or unlawful activity in the corporate world and Government, there are perverse outcomes. The whistle blowers are silenced. They have no voice. They are strangled. Their cry for justice is not heard at all. It is as if blowing the whistle—blowing as hard as one can—with no sound coming out. The whistle blowers themselves feel as if they are being strangled, and silenced and no one is listening.

David Lewis of Corruption Watch suggested at a *Daily Maverick* event in 2019—'Business Against Corruption'—that there are three types of whistle blowers:

(*a*) The first type of Whistle Blower who is 'pure'—who like Cynthia Stimpel, upon realising that there is fraud and corruption, takes action and reports it, to the detriment and self-sacrifice of both equanimity and job, in order to stop the corruption.

(*b*) The second type of whistle blower is like Suzanne Daniels—who has been in the 'inner circle' and being aware of the corruption, took action much later down the line, and reported the perpetrators and the corruption, providing all the evidence, she too suffered detriment, and is treated as an outcast.

(*c*) The third type of whistle blower is like—Angelo Agrizzi—who had been 'deeply part of the corruption' and wants to now bargain for his life and safety and hence decided to whistle-blow on his company Bosasa, as disclosed at the Zondo Commission.

LEGISLATION CONCERNING PROTECTED DISCLOSURES

Over the years many countries have sought to develop legislation regarding disclosing of sensitive or confidential information; in order to stop or prevent unlawful activities, as well as protection of whistle blowers. Listed below are a few examples of pieces of legislation from various countries.

South Africa—The Protected Disclosures Act 2000 and Amendment Act of 2017

The Protected Disclosures Act talks to the points of transparency, the Bill of Rights, Freedom of Expression and openness. It deals with the employer/employee relationship. The keys points can be summarised:

1. Every employer and employee has the responsibility to disclose criminal and any irregular conduct in the work place.
2. Employers have the responsibility to protect employees making such disclosures from retaliation.
3. Employers have the obligation to create a culture that facilitates disclosure of criminal and irregular conduct.

Protected disclosures legislation in other countries

United States of America — The Whistle-blower Protection Act was made into federal law in the United States in 1989

Whistle Blower protection laws and regulations guarantee freedom of speech for workers and contractors in certain situations. Whistle-blowers are protected from retaliation for disclosure of information which the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety.

United Kingdom — Public Interest Disclosure Act 1998

Protection for whistle-blowers in the United Kingdom (UK) is provided under the Public Interest Disclosure Act 1998 (PIDA), which amends the Employment Rights Act 1996. The PIDA protects employees and workers who blow the whistle about wrongdoing. Only certain kinds of disclosure qualify for protection under PIDA. It provides the right for workers to take a case to an employment tribunal if they have been victimised at work or they have lost their jobs because they have 'blown the whistle'.

France

There is very little specific statutory protection for whistle-blowers. However, The French National Commission for Data Protection and Liberties (CNIL) imposes a duty to protect those who make a complaint under an employer's whistleblowing procedure.

Australia — Australian Security and Investment Commission (ASIC)

To encourage whistle-blowers to come forward with their concerns and protect them when they do, the *Corporations Act 2001* (Corporations Act) gives certain categories of people legal rights and protections as whistle-blowers. Whistle-blowers play an important role in identifying and calling out misconduct and harm to consumers and the community.

From 1 July 2019, the whistle-blower protections in the Corporations Act have been expanded to provide greater protections for whistle-blowers. This includes requiring public companies, large proprietary companies, and corporate trustees of APRA-regulated superannuation entities to have a whistle-blower policy as from 1 January 2020

The new laws introduce enhanced requirements designed to protect a whistle-blower's identity during and following a disclosure. For the first time in Australia, whistle-blowers can submit reports without the need to declare their identity, or prove the disclosure is being made in 'good faith'.

New Zealand — Protected Disclosures Act 2000

In 2000 the New Zealand Parliament recognised the importance of the reporting of suspected serious wrongdoing in organisations with the enactment of the Protected Disclosures Act 2000 ('the Act'). The Act aims to facilitate speaking up about suspected serious wrongdoing so that the organisation can do something about it

RIGHTS AND PLIGHTS OF WHISTLE BLOWERS

For most whistle-blowers there—

> … is no end to the story.
>
> For most, the harassment in various forms never stops. Most are never vindicated: usually their allegations remain unproven or clouded in doubt and controversy. And most never receive justice: the problems that they sought to uncover are not corrected, and no-one is called to account.
>
> FAIR, The Whistle-blower's Ordeal, 2013 (Courtesy of The Ethics Institute)

> According to Norton Rose Fulbright, in an article published in April 2019, regarding the EU Compliance in the Whistle Blowing Agreement, they state under the section of 'Rights of Whistle-blowers', that 'Whistle-blowers have the right to be supported by the competent authorities in protecting themselves against any adverse consequences.[1]

In summary though, although there is legislation is place, and as in South Africa, whistleblowers are not protected at all.

ETHICS OF WHISTLE BLOWING

The question is whether there is ethics in whistle blowing? The majority of people would rather look the other way than speak out.

Charlie Middleton, author and whistle-blower, on proposing to reduce corruption by increasing the incentives for insiders to report wrongdoing at work, reports what he was told by colleagues:

> In principle it sounds correct and a potential step in the right direction. However, from my observation of the empirical evidence, there are multiple challenges:
>
> (1) The incentives to whistle-blow, while potentially large, are uncertain. Employees are in a 'captured system' and are afraid of retaliation. The retaliation is much more dangerous than the protections offered by those who reward whistleblowers;
>
> (2) Many specialists like HR Departments and Executives Search Professionals openly say that whistleblowing is 'unethical', since the employee who turns out to be a whistle-blower has betrayed his/her employer trust relationship.

Their view is that even if the employer has committed criminal acts and other wrongdoing, an 'ethical' and 'fair' employee should act responsibly and should not betray the trust and his/her responsibility to adhere to the confidentiality and trust obligations his/her job requires.

As much as society perceives whistle blowing as a pariah status, society at large would not have known about corrupt activities happening in South Africa (or in other countries):

- The Gupta Leaks

- State capture by Bosasa
- Extent of corruption in public service
- Steinhoff (Viceroy)
- VBS Bank
- SAA
- PRASA
- TRANSNET
- Eskom
- Denel
- More recent crooked procurement cases following the Covid-19 Pandemic.

Daily Maverick published an article on 1 March 2019, authored by Marianne Merten:[2]

> State Capture has extracted an enormous price directly and indirectly on South Africans, most harshly on the poorest and most vulnerable, who cannot opt for private housing, private health insurance, private education and private security.
>
> Here's how the cost of State Capture adds up to R1,5-trillion over the past four years or so:
>
> - R252,5-billion in lost Budget,
> - R67-billion more in debt service costs,
> - R90-billion lost in tax revenue collection.
> - R506 billion were lost from the value of South African bonds and listed companies in the March 2017 midnight Cabinet reshuffle,
> - Nenegate wiped out R378-billion from the JSE.
> - R200-billion overspent on Medupi and Kusile coal power stations that are not only over budget but also overdue in completion.
> - The directly State Capture identified costs include R1-billion McKinsey consultancy fee, R659-million Eskom prepayment for coal to the Gupta-owned Tegeta and the R5,3-billion finder's fee to a Gupta-linked company in the Transnet locomotive deal.

REPERCUSSIONS FOR WHISTLE BLOWERS

Whistle-blowers all too often feel the extreme repercussions of society once they blow the whistle. They become the pariahs, outcast, treated like lepers, everyone avoids their company and even speaking to them. They are made out to be liars, disloyal to their peers, colleagues and places of employment, charges against them are trumped up, they are alleged to have committed misconduct, they are 'gas-lit', labelled as trouble makers, non-team players, poor performers etc.

The plight suffered by whistle blowers can be extreme: Some have lost homes, lost jobs, lost both current income and future income. Whistle-blowers lose self-confidence; we start doubting ourselves. Many of us go through mental depression, and have to see psychologists and psychiatrists. Some of us lose our friends, our families, our spouses, our children through this saga of whistle blowing. Some of us never recover and some of us commit suicide.

Society is harsh where whistle blowers are concerned, and only in very few areas will one find empathy and understanding.

Example case study of whistle blowing

The *Tshishonga* case sets a valuable precedent, and yet this case is not being used by lawyers when dealing with whistle blowing cases. The majority defer to labour issues and the cases are dealt with at the CCMA and Labour Court.

Brief summary of the Tshishonga case

The four elements identified in this case for a situation to qualify as one justifying a protected disclosure are:

1. the impropriety is of an exceptionally serious nature;
2. the disclosure has been made to the employer and no action has been taken within a reasonable period;
3. the employee has reason to believe that the evidence will be concealed or destroyed if the disclosure is made to the employer and there is no regulatory body prescribed;
4. the employee has reason to believe that s/he will be subjected to occupational detriment.

Reparations and remedies— rewards and compensation

Through my own experience and meeting and communicating with other whistle-blowers and like-minded people who want to assist whistle blowers, there is a strong and urgent need for reparations. To fix the situation the following needs to be in place to assist future whistle blowers or to create a culture in our society to speak up and speak out when one observes wrongdoing.

1. Training
2. Legal Assistance and improve current Legislation
3. Trauma Counselling / Psychological / Psychiatric
4. Financial Assistance
5. Movement toward removing the stigma of whistle blowers
6. Movement toward encouraging ethical behaviour.
7. Rewards and Compensation

1. Training

Training is needed for the Whistle Blower as well as Training for the respective Manager or senior who receives the whistle blowing report. Training for Human Resources Practitioners is also indicated. When one is about to disclose any wrongdoing, it is one of the most difficult actions in one's life. There is no template, no handbook, no instruction readily available. Recently, civil society organisation called Corruption Watch, and The Ethics Institute have independently published a Whistle Blowing Handbook.

In recent years many other companies and legal firms have taken similar steps, realising the need for such a handbook. Although many organisations within South African and globally are conducting training in Ethics and bringing awareness to

ethics, fraud, corruption, this does not hit home to individuals, in their respective positions. There appears no congruency in translating ethical behaviour into their active workplace conduct. Hence this is an area for further development.

2. Legal assistance and improve current legislation

The majority of whistle blowers have suffered the detriment of not being able to afford legal fees. Hence, they would be bullied and retaliated against by the company in question. perpetuating the fraud, with assistance from expensive lawyers, who only fight for their client and not for true justice. The end result being that the whistle blower stops fighting, gives up because the costs are too high and the battle too unequal. A recommendation would be that there should be a Voluntary Panel of Lawyers, Attorneys, Senior and Junior Counsel, who are prepared to assist whistle blowers from a justice perspective and not a monetary perspective. Improving and enhancing the current Protected Disclosures Act (PDA) legislation and ensure independence from the Labour Relations Act.

3. Trauma counselling / psychological and psychiatric assistance

Many if not all whistle blowers suffer mental depression, trauma, psychological effects and psychiatric detriment. We are all affected, one way or the other. Whistle blowers need to rely on their mental strength, their belief system, the families and friends and society. However, if all these fall like dominoes around them, how do they cope? With no funds to sustain them, loss of income and subsequent consequences of no medical aid and hence make them financially unable to seek suitable medical assistance. A recommendation would be that there is a panel of Voluntary Trauma Counsellors, Psychologists, Psychiatrists, and Whistle Blowing Support Groups, established.

4. Financial assistance

The financial detriment has knocked all whistle blowers (or even people just refusing to do the wrong things who are then dismissed from their work place) the hardest. Many of us are still suffering the impacts years later. Many have lost their homes, their earnings; their potential to earn is destroyed by the media or the companies who make it difficult for them to be employed. It is recommended that a special Fund / Funds be set up to assist whistle blowers to get back on their feet, to give them back their dignity, and most importantly to be able to assist their children to continue their education at primary, secondary and tertiary levels. Banks should not be hounding whistle-blowers and instead write off their debt or collect their debt from the Company who fired them. It is also conceivable that employers should offer insurance cover against the fall-out of whistle-blowing.

5. Movement to remove the stigma of whistle blowing

The stigma of whistle blowing is the hardest to remove. Although many people will perceive the whistle blower as a 'heroes, brave, courageous' etc, there is still

a stigma attached by human resources, staff, executives, senior people in organisations, and amongst society. This will fall under the training and education of staff in organizations together with their seniors and executives, Risk Management and Compliance departments. The Employment Contracts and the Code of Ethics in companies must incorporate and align the points of 'conducting oneself in an ethical manner' and 'not disclosing confidential information'. There is incongruence in these statements. More work needs to be done here.

6. Movement to encourage people to behave ethically

By instilling ethics at a young age, via early learning development, primary and high schools, universities and workplaces. Encourage having a 'conscience'. Striving at all times to do the right thing.

7. Rewards and compensation

The Securities and Exchange Commission of the United States is authorised by Congress to provide monetary awards to eligible individuals who come forward with high quality original information that leads to a Commission enforcement action in which over the amount of US$1 000 000 in sanctions is ordered. The range for awards is between 10% and 30% of the money collected.

UK—Compensation is assessed on losses suffered by the whistle blower; there is no reward for disclosures. Requirements must be met, including that the disclosure is of a type that is protected. The whistle-blower must have a reasonable belief that the disclosure is made in the public interest. Large pay-outs are possible in the UK depending on the nature of the losses being claimed. The other type of claim is for suffering detriment, for example, being denied training opportunities, demoted, or refused a promotion. Compensation for injury to feelings can be claimed under detriment but not unfair dismissal. Notwithstanding this, if whistle blowers are suing for unfair dismissal, then they can also seek compensation for injury to feelings by pursuing an additional claim for any detriments they were subjected to before or after dismissal.

Whistle blowing in the UK is less lucrative than in the US. Essentially one system rewards for whistleblowing and the other compensates for losses. Some argue that the U.S. system is preferable because people are rewarded for coming forward rather than compensated for the adverse consequences of whistleblowing. On the one hand, rewards for reporting incentivise early detection and may avoid the consequences of workplace practices such as illegal behaviour and flouting health and safety procedures. On the other hand, it can be argued that reporting wrongdoing should be its own reward.

Other countries have implemented various whistle blowing policies within their places of work; however, there is no compensation or rewards as yet linked to any disclosures.

South Africa has in the past paid 'informers' in the apartheid years for information. This action has continued in the post-apartheid years, in the government

and military. It is recommended that this should be revisited especially when the government itself is stealing from the poor.

CONCLUSION

South Africa has many examples of people who stood their ground and blew the lid off corrupt activities. And the vast majority have paid a dear price for their moral action, many losing their jobs, families and their lives.

One of the well-publicised whistle-blower cases was that of Wendy Addison, who opened a can of worms on executives' self-enrichment schemes within the Leisure Net group some 18 years ago. She too paid the price of having to leave the country and live in hardship for years as she struggled to find work in a foreign country. She is now the Founder of 'Speak Up Speak Out', and she trains companies on how to focus on having those 'Courageous Conversations'. Others like Lennox Garane — Senior Parliamentary Manager — shot himself in his office in Parliament, as a 'Protest Suicide'.

The whistleblowing incident that sparked the biggest exposure in SA and gave rise, via the intervention of the Public Protector, to the State Capture Commission, is indeed the Gupta Leaks. The lives of the brave people who encountered and exposed the hard drive of the Sahara CEO — a kingpin in the daily dealings of the Gupta empire — have also been threatened and impacted by having to relocate and experience a massive upheaval to their lives. They are no longer living in South Africa, and had to leave family and friends for their own personal safety.

Many people have come forward to speak at the Zondo Commission on State Capture albeit that some are lying to protect themselves.

This process in the Zondo Commission has enabled the moral courage levels to rise in many, to tell it like it happened, even though their experiences and consequences were not as stressful and costly as the following people and others had to endure: Terry Crawford- Browne, Suzanne Daniels, Mosilo Mothepo, Bianca Goodson Smith, Temba Maseko, Dr Masimba Dahwa, Ms Thuli Mpshe, Silvain Bosc, Tara Jandrell, June Bellamy, Altu Sadie, Juan Lerena, Athol Williams, Devoshum Moodley-Veera, Lennox Garane, Zelda Holtzman, Martina Della Tonga, and many, many others.

If we are to fight corruption more meaningfully in South Africa, Africa and the world, we need to find improved ways of protecting and rewarding whistle-blowers. We need them to feel safe and protected to come forward and expose that which robs shareholders and citizens of tens of billions of rand each year. Corruption is a crime against humanity.

> To all whistle-blowers out there who have played their part in thwarting transactions that needed to be blocked, no matter how small or whether it is in the private or public sector, we salute you. We recognise your suffering, your anguish and the pain that you and your families have endured. We thank you and can only wish that we had more of you. If only we could have protected and comforted you. If only we could help you have that which you have lost returned to you, a hundred-fold.
>
> Wayne Duvenage, OUTA.

CHAPTER 15

The Regulation of Procurement of Goods and Services by the State

The first Entebbe conference which ended on 25 July 2014 and the Cape Town conference which ended on 24 November 2015 organised by KAS and Accountability Now devoted much discussion to finding ways to prevent or correct the crime of corruption through the regulation of governmental procurement processes and the review of pro-curements that may be infected with malfeasance or misfeasance. This focus is sensible. Much of the corrupt activity in the world involves abuses in the supply chain of governments and the public procurement systems in place for departments of state as well as state-owned enterprises. These systems come in a variety of forms having different levels of sophistication.

The discussions were led by four outstanding contributors, who, in order of appearance, were able to cast light on the topic:

- Gaby Schafer who is President of the Budget Control Institution (BCI) in Schleswig Holstein, Germany
- Kevin Malunga, then Deputy Public Protector in SA
- Wolfgang Pistol, retired German police official and former Anti-Corruption Ombudsman.
- Kate O'Regan, former Justice of the SA Constitutional Court whose fixed term of office ended in 2009. She has also served as the inaugural chair of the United Nations Internal Justice Council from 2008–2012. Since 2011, she has served as President of the International Monetary Fund Administrative Tribunal, and from 2012 to 2018, as a member of the World Bank Sanctions Board. In 2020 she became a member of the African Development Bank Sanctions Appeal Board and since 2016 she has been the inaugural Director of the Bonavero Institute of Human Rights at the University of Oxford Faculty of Law.

Each contributor spoke to their own experiences in their respective working environments. It is accordingly appropriate to summarise their presentations.

Gaby Schafer

As President of the BCI or Landesrechnungshof as it is known in Schleswig-Holstein, Schafer explained that:

> The Landesrechnungshof examines state financial management. It audits both revenue and expenditure totalling over €10 billion.
>
> The Landesrechnungshof makes recommendations on the basis of the lessons learnt from earlier audit work and provides advice to the audited bodies, to Parliament and the State Government. Its consultant activities have continuously increased and set out

significant recommendations for quality improvement, pointing up the potential for savings or increases in revenue.

- The Landesrechnungshof reports on its audit findings in management letters that are sent to the audited bodies for comment.
- The Landesrechnungshof submits an annual report to the Parliament as well as to the State Government. The annual report is also used as a basis for Parliament granting discharge to the State Government. The annual report is presented to the public at a press conference.
- The Landesrechnungshof may at any time submit special reports on matters of major significance to the Parliament and to the State Government.

The Landesrechnungshof does not only provide advice to the executive and legislative branches by including recommendations for improvement in its management letters and annual reports, but also by commenting—orally or in written form—on topical issues such as government bills and major procurement projects, or in the course of the annual budget procedure.

In Schleswig-Holstein the BCI employs 69 auditors and 16 administrative officials. There are similar offices throughout the German federation. The biggest proportions of the staff in Schleswig-Holstein are qualified in public administration (36%) with 18% in the field of economics, 15% in taxation and 11% in law. Engineering and social services, including schools each take up 7% of the staff complement which is divided into four audit teams.

While the BCI has no powers of enforcement, it does enjoy constitutionally guaranteed independence, which it puts to good use to persuade officialdom of the wisdom of the recommendations it makes on budget and expenditure issues which may arise from time to time.

Schafer describes the trade-off involved in being 'a knight without a sword' or 'toothless tiger' in the following way:

This is the price we pay for our independence and our constitutional guarantee.

The Landesrechnungshof is a supreme federal authority. As an independent body of government auditing the Landesrechnungshof is subject only to the law.

The status of the Landesrechnungshof, its Members and its essential functions are guaranteed by the Constitution.

The Landesrechnungshof is serving and assisting both the executive and legislative branches of government but not forming part of either of them.

The Landesrechnungshof has no executive, legislative or judicial powers.

As we have no powers of enforcement, we have to convince the audited bodies with our arguments. We cannot compel compliance with our recommendations; we need to rely on the professionality and credibility of our arguments. And it works: In past years, the parliamentary Financial Committee endorsed almost all our audit findings.

The professional skills and talent available in the BCI, operating in a German context in which there is near universal commitment to constitutionalism under the rule of law, make it possible for the BCI to act persuasively and to achieve the high number of endorsements of its audit findings of which Schafer rightly boasts.

As has been ruefully pointed out, by Tendai Biti, a leading Zimbabwean opposition politician: 'In African politics, we have constitutions but no constitutionalists;

rules but no rule of law.' It is unlikely that a BCI in Africa would enjoy the same successes as are enjoyed by the team that Schafer leads. The levels of skill and specialisation she commands are not plentiful in Africa or elsewhere in developing countries. The utility of the work of the BCI is both profound and advantageous, but its transferability to a context in which universal respect for the rule of law is notably absent in the public administration is questionable. The affordability of a BCI type body in the developing nations of the world is also questionable. It is conceivable that BCI employees on the point of retiring or eager to volunteer could be seconded to countries desirous of improving budgetary controls, but the political and logistical obstacles will have to be overcome. They could train and advise on the basis of their experience.

Kevin Malunga

As the Deputy Public Protector in South Africa, Malunga was well placed to reflect on instances of maladministration in the public administration and state affairs. His office, The Office of the Public Protector, has a constitutional mandate to investigate and report on such matters. It is also empowered to order that 'appropriate remedial action' be taken to correct impropriety or prejudice flowing from instances of maladministration.

The Public Protector is an independent Chapter Nine (of the SA Constitution) Institution enjoined to act without fear, favour or prejudice. The constitutionally imparted maladministration mandate is supplemented by the provisions of the Executive Members Ethics Act which in effect makes the Public Protector the policing and ethics authority in respect of the executive branch of government.

This Act is intended to keep the activities of the executive branch of government squeaky clean in an effective and efficient way through swift investigation of complaints by opposition politicians. A good recent example of this is the complaint of money laundering lodged by the former Leader of the Opposition against the current President, whose campaign fundraisers solicited a large donation from a known crook, the late Gavin Watson, head of Bosasa, a logistics company known for its abuse of the procurement system in the correctional service administration of SA. The donation was also alleged to be one that unlawfully put the president at risk of a conflict of interests due to Bosasa doing business with his government on an ongoing basis.

As to the investigating of allegations of money laundering by or on behalf of the president, it is apparent from the Act that the task of enforcing members' ethics is that of the Public Protector. The code of ethics contemplated in the Act requires that the president meets 'all the obligations imposed on him by law'. He has taken an oath of office which requires him to 'obey, observe, uphold and maintain the Constitution and all other law of the Republic' which obviously cannot be done by indulging in criminality or committing breaches of constitutionally imposed specific obligations to avoid the risk of conflicts of interest.

The Act serves the constitutional values of openness, accountability and responsiveness by requiring that the public protector report on any complaint within 30 days or such reasonably extended period as is appropriate in the circumstances.

The '*Secure in Comfort*' and '*State of Capture*' reports of the Public Protector concerning illegal expenditure at the Nkandla country seat of the Zuma clan and the matters of state capture currently under investigation before the Zondo Commission of Inquiry respectively are reports which could not have seen the light of day had the Public Protector not been given the wide jurisdiction conferred by the Act to, in essence, keep members of the executive honest. Criminal charges were laid on the basis of the *Secure in Comfort* report (no prosecutions have followed yet) and many more are likely to arise from the process triggered by the *State of Capture* report.

The Public Protector is obliged by the Act to investigate complaints of the kind made by the leader of the opposition. The Act also specifies that nothing in it shall prevent or delay a criminal prosecution. This clearly implies that the investigation of criminal conduct falls within the ambit of the mandate of the Public Protector.

A finding by the Public Protector adverse to the president on the money laundering complaint has made its way to the courts on judicial review, with success; an appeal to the Constitutional Court is pending. It will elucidate the powers of the Public Protector further. For the purposes of deciding whether the risk of a conflict of interests exists, the highest court will grapple with the notion that the fundraising in what was called the 'CR17 Campaign' put sufficient distance between the candidate and the funding.

The Office of the Public Protector is the institution of state that parliament has nominated to police the ethics of the executive branch of government, and criminal conduct is included in the mandate so given.

The fact that the currently incumbent Public Protector has allegations of incompetence and dishonesty swirling around her head does not mean that the functions of her office must be suspended or not called upon to fulfil its functions. If the Public Protector is suspended pending an investigation of her fitness for office, her deputy will take over and the work of her office will continue.

Nobody wants a suspected money launderer as president of the country for a minute longer than the law requires. Hence the Act's thirty-day reporting requirement.

Even the risk of a conflict of interest that is involved in accepting a well-concealed 'donation' via the CR17 campaign from a dodgy character who has amassed great wealth via the criminal abuse of the public procurement system is arguably intolerable in a functional democracy under the rule of law. All the more so when it is widely known and well publicized that the Special Investigations Unit recommended the prosecution of the donor's company, Bosasa, more than ten years ago.

Malunga was also able to cite examples of the reports that the Public Protector has prepared pursuant to the exercise of her mandate. His detailed presentation was well received and is now Appendix Four to this book. The section on procurement related complaints is of particular relevance to the topic now under consideration.

At the time that Malunga spoke, in 2014, the Public Protector was Adv (now Professor) Thuli Madonsela. Her term of office ended in 2016 and she was succeeded by a person hand-picked by President Jacob Zuma to take her place. Madonsela was a remarkably good Public Protector. Her willingness to go out on a limb to uphold constitutional values and discharge her mandate properly saw her reach the *Time* magazine top 100 influential people list in April 2014, shortly before Malunga delivered his paper in Entebbe.

The *Time* list singles out 'the activism and innovation of thinkers, artists, visionaries, philosophers and scientists' in making its selection. The magazine seeks people who, according to the magazine, are 'using their ideas, their visions and their actions to transform the world and have an effect on a multitude of people'.

Madonsela's office released a statement in which she acknowledged the accolade:

> Like several other accolades that have been bestowed on me, I regard my inclusion in the *Time* 100 as an acknowledgement of the selfless efforts of the Public Protector team at large.

She went on to say she hoped the award would '… alert governments of the potential of this institution as a partner in promoting good governance, thus strengthening constitutional democracy.'

Her successor, Adv Busisiwe Mkhwebane, has been accused by the official opposition in SA of being incompetent and dishonest. There are proceedings pending against her for her removal from office.

While it is so that Madonsela was a breath of fresh air, it is so that her office was guilty of 'scope creep' during her term of seven years which is not renewable. The work required to deal with allegations of maladministration is very different to a corruption investigation. Strictly speaking, upon finding evidence of any crime, except in an investigation under the Executive Members Ethics Act, the Office of the Public Protector should refer the investigation to the criminal justice administration to investigate and to prosecute if there is a case to answer.

Owing to the capture of the criminal justice administration by the Zuma patronage network during Madonsela's term of office, the option of referring on criminal matters was closed to her. Instead of turning a blind eye to crime and sticking strictly to matters involving maladministration, she investigated, as the examples given by Malunga above illustrate.

After her term of office ended, Madonsela did draw attention to the fact that the skills-set required for the investigation of corruption is different to that required for maladministration. The latter involves capacity constraints, the inability to work as required due to lack of training, negligence and activities with unintended consequences. Corruption on the other hand is deliberate.

The differences between the Madonsela era and that of her successor afford a good illustration of the old truism that any system is only as good as those who lead or make it function.

Wolfgang Pistol

In Schleswig-Holstein the office of the anti-corruption ombudsman exists to protect whistle blowers. The system it operates is a great way to encourage whistle blowers to come forward in the knowledge that their identities will be protected by the ombudsman.

The problem identified when the office was set up was the under-reporting of corruption, particularly in procurement situations and in the building industry in general. The whistle blowers, fearing exposure, repercussions, loss of their jobs and the terrors of the witness box in a criminal court, were understandably reluctant to come forward.

Once the ombud was put in place and properly introduced to society, whistle blowers took advantage of their guaranteed anonymity to make reports to him. The next step in the process was for the ombud to make investigations with a view to establishing malfeasance. Often the paper trail or the absence of any warning to the corrupt would enable the ombud to establish a case for the police to investigate without them or the accused ever finding out about the initial tip off from the whistle blower.

Once again the system is only as good as the ombud. The practice of allowing a recently retired chief constable to take up the independent position of ombud is a salutary one. Not only is there a wealth of experience to draw on, he knows the police personnel with whom he has to deal and has experience in the field of finding proof of corruption.

As corruption is a crime committed in secret against victims who are not even aware of it, the task of establishing a provable case is a difficult one. The inside information that an undetected whistle blower is able to give to the ombud can be invaluable to investigators and prosecutors who are tasked with seeking a conviction.

Pistol shared statistical information that suggested that the introduction of the ombud created a marked improvement in the rate of detection and conviction.

Critical to the success of the office is the trust that the ombud is able to build with the public. Once the independence of the office is accepted as a given, it becomes easier for those in possession of sensitive information and even those who merely suspect something is amiss to come forward anonymously to the ombud to take up their concerns in a manner that does not prejudice them. The traditional lines of whistle blowing are short circuited and the horrors that so many whistle blowers endure are obviated.

The critical element for success is the capacity and integrity of the ombud to observe confidentiality and act independently.

Kate O'Regan

Justice O'Regan has worn many hats in her illustrious career. She attended the Cape Town Conference to share her experiences at the World Bank with delegates.

The World Bank is a lending institution which makes loans for huge development projects around the world. It has a sanctions scheme in place which requires those to whom it lends money to account for every item of expenditure connected to the loan. The accounting takes place in the form of detailed vouchers for all expenses incurred in the execution of the project to which it relates.

The sanction is this: if the borrower and its contractors are unable to provide a credible and complete paper trail of their expenditure toward the execution of the project on a monthly basis, the World Bank simply stops advancing money and, if there is no accountable explanation for the failure to so provide, it blacklists the culprits. The result of being blacklisted is that World Bank finance is not available to those blacklisted either temporarily or permanently.

The system bypasses the usual channels completely. There is no need to prove malfeasance of any kind beyond the failure to account to the satisfaction of the Bank. No double dealing, no corrupt payments no malfeasances need be proved; the flow of tranches of the loans in question simply dries up when the accounting required does not take place.

It is open to governments, lenders and procurers of goods and services to agree a similar system with those with whom they enter into procurement contracts. Creating the political will to do so involves the derailing of the gravy trains that feed off the malfeasance in procurement throughout the world.

It is nevertheless instructive to see how effective the system of sanctions introduced by the World Bank has been in stamping out corrupt activities. It is clear that the contractors prefer the prospect of return business in the future above the prejudice of being blacklisted. And so they should.

CHAPTER 16

Corruption as a Whole-of-Society Challenge

By the time their series of conferences reached Johannesburg in 2016, it was apparent to the organisers, KAS and Accountability Now, that further preaching to the converted in government, non-governmental organizations, academia, the civil society sector and the judiciary was not going to advance the project aimed at countering the corrupt in an effective or efficient way. The net needed to be spread wider. The guest list of delegates for the Johannesburg conference was very different to those of the previous two conferences.

In the concept note preceding the conference the thinking behind convening it is revealed:

> A conference on 'Activism against Corruption in Africa' [was called] in a bid to chart a course capable of identifying and exchanging best practices and experiences, and ultimately, using a practical road map towards successful implementation of the strategies identified.
>
> This is a follow-up conference to the one that was held last year (2015) in Cape Town on 'Combating Corruption in Africa'.
>
> Undoubtedly, there is need throughout Africa and the world to generate the necessary political will to deal with corruption effectively and efficiently. All too often the forms of corruption prevalent in Africa involve the misappropriation of public money. In short, corruption is theft from the poor.
>
> The generation of political will to take a serious, principled and properly resourced stand against corruption involves persuading politicians that it is in their own self-interest to promote measures, structures and operational environments in which corruption is dealt with appropriately.
>
> Among the key practical steps necessary to achieve the aforementioned desire involves, mobilizing the masses from the grass roots level through educational and advocacy work by the civil society, commerce and industry, faith-based organisations and political parties whether or not they are in government, in order to give impetus to the striving for governance informed by integrity. Use of the media to give focus to the longing of ordinary people for government with integrity that is aimed at serving their needs rather than enriching their representatives is indicated.
>
> The objective of this conference is to move masses from being merely 'anti-corrupt' (everyone is at least nominally against corruption whether by way of lip-service or by way of genuine concern) to concentrating activism on a country by country basis in a way that focuses on what is needed on the ground in each country.
>
> The conference will draw on the experience of the delegates, the expertise of speakers and the energy generated in the crucible of debate to devise a resolution that is capable of taking the war on the corrupt forward to victory.

Some of the delegates and speakers were unlikely participants in a conference with a corruption related theme.

The critical role of the media, especially as regards investigative journalism, was tackled from three different perspectives. Mr. Beauregard Tromp, Deputy & Acting Editor of the *Mail and Guardian* newspaper gave the media practitioner's perspective.

Prof. Franz Krueger of the University of Witwatersrand contributed the media scholar's perspective. Mr. Henry Maina, Executive Director, Article 19 East African Region, provided insights into the media defender's perspective. In a separate session Prof. Jamil Mujuzi of the University of Western Cape, whose area of expertise is in international co-operation in criminal matters, spoke to the role of civil society in countering corruption.

Prof. Rev. Aidan Msafiri a Research Associate from Mwenge Catholic University, Moshi Tanzania provided enlightenment on the role of the faith-based organizations. Mr. Mandala Mambulasa, Attorney & Former President of Malawi Bar Association, spoke about the role of the private sector in the fight against corruption. The role of the trade unions was described by Mr. Zwelinzima Vavi, former General Secretary of the Congress of South African Trade Unions (COSATU) & Vice-Chairperson of the Millennium Labour Council.

The United Nations has identified the need to tackle grand corruption because it poses an obstacle to the achievement of the Sustainable Development Goals which it wishes to achieve by 2030. One of these SDGs is the establishment of strong governance institutions. The absence of strong anti-corruption machinery of state in many nations is at the core of the culture of impunity which the corrupt in high places enjoy.

The UN General Assembly has resolved to hold a special session on corruption in June 2021 (pandemic permitting). Columbia intends to propose at that special sitting, called 'Special Session of the United Nations General Assembly' (UNGASS) 2021, that an International Anti-Corruption Court be established to take on issues around grand corruption, kleptocracy and state capture. As the UN session is scheduled for three days, it is likely that a wide-ranging debate will be held.

A panel to look into issues of Financial Accountability, Transparency and Integrity, called the FACTI Panel, has been established in preparation for the special sitting and will report by February 2021. Its interim report was published in September 2020, as has been noted in a previous chapter. Obviously financial accountability and transparency are beyond the scope of this book save as they impact on corruption. However, the integrity aspect of the panel's work will have to involve a worldwide reconsideration of the strength of the anti-corruption machinery available at present, in particular in relation to its ability to deal with issues of grand corruption.

On 2 March 2020 the FACTI panel was launched with terms of reference that would have had Moses in a sweat as he answered God's call to summit Mount Sinai. As corruption was infecting his nation and had been since Eve tempted Adam in the Garden of Eden, those of the Abrahamic traditions will know that the panel faces a daunting task.

The two initiators of the panel, the President of the General Assembly and the President of the Economic and Social Council, provide an overview of their vision in the announcement of the establishment of the FACTI panel.

> This initiative, taken upon our own responsibility, was developed in consideration of the request contained in General Assembly resolution 74/206 entitled; 'Promotion of international co-operation to combat illicit financial flows and strengthen good practices on assets return to foster sustainable development'. We expect the panel to offer new and creative solutions to make the systems for financial accountability, transparency and integrity more robust, effective, and universal in approach.

This book focuses, *inter alia*, on the unavoidable role of countering corruption in the execution of the mission of the panel as it relates to reforming integrity systems with new and creative solutions.

Accountability and integrity are currently in short supply in the world, hence the establishment of the panel. Corruption in high places, sometimes called 'grand corruption' (a concept yet to be defined in international law) is often identified as the reason for the absence of proper accountability and effective integrity in the modern context.

When it comes to grand corruption, the problem is arguably somewhat more subtle: it is the culture of corruption *with impunity* that emboldens ever-increasing numbers of powerfully placed individuals to 'go over to the dark side' to enjoy the fruits of their illegal activities. Looting without any prospect of being punished or even having the loot confiscated, wherever in the world it is stashed, are attractive propositions to too many politicians, public servants and people in business. Impunity lures them in with its siren call.

> That was not the case with Adam and Eve: he was told off in no uncertain terms: '… on your account the earth will be cursed'; Eve's punishment was 'great labour in childbearing' and the middleman, the serpent, was told, 'on your belly you will crawl and dust you will eat'.

Modern kleptocrats have devised the perverse aspects of a world order in which they have been able to avoid appropriately dire consequences for corrupt activities. These abominations include captured or meek law enforcement officials, corrupt judges and multiple opportunities for repurposing the state to their own greedy ends. Dense tax laws which elide the avoidance (legal) and evasion (illegal) of taxes, tax havens, illicit financial flows to tax havens, secrecy a la the 'Panama Papers', and the exploitation of resources of the developing nations that serve to enrich developed nations unfairly are further examples of the world order currently in place.

It is upon this culture of impunity that the panel is going to have to focus some attention if its terms of reference are to produce autonomously devised lasting solutions to the perennial problems that grand corruption afflicts on nations—and especially the poor, from whose needs resources are diverted to the corrupt to fritter away.

The terms of reference of the panel are wide-ranging. A sample, relevant to corruption (the absence of integrity) will suffice to illustrate this point:

> The current international institutional architecture falls short on many accounts in combating all types of illicit finance—from criminal, corrupt or commercial activities—and returning stolen assets to their country of origin. These areas include: financial transparency, tax matters, combating bribery and corruption, preventing money laundering and returning stolen assets. Rethinking and redesigning the international frameworks related to financial accountability, transparency and integrity is critical to financing the Sustainable Development Goals. This is a global problem that requires global co-operation.

The stakes are high as the panel is expected to contribute to the implementation of:

> The ambitious and transformational vision of the 2030 Agenda to change global economic and financial systems to make them fair and equitable: systems that contribute to ending poverty and hunger and achieving sustainable development in all its dimensions. Our common goal is to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions.

A leading cause of the 'global problem' alluded to in the terms of reference quoted above is the impunity that the powerful are able to enjoy. There is no shortage of laws relating to corruption. As was pointed out by Judges Goldstone and Wolf of Integrity Initiatives International in their *Boston Globe* article of March 2020:

> *Grand corruption does not flourish because of a lack of laws. There are 187 nations party to the United Nations Convention Against Corruption* [UNCAC]. Almost all of them have laws prohibiting extortion, bribery, money laundering, and misappropriation of national resources. They also have an international obligation to enforce those laws against their corrupt leaders. However, kleptocrats enjoy impunity in their own countries because they control the administration of justice. They will not permit the prosecution and punishment of their collaborators and themselves.

Irrespective of what the FACTI panel recommends in relation to financial accountability and transparency, all of its work will come to nought if it is unable to devise a means of ensuring integrity by dealing decisively with the kleptocrats who regard themselves as above the law and who continue to loot and plunder the public purse to the detriment of the UN SDGs. It is the achievement of these goals which has inspired the FACTI initiative. Close attention to what is technically feasible and politically viable is required. Devising a means of seeing off the kleptocrats will involve innovative initiatives.

According to Article 5 of UNCAC, its 187 member nations are obliged to:

> … maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

These obligations are all too often honoured in the breach in that no effective anti-corruption structures operate to ensure integrity: hence the culture of corruption with impunity.

The FACTI panel will have to give close attention to this aspect of its terms of reference. Any failure to do so will surely render other reforms it recommends difficult to enforce or even unachievable. Either the anti-corruption machinery of the nations which are party to UNCAC might have to undergo radical reform to beef up the effectiveness of the war on grand corruption, or some other way of dealing with the kleptocrats is going to have to be devised.

A cost/benefit analysis may reveal that transferring responsibility for ending the culture of grand corruption with impunity to an International Anti-Corruption Court, which operates on the basis of complementarity, may prove to be the most elegant solution to the problem. 'Complementarity' means that this new court would exercise its authority to prosecute only if a country was found to be unable or unwilling to prosecute its leaders itself. Countries not desirous of having their leaders internationally prosecuted would accordingly be incentivised to improve the anti-corruption and integrity measures on the home front.

It is going to be interesting to see what the FACTI panel brings down from the mountain when it reports back to the two presidents who have established it, especially on how to effectively defend the integrity systems currently under siege in world affairs.

An interesting feature of its work is the decision to hold 'town hall' meetings for the panel via cyberspace. At these meetings anyone who cares to attend is given the opportunity of participating. This globalises the efforts of the panel and provides fertile ground for the exchange of ideas.

In the run up to the UNGASS 2021, an invitation to present submissions for consideration has attracted some valuable input from civil society. A thoughtful and rich submission by Transparency International on 20 March 2020 includes the following overview of possibilities as regards international infrastructure:[1]

> **3. New international infrastructure—options for tackling grand corruption impunity**
> The nature and scale of the problem of grand corruption suggests the need for a comprehensive approach that includes reforms to international justice institutions. One notable proposal from the Government of Colombia and US Judge Mark Wolf is for creation of an international anti-corruption court with jurisdiction over grand corruption cases where countries themselves are unable or unwilling to pursue them. The proposal for a stand-alone court deserves careful study. So too, do six other potential reforms to the international criminal law infrastructure:
>
> - Extending the jurisdiction of the International Criminal Court (ICC)
> - Regional anti-corruption courts, similar to regional human rights courts that already exist. This is under consideration in Africa under the Malabo Protocol and in discussions at the Economic Community of West African States (ECOWAS)
> - International or regional anti-corruption prosecutors or enforcement agencies. The new European Prosecutor's Office provides an example of how that might work.
> - International or regional investigative agencies. An example of this is the International Anti-Corruption Coordination Centre established by the UK in July 2017, which brings together specialist law enforcement officers from multiple agencies around the world to tackle allegations of grand corruption.

- A framework for ad hoc international prosecution or investigative functions focused on one country. A salient example is the International Commission against Impunity in Guatemala (CICIG) set up by the United Nations in 2006. Its mandate ended in 2019 The complexity of this subject matter points to the need for in-depth analysis and multi-stakeholder expert discussions over an extended period. The options, and possible combinations of options, should be evaluated according to a range of criteria, including political feasibility, effectiveness and cost—criteria that are to some extent interconnected. Along the same lines, the Statement adopted by the Oslo Expert Group Meeting in June 2019, includes two of its recommendations encouraging the exploration of innovative ideas, including most of the infrastructure options mentioned above.

The Basel Institute has innovative ideas around the recovery of the loot of grand corruption:

> … Member states should through the political statement be urged to implement the following measures:
>
> 1. Member States shall introduce Non-Conviction Based Confiscation (NCBC) measures in order to provide for judicial proceedings for the confiscation of property that has been acquired through, or that is related to, the commission of an offence established in the Convention.[UNCAC].
> 2. Member states shall adopt such measures as may be necessary to permit their competent authorities to provide assistance in obtaining evidence and to provide assistance in freezing or seizing assets in relation to NCBC investigations and proceedings in another State Party, and to give effect to an order of NCBC issued by a court or other competent authority of another State Party.
> 3. Member States shall adopt such measures as may be necessary to allow confiscation of assets subject to the power of disposal of a public official if the wealth of the person has increased disproportionately during her/his public function and it has not been demonstrated that the asset in question was acquired legitimately.
> 4. Member States shall interpret the principle of dual criminality in line with Article 43(2) of the Convention.
> 5. Member states shall take such measures as may be necessary to permit their competent authorities to provide information and evidence to another State Party without prior notification to the affected person (if the requesting country demonstrates that such is necessary in light of the nature of the conduct under investigation).
> 6. Member states shall take such measures as may be necessary to recognize damage to another State Party as a basis for returning confiscated assets or monies refunded as the disgorgement of profits.

The Open Contracting Partnership has summarised its submission for consideration at UNGASS 2021:

> Governments spend over $9.5trillion on public contracting and procurement every year, a third of all government spending. It is a government's number 1 corruption risk so it is always an important anti-corruption topic. New approaches, including open data, digitisation and civic monitoring, mounting evidence of their impact and their widespread endorsement are transforming international best practices. This makes the UNGASS on Corruption an important opportunity to codify and share these new emerging norms.

The UNCAC Coalition stresses selected topics, the most fundamental of which is the need for effective and strong institutions:

Effective institutions

Member States should commit to ensuring that anti-corruption bodies—those mandated to work on the prevention of corruption as well as those specialized in investigating and combatting corruption—are provided with the necessary independence, powers and resources to carry out their functions effectively and can operate free from any undue influence (UNCAC Articles 6 and 36), including by ensuring that the principles of the Jakarta Statement are fully implemented and complied with, both in law and in practice. More broadly, in line with SDG #16.6 ('develop effective, accountable and transparent institutions at all levels'), Member States should take steps to strengthen institutions that play a crucial role in national integrity systems, such as election commissions, regulatory and oversight bodies, law enforcement agencies and the judiciary as well as the oversight role of parliaments. Captured, dysfunctional and ineffective oversight bodies and institutions in many countries are at the centre of weak oversight systems and poor performance in preventing and fighting corruption.'

Other less relevant but nevertheless important topics raised in the UNCAC coalition submission include the regulation of access to information; better architecture for public procurement and the observance of transparency in relation to public finances; transparent and accessible company registries; beneficial ownership transparency; regulation of political funding, management of conflicts of interest and asset disclosure. On the management of conflicts of interest the coalition suggests that:

> To ensure a clear separation of public position and private interests and to prevent and manage conflicts of interest (UNCAC Articles 7.4, 8 and 12.2(e)), Member States should adopt, implement and enforce adequate and comprehensive frameworks to address conflicts of interest for decision-makers in the public sector. Such frameworks should also regulate cases of the 'revolving door'—the movement of individuals between public office and private sector jobs in the same area (in either direction).

The UNCAC submission relating to the role of civil society and its participation in anti-corruption efforts is a fitting way to end any discussion of the topic:

> Member States should use the UNGASS for a high-level political commitment highlighting the importance of involving CSOs, academia and other non-government stakeholders in anti-corruption efforts. Furthermore, the political declaration should include a clear commitment to creating and maintaining a safe and enabling environment for civil society, to eliminate any impediments in law and practice that constrain such participation contrary to the letter and the spirit of the UNCAC, international human rights standards and the 2030 UN Agenda for Sustainable Development. This requires appropriate measures for respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption and the ability for CSOs and the media to organise and operate independently and without fear of reprisal because of their anti-corruption work.

Quite so.

Konrad Adenauer formed the Christian Democratic Union (CDU) as a political party to unite Catholics and Protestants in Germany in their opposition to the scourge of national-socialism of the kind Hitler introduced in the early part of the twentieth century. KAS, as the bearer of his legacy, maintains the Christian ethos

which prompted Adenauer's role in the creation of a constitutional order in which the rule of law plays a leading role.

The patron of Accountability Now is Archbishop Emeritus Desmond Tutu. His activism against apartheid and fealty to peace and justice at a time when it was difficult for him to champion his cause, make him the ideal patron and one whom Accountability Now counts itself fortunate to have.

In these circumstances, it is appropriate that the role of the faith-based institutions in countering corruption should feature in the work of the conferences discussed in this book. The Abrahamic tradition which has given birth to the Jewish, Christian and Islamic faiths is one in which corruption has featured since time immemorial. After the creation, the first story in the Old Testament is that of Adam and Eve's fall from grace in the Garden of Eden, while the story of Christ's betrayal for a bribe of 30 pieces of silver is central to the New Testament. Other Bible passages relevant to the topic of corruption are numerous, as appears from this list in the endnote.[2] The Holy Quran is also peppered with references that are the subject matter of a separate endnote.[3]

As religious thought is focused on achieving the triumph of good over evil, it makes good sense that faith-based institutions should be involved in the struggle to rid the world of corruption in all its manifestations. The influence of the guiding principles of all faiths is both welcome and benign. There is however a need for clergy to become more directly involved in countering corruption through advocacy of reforms where they are needed and the promotion of integrity in the affairs of the state and of faith-based organisations too.

INVESTIGATIVE JOURNALISM

The specialised journalists who 'dig dirt' on the corrupt have an important role to play too. Their efforts bring to the attention of the public the malfeasance of the powerful and those involved in petty corruption too. The Nixon presidency in the USA ended in disgrace due to the unflagging efforts of two journalists who broke the Watergate burglary story. John Profumo resigned from the British cabinet after the press got hold of the details of his dalliance with Christine Keeler, who was involved with a Russian spy.

The role of investigative journalists is akin to the proverbial canary in the coalmine, used to warn miners of toxic fumes at or near the coalface. It is often a dangerous role and requires great skill and tenacity to achieve success. The protection of sources, the courting of whistle blowers and the fending off of police officials more interested in finding out where the leak came from than in investigating the corruption revealed are all professional hazards which these intrepid journalists have to face to achieve success in their work. Sifting of documentary evidence in order to find the diamonds in the dust, often purposely buried and concealed, is an arduous task that tests the tenacity of investigative journalists. They put their lives in danger by doing their work properly. Society as a whole is in their debt.

The perspective of the leading investigative journalists who work for the *Daily Maverick* in SA is instructive:[4]

> It is important at this point to pull back and understand where South Africa is right now.
>
> The twin scourge of horrific violence against women and xenophobia have again reared their ugly heads this September [2019]. The country is a stuttering ship about to hit an iceberg.
>
> We're still nursing the wounds after the mauling that was Jacob Zuma's presidency. These wounds are deep and by now badly infected; it is not at all certain the patient, South Africa, can recover. Any moment now, it could slip into anaphylactic shock and the entire structure, whose foundation was so expertly eroded over the last decade, may collapse. The economy is in freefall, people are desperately unhappy, the reforms that were expected to happen have yet to materialise, in great part thanks to the vicious fight-back that's been led by the Zuma-aligned forces. (One can't really expect them to ride quietly into the sunset—should they lose this battle, it will be orange overalls instead of Armani suits and red berets.)
>
> The streets are angry. The streets are dangerous.
>
> It is time for decisive action by the South African state and its government. It is time for it to either put up or shut up.
>
> For way too long, it was parts of civil society, the judiciary and the media who were not only doing their job but also covered for a historically, almost comically, absent state and its organs. It was the media who brought into the public domain the truth about the true extent of State Capture corruption. It was civil society, when it was not feeding the hungry, clothing and healing the poor, and educating the insufficiently educated (all of which should be the government's domain), that took the media exposés and doggedly pursued them all the way to the Constitutional Court. All along, the judges refused to be intimidated and passed the judgements which in any normal country would have changed history.
>
> But we, the media, cannot do it in a vacuum anymore. Independent media these days is an impecunious place to be, where journalists are barely surviving, working for publications that soon might be no more.
>
> NGOs are so stretched that they may soon break—and that's even before they have to endure the ignominy of being branded 'foreign agents' by the State Capture players and their attack dogs.
>
> So … here we are. It is time for all, especially the bodies comprising the 'security cluster', to act. It is time for the NPA to take a trip to the nearest court with a bunch of empty folders. All they need is to print the media's exposés and the accompanying attachments in the print shop across the street from the court. It is time for all ministers and everyone else paid by a public dime to show up for work and take action. Of course, results can't be achieved in a day, as the problems are so deep and extensive that anyone can understand that it will take time to fix them. But they need to be SEEN as acting in people's interest, and not for their narrow, short-term political gain.
>
> It is also the time for the parts of the opposition that are willing to participate in rebuilding this country to actually do it. Time to stop shouting at people. Elections are in the future—now we all need to ensure *we actually have that future*.
>
> AND, it is time for President Ramaphosa to remember he is not only elected to be the head of SA government, but also to be the LEADER of the South African people. That requires compassion, action and true commitment. Whatever the State Capture actors might do to taint his *past*, the people of South Africa will support him if they see that he is fighting for their *present* and never stops working for their *future*.

> The independent journalists of this country are tired of shouldering that future, sometimes on their own. Over the many years, we uncovered what really happened in Marikana, we exposed the Guptas, Nkandla and the depths of State Capture. Since the #GuptaLeaks, literally hundreds of people involved in State Capture crimes have been outed, fully exposing the secretary-general of the ruling party, and the top leadership of the third-biggest party in the country.
>
> How many of them have been arrested, charged and jailed since, say, Marikana?[a police massacre of striking miners in 2012] How many?
>
> And you still expect us to consider South Africa a respectable state?
>
> Relying on media and civil society to do these important jobs of government is unsustainable. The media fraternity cannot keep its motivation forever. Or our jobs. Or our lives. Do not think that investigations like 'VBS Theft, Money Laundering & Life's Little Luxuries: Julius Malema's time of spending dangerously' will continue to materialise from thin air, over and over again. Journalists in South Africa operate in clear and present danger. It's time to do something about it.
>
> A good place to start would be to take the investigations brought into the public domain by Scorpio, amaBhungane, News24 and other investigative outfits seriously. The future of our country now depends on *you* doing *your* job.
>
> Should you do nothing, just please don't say *again* that we did not warn you. Because we have. Because we are warning you, right now.
>
> Your move, South Africa.
>
> Within two days of publishing this editorial, Julius Malema banned *Daily Maverick*, Scorpio and amaBhungane from attending any further EFF events or press conferences. Beyond the concerning implications for press freedom, the staff at *Daily Maverick* were largely unperturbed: the basis of their investigations comes not from EFF press conferences but rather what happens when the cameras stop rolling.

CIVIL SOCIETY ORGANISATIONS (CSOs)

The role of CSOs, the Foundations, Institutes, NGOs and more informal groupings and alliances is mentioned in the *Daily Maverick* editorial quoted immediately above. The lot of CSOs is varied and dependent upon the levels of funding that they are able to garner. CSOs that stand up against oppressive and corrupt regimes find themselves accused of being unpatriotic and sometimes also of being recipients of foreign funding and of pursuing hidden agendas of treasonous and seditious nature at the behest of their paymaster. Some in the sector find their hands tied by timid funders who hesitate (until it is too late) to fund 'controversial' projects which speak truth to power.

It is as well for those in civil society to remember that the price of liberty is eternal vigilance. Active citizenship is needed rather than being passive subjects of authoritarian regimes that are strangers to the rule of law and kleptocratic by inclination.

TRADE UNIONS

We have offered an alternative definition of corruption as 'theft from the poor'. Members of trade unions are generally working class, although this is not always so. Nevertheless, it is not the workers who have the opportunities to ransack funds

for corrupt purposes. The strength of trade unions is that clear lines of responsibility exist to exact accountability from employers, members and union officials. This structure provides the opportunity for installing integrity systems in the workplace so as to prevent the leakage of funds to the detriment of the members of the unions active in the workplace. It is because union organisers are alert to the rights of their members and willing to assert them against corrupt practices that undermine members' interests that unions are well-placed, when properly organised, to counter corruption in their sphere of influence.

It does happen that unions can lose their way. Zweli Vavi, former General Secretary of COSATU, a confederation of unions that is in alliance with the ANC in SA, had delegates to the Johannesburg conference spellbound when he related events at the Polokwane conference of the ANC held in 2007 at which Jacob Zuma ascended to the leadership of the ANC. At the time Vavi, a staunch Zuma supporter, hailed his success as 'The Zuma tsunami'. By the time he attended the conference at which he spoke to the invitees of KAS and Accountability Now, Vavi had changed his views in the face of a mountain of evidence of the corruption and state capture in which Zuma was a leading participant. Vavi called the election of Zuma the 'greatest mistake in the history of the world'. This is an overstatement of course, but it does reflect the depth of feeling of a man who was tricked by the deceit of Zuma into giving him political support that prevented Zuma from standing trial and enabled him to be elected as president of SA after the ANC won the elections held in 2009.

Unions in SA are now more cautious about whom they support in the political field.

CHAPTER 17

The Role of Education in Countering the Corrupt

Martin Kreutner headed up the International Anti-Corruption Academy in 2016 when he delivered a keynote address at the KAS/Accountability Now conference held in Johannesburg. His take-home message, which he had also promoted at the UN SDG Summit held in New York on 25 September 2015, neatly summarises the thrust of his presentation. He said:

> Corruption is the antithesis vis-à-vis human rights, the venom vis-à-vis the rule of law, the poison for prosperity and development, the reverse of equity and equality. Investing in anti-corruption education and empowerment is therefore the smart way towards sustainable development; safeguarding human rights and strengthening the rule of law.

It is through educational efforts that the prevention of corruption is best achieved. Those whose task it is to combat the corrupt need to be equipped to deal with devious and highly motivated criminals intent upon enjoying their loot with impunity. The covering of tracks by the corrupt is legendary. Criminal dockets disappear, witnesses lose their memory, change their stories or also disappear without a trace; prosecutors and even judges are paid off and the culture of impunity continues. The system is severely tested by the shenanigans that the corrupt deploy to avoid the consequences of their activities.

Skilled investigation and prosecution services by highly qualified specialists are needed if the flow of loot is to be reduced. The training and education of those involved in the investigation of corruption and kleptocracy is accordingly at the forefront of the war on corruption.

This can be seen from the commitment of the UN to SDG #16 which envisages strong institutions of governance to make the realisation of all of the SDGs a possibility that is attainable by 2030 or sooner. It is however possible that the ravages of the current pandemic worldwide will compel the UN to postpone the delivery date of 2030 due to the changed circumstances in the world after the pandemic.

The need for capacity building in the anti-corruption field is at a premium due in part to the fact that each nation that has subscribed to the UNCAC is dependent on its own efforts to deal with the corrupt. There are no functioning regional or international anti-corruption bodies that can be asked to assist directly. The machinery of each state has to be relied upon to deal with the corruption caseload in that state.

The UN General Assembly recognises this conundrum. It remarks, at a meeting held on 29 June 2015, that it:[1]

> Recognises that the negative impact of corruption on human rights and sustainable development can be combated through anti-corruption education, and notes … the capacity-building activities and specialised curricula developed by relevant institutions such as the UN Office on Drugs and Crime (UNODC) and the International Anti-Corruption Academy.

This form of recognition was given in the context of a discussion on the need to promote and protect all human rights, civil, political, economic, social and cultural—including the right to development. The negative impact of corruption on the enjoyment of human rights was regarded by the General Assembly in the following terms:

> … preventive measures are one of the most effective means of countering corruption and of avoiding its negative impact on the enjoyment of human rights, calls for the strengthening of prevention measures at all levels, and underlines that one key aspect of preventive measures is to address the needs of groups in vulnerable situations who may be the first victims of corruption.

Former US Secretary of State John Kerry pointed out in August 2016, that:[2]

> Corruption is a root cause of violent extremism. Violent extremist groups use humiliation, marginalisation, inequality and poverty caused by corruption as recruitment tools. The fight against corruption has to be a global security priority of the first order.

The first two elements of the STIRS criteria laid down by the Constitutional Court in SA are Specialisation and Training. The creation of a corps of specialists who are well-trained in countering the wiles of the corrupt is the core business of those who educate the teams that operate against the corrupt.

On the preventative side, the ability to alert a community in the grip of corruption is vital. The knowledge that the cause of the misery of the marginalised is the diversion of public funding intended for their upliftment is central to garnering community buy-in to prevent corruption. The idea that corruption is a way of life is best dispelled by persuading communities that it does not have to be so. Knowledge of their rights and capacity to claim them has to be imparted through public education at all levels from bumper sticker to incorporation in school and university curriculae. A handbook of the kind available for free download from the homepage of the website of Accountability Now is a good start.[3] Knowing one's human and constitutional rights as well as where and how to assert them should be part of the civic education in all schools in all countries.

If the general run of any given population has no inkling of the power of the rule of law to protect it against the ravages of corruption, there is little prospect of ending the endemic culture of impunity which the corrupt enjoy.

On the investigation of corruption, the skills of a detective are needed to follow up clues and documentary evidence as well as reports from whistle blowers and other witnesses. Properly trained police personnel can be recruited into anti-corruption work. The FBI in the USA and the Serious Fraud Office at Scotland Yard in London are the premier organisations involved in the actual investigation of corruption. They allow trainees from developing countries to attend training courses

tailor made to their needs. The imparting of expertise in this way can serve to sharpen the effectiveness of anti-corruption efforts. In SA the Scorpions recruits were sent to both institutions for training and became so good at their work that a corrupt new political leadership had to close down the Scorpions unit for fear of conviction after a proper investigation of their corrupt activities.

Forensic accountants are often needed in corruption cases to wade through masses of accounting documents to extract the crooked transactions buried in the paperwork. The efforts of forensic accountants have been facilitated in recent years by the development of artificial intelligence that is able to extract the 'diamonds from the dust' in a fraction of the time it takes a human to search for the 'diamonds' manually.

On the prosecution side of anti-corruption work, the training of a specialist corruption or commercial cases prosecutor is both theoretical and practical. Advanced courses and years of court work can, in a worthy candidate, so sharpen the skills of prosecutors as to render them capable of contesting cases against the highly paid and very experienced trial lawyers that the corrupt are usually able to afford to conduct their defence in criminal cases brought against them. The onus of proof is on the prosecutors. They have to prove their cases by adducing evidence that satisfies the court beyond any reasonable doubt that all of the elements of the charges have been proved. The defence team tests the case and, if required to do so, sets up a contrary version that is intended to show, on a balance of probabilities, that the version of the accused person is reasonably possibly true. A balance of probabilities is far less onerous than adducing proof beyond a reasonable doubt.

In some jurisdictions, chiefly those which train judges at tertiary level, it is possible to become a judge who sits in a court that hears corruption cases exclusively. In other countries, high court judges are regarded as sufficiently skilled and experienced to sit in corruption cases and weigh the evidence as they would in any other criminal case of less complex nature. Sometimes specialist courts are called into existence to deal with a particular crisis.

The levels of learning required by those who make corruption busting their profession are exacting and ever more challenging as the corrupt are forever modifying their corrupt activities in ever more innovative ways in order to escape detection, investigation, prosecution and conviction.

The courses offered by the International Anti-Corruption Academy (IACA) in Vienna are supported by 70 countries around the world. Students from 145 countries have passed through its doors. IACA offers standardised training and research activities as well as more specialised and tailor-made programmes to fulfil the perceived needs of students. It has interdisciplinary degree programmes and is also used as a platform for direct dialogue and networking through its summer academy programme, conferences, special events and alumni gatherings. The facilities of IACA are also used as a think tank and for the purpose of benchmarking anti-corruption activities of all kinds. A master in anti-corruption studies (MACS) degree is offered by IACA and students are encouraged to write a thesis on a topic of

particular interest to them in their professional work. The MACS curriculum is divided into modules as follows:

- Concepts and Theories on Corruption
- Corruption and Economics
- Corruption and Politics
- Business and Corruption
- Anti-corruption and the law
- Enforcement
- Prevention.

Countries which are serious about taking the fight to the corrupt should consider making it possible for their anti-corruption personnel to attend courses at IACA. The regional summer activities of IACA take its educational expertise into Latin America, East Africa, Asia and South Eastern Europe.

CHAPTER 18

Minimum Sentencing and Other Punishment of the Corrupt

The sentencing of those found guilty of corruption is varied in different jurisdictions. In China, for example, the death penalty is used to punish the corrupt. In the Middle East, in countries in which *Sharia* law is followed, capital punishment for corruption also still occurs.

Though punishments don't often come directly from the Quran, the ideas of certain types of capital punishments can be brought to bear in accordance to the severity of crimes committed. Islamic Scholar Numan Ali Khan says, 'there are many passages where certain things are highlighted more than others'. The reasoning behind the use of capital punishments in Islam is to regulate and make sure that humanity is still intact within society, which is why the forms of punishments have evolved as the times have changed to adapt to the ways of living in this life where Islam is also evolving and growing. In the modern era most Muslim-majority countries have adopted criminal legal codes based on European models. Persisting with capital punishments of any kind has also caused controversy around the world because these are regarded as inhumane forms of punishment in international law. Legal forms of capital punishment vary among Islamic countries.

In August 2018 Iranian Supreme Leader Ayatollah Ali Khamenei approved the establishment of special courts to crack down on financial crimes, saying the courts will target 'enemies' 'disrupting and corrupting the economy.'[1]

The recent corruption sweep in Iran comes at a time of great economic turmoil. In earlier times, during the 1978–79 Iranian Revolution, Ayatollah Khomeini established revolutionary courts to prosecute a broad swath of crimes, including 'sowing corruption on earth,' 'crimes against the people' and 'crimes against the Revolution'—all of which were capital offenses.

Some African jurisdictions still practice capital punishment, usually for crimes of violence by repeat offenders. In South Africa, it was left to the Constitutional Court to declare capital punishment unconstitutional as a form of 'cruel, inhuman or degrading' punishment as the phrase in Section 12(1)(e) of the Bill of Rights puts it. The politicians had been unable to agree on the fate of capital punishment as it was used in the pre-liberation apartheid order in South Africa. The Court's first criminal law case consigned capital punishment for murder to the dustbin of history and it is unlikely that any attempt will be made to revive it, despite its popularity among the general population in SA.

The punishment of the corrupt is a sensitive issue. Not only is it difficult to prove the crime of corruption, those who stand trial are (or were once) all too often

powerful and well-connected figures. In Angola, outgoing President Dos Santos thought fit to grant his entire family immunity from prosecution before he retired after more than three corruption-soaked decades in the leadership of his country. The incoming government did not countenance this step and has frozen the assets of Isabel dos Santos, the daughter of the former president, who is reputed to be the richest woman in Africa. She is not going down without a fight though, having been reported by Legalbrief Today on 13 May 2020 as saying:[2]

> 'Looking at the forged evidence it is now clear the Angolan state, through the intelligence services, prosecution, Civil Court, and Supreme Court, has colluded and contrived a case to obtain an unfair and illegal decision against me.'

There is also an unusual trial in progress in the Democratic Republic of Congo (DRC), one of the weakest states in Africa, in which a presidential advisor is facing charges of corruption. This is how Legalbrief Today reported the matter, coincidentally also on 13 May 2020:

> A powerful aide to President Felix Tshisekedi is on trial for corruption in a case without precedent in the DRC. Tshisekedi's chief of staff Vital Kamerhe [the aide] is accused of having embezzled more than $50m. A report on the Bangkok Post site notes that he is being tried in a makeshift court set up within Kinshasa's central prison compound, where he has been in custody since 8 April. The proceedings are being broadcast on national television. 'I have a major function to carry out,' Kamerhe told the court. 'I have all the fame that comes with the job, so I am duty-bound to behave as a statesman … and to honour our justice system.' The *New York Times* reports that Kamerhe is charged alongside two others, Lebanese businessman Jammal Samih and Jeannot Muhima, a senior aide to Tshisekedi. They also pleaded not guilty to the charges.
>
> The trio are accused of siphoning funds intended to finance major works under a '100-day' emergency action plan that Tshisekedi launched after he took office in January last year. The funds were earmarked for the construction of 4 500 pre-fabricated homes. The NYT says the case against Kamerhe is part of a broad investigation that is supposed to mark the 'renewal' of the Congolese justice system in the fight against corruption among the elite since the country's independence from Belgium in 1960.
>
> Never in Congo's political history over the past two decades has such an important player on the political scene been put behind bars,' said New York University's Congo Study Group.

After the trial judge died of a heart attack, the trial had to be restarted. Kamerhe was convicted and sentenced to twenty years with hard labour.

The seriousness with which courts view the crime of corruption is well-documented. Judge Navi Pillay, when she was UN Human Rights Commissioner, put it this way:[3]

> Make no mistake about it, corruption is a killer.

The former Prime Minister of the UK, David Cameron, is reported to have remarked:[4]

> The evil of corruption reaches into every corner of the world. It lies at the heart of the most urgent problems we face — from economic uncertainty, to endemic poverty, to the ever-present threat of radicalisation and extremism.

And perhaps most pertinently, Ulla Tørnæs, Denmark's Minister for Development Cooperation:[5]

> Corruption in the form of bribery and misuse of public funds is a major obstacle to democracy and economic development in many of the world's poor countries.

The punishment of the convicted corrupt is accordingly a matter of some moment. In most countries mechanisms exist to enable the victims of the corrupt activity to claw back the proceeds of corruption. A tender to return the loot is regarded as a mitigating circumstance by most courts. The tricky issue is whether it is appropriate for legislation that binds courts to pass a minimum sentence in respect of those found guilty of serious or grand corruption as an appropriate way of addressing the crime of corruption.

The notion of a minimum sentence is a politically driven one. Fearing that the state would be regarded as 'soft on crime' after the death penalty was abolished in SA, the government introduced minimum sentences in respect of serious crimes in order to show, politically at least, that it was not soft on crime.

The courts found this a bitter pill to swallow, seeing an intrusion into their traditional discretion in relation to the passing of a sentence that is tailor made in each case to balance the interests of the victims, broader society as to those of the convicted criminal.

From a scientific viewpoint the utility of setting severe minimum penalties and sentences is questionable in relation to corruption. The commission of the offence of corruption is a calculated affair. No crime of passion, negligent action or spur of the moment decision is involved. Being a bilateral offence in which there is invariably a corruptor and a corruptee, it is clear that careful calculation goes into the plot to commit the offence. Not only do the offenders weigh the chances of being caught, they also consider the prospects of being convicted and punished, and take a calculated risk when they decide to commit the crime anyway.

This thought process is based on the assessment of the prospects of being caught and punished. The assessment is usually that the prospects of being successfully investigated are so slim that the risk is worth taking. The parameters of punishment do not feature in the calculations of the criminals embarking on a corrupt enterprise or transaction.

The research is critical of mandatory minimum sentencing regimens because the intention to deter with the threat of increased terms of incarceration is not an intention that works in practice.

As Valerie Wright observes in her briefing note for the Sentencing Project called 'Deterrence in Criminal Justice':[6]

> Research to date generally indicates that increases in the certainty of punishment, as opposed to the severity of punishment, are more likely to produce deterrent benefits

Wright points out that:

> If there is 100% certainty of being apprehended for committing a crime, few people would do so. But since most crimes, including serious ones, do not result in an arrest and conviction, the overall deterrent effect of the certainty of punishment is substantially

> reduced. Clearly, enhancing the severity of punishment will have little impact on people who do not believe they will be apprehended for their actions

While this point applies to pre-meditated crime in general, it applies *a fortiori* to carefully planned and executed acts of corruption.

A 1999 study by the Institute of Criminology at Cambridge University, upon which Wright draws, reached the conclusion that:

> … the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects.

The Cambridge researchers found that an increased likelihood (certainty) of apprehension and punishment was associated with declining crime rates.

Wright also refers to the work of Nagin and Pogarsky who found that 'punishment certainty is far more consistently found to deter crime than punishment severity, and the extra-legal consequences of crime seem at least as great a deterrent as the legal consequences.'

The conclusion reached by the study conducted by Wright seems unimpeachable:

> … research findings imply that increasingly lengthy prison terms are counterproductive … [and] that the deterrent effect of lengthy sentences would not be substantially diminished if punishments were reduced from their current levels.

Wright suggests that policy-makers should reconsider their over-reliance on severity based policies such as long prison sentences. Resources freed up by a re-think of this kind could be used for increased initiatives for prevention and treatment of offenders.

Applied to sentencing the corrupt, the lesson to be learnt from the research is that severity of sentence is not a factor that bears proper scrutiny as a means of reducing the incidence of corruption. It is far more probable that the apprehension of certainly being caught, investigated, prosecuted and found guilty at the end of a fair trial is a more useful means of addressing the crime of corruption.

The utility of minimum sentences for corruption offenders is accordingly questionable, expensive and not a useful way of addressing the problem. Strong anti-corruption institutions of state of the kind contemplated by UN SDG #16 are a more appropriate strategy.

CHAPTER 19

Preservation and Forfeiture of the Loot of Corruption

There can be little doubt that an effective means of countering corruption is to create systems designed to bring about the forfeiture of the loot of corruption by those involved and their fellow travellers. A greater disincentive is hard to imagine. The use of civil proceedings, in which the onus of proof is lighter, to rake back the proceeds of corruption is a form of restorative justice that is particularly applicable in situations in which the victims of the crime (usually the poor and disadvantaged in society) are not even aware of the commission of the crime of corruption nor of the adverse impact of the looting involved in diverting public funds to the private interests of the corrupt.

It is appropriate in the post-pandemic world to give particular attention to the efficacy of existing machinery and to consider upgrades where indicated. If an International Anti-Corruption Court is established, it will have jurisdiction to freeze, seize, declare forfeit and return the proceeds of grand corruption to the victims of grand corruption.

The civil recovery of the proceeds of corruption requires that the state or state-owned enterprises that are the nominal victim of the corruption can generate the will to take up the cudgels against the corrupt. This is sometimes, if not often, difficult to do because the corrupt are influential people who all too frequently have control of the criminal justice administration in the countries in which they perpetrate their corrupt activities. Officials whose duty it is to protect the public purse come under pressure due to fear of retaliation by the corruption and apprehension that the friends of the corrupt will sabotage efforts to recover loot.

The creation of international jurisdiction for preservation and forfeiture processes would help solve these practical problems.

The simplicity of a civil freezing order, in terms of which the proceeds of the crime of corruption are identified, seized and held pending the determination of the civil or criminal proceedings against the corrupt is attractive and indeed only possible once the location of the misappropriated loot is determined.

Modern forensic accounting practices and the automation of the banking systems of the world make it considerably easier, using artificial intelligence, to track the loot through the various, sometimes dodgy, jurisdictions in which it is hidden away from law enforcers.

At the urgings of Eddie Cross, the inimitable Zimbabwean opposition politician (as he then was), the Boksburg Declaration (which is quoted in full in the second appendix of this book) includes as resolution 6:

> The international community of nations must use its capacity to monitor and investigate global financial movements via the Society for Worldwide Interbank Financial Telecommunication (SWIFT) as a means for identifying illegal movements of funds implicated in corrupt activity around the world. This capacity must be used to secure the prosecution of individuals and companies who are involved in corruption. Every effort must be made to recover funds which are the product of corrupt activity and to return these funds to the lawful authorities in their countries of origin.

The legal machinery for what are called 'anti-dissipation orders' exists in most jurisdictions and can, given the necessary political will, easily be legislated in the jurisdictions that do not yet have the laws to enable the courts to grant the anti-dissipation relief.

One of the great advantages of persuading a court to grant an anti-dissipation order is that the seizure of the assets or the freezing of the account concerned can only be ended by a court order reversing the freezing order. This step can only be taken by putting up a convincing explanation for the presence of the loot in the account in question. Often, the looters, caught with a freezing order granted without notice to them, decide that discretion dictates that they not oppose the freezing order.

To do so usually involves an explanation that has to seek to excuse obvious criminality. Making an affidavit to try to do so can involve its deponent in further trouble relating to the falsity of the affidavit. So the freezing order goes unchallenged and in due course, in unopposed proceedings, it is converted into an order forfeiting the frozen funds or assets to the rightful owner who has used the courts to assert the right of ownership.

An advantage of civil freezing orders is that there is no great delay involved in obtaining such an order *ex parte* (without notice to the respondent looter) once the facts are marshalled, the loot is traced to an identifiable place or account and service of court papers is executed. The application is served on the court first, and only after the freezing order is granted is it served on the respondent account or asset holder. This procedure is followed to obviate the subject matter of the order being hidden or moved away before service of the order attaching same is granted.

Experience in the field is that all too often the respondents in applications of this kind realise that the game is up when the freezing order is granted. They make no effort to oppose the court proceedings and allow the follow up forfeiture proceedings to be taken to final judgment be default. Some victims of freezing orders, like Isabel dos Santos, discussed and quoted in the previous chapter of this book, do not go down without a fight. That fight is made difficult if the freezing order stays in place while the parties contest the right of the applicant to the relief obtained without notice to the respondent.

Forensic accountants who specialise in the obtaining of freezing orders (technically called an attachment of assets pending final judgment) are able to use the SWIFT banking system to trace the loot every step of the way to the account or

place in which it is found. If looted funds have been used to buy an asset, then it is also possible to freeze the asset acquired in this way.

In criminal proceedings most jurisdictions allow a court, at the sentencing stage of proceedings, to order the convicted accused to refund the loot in corruption cases. If the loot is well-hidden or has been dissipated by the accused, then the utility of such an order is questionable.

In order to obviate an empty order to pay back the money stolen, the criminal law has been developed by legislatures in advanced jurisdictions to allow for an assets forfeiture unit in the criminal justice administration to seek a civil attachment order in criminal proceedings which has the effect of freezing the loot in question until the criminal trial has ended, at which stage the fate of the loot is the subject of the court's order in the matter. The proceeds of crime can be returned to the rightful owner in this way and it is also possible to seek forfeiture of assets used as the instrumentality of the crime.

So, for example, a house used as an illegal drug-making laboratory to manufacture recreational drugs, may be forfeited to the state as part of the penalty paid by the convicted accused persons who operated from and owned that house.

An advantage of this type of procedure in criminal cases is that the co-operation of the common victims of corruption (usually nominally a state department or state-owned enterprise) is not required. The decision-making in the case is in the hands of the prosecution service, not the victims of the looting. The reason for the advantage is that it enables the state to use its anti-corruption machinery to recover assets looted without any buy-in from the department of state or state-owned enterprise that has been looted.

This is significant in SA where the Zondo Commission of Inquiry into State Capture has heard a great deal of evidence of looting that has not been acted on by those looted. An alternative way of tackling this problem is to cede the claims to loot to a special purpose vehicle in the form of a company that specialises in debt recovery of this kind.

In corruption cases it is usually sufficient to recover the loot, but some asset forfeiture units do seek to take matters further than that. In a case against the operator of an illegal casino, the Constitutional Court in SA, reversing a decision of the Supreme Court of Appeal declined a request that the factory building in which the casino was operated be forfeited.

This is how the case is summed up in the *SA Law Reports* headnote:[1]

> Statutory civil forfeiture of assets is meant to pursue worthy and noble objectives aimed at curbing serious crime. And yet there is no gainsaying that, in effect, it is Draconian. It is premised on the notion that it is a civil remedy and that the prosecution or the State has to show only on a balance of probabilities that the property may be seized and forfeited to the State. The criminal standard of proof does not come into it. When the State seeks civil forfeiture of assets that were used in the commission of a crime, it is not required to show that the owner has been convicted of the offence or that the owner performed an unlawful act with a criminal intent. The initial and central enquiry in

asset forfeiture is whether the property is an instrumentality of an offence. If it is, the property is liable to be declared forfeit to the State.

In principle, the closer the criminal activities are to the primary objectives of the Prevention of Organised Crime Act 121 of 1998 (POCA), the more readily should a court grant a forfeiture order. Conversely, the more remote the activities are from these objectives, the more compelling must the circumstances be to make such an order appropriate. Furthermore, any determination of proportionality should take into account the extent to which the common law and statutes prove (or threaten to be) inadequate in the circumstances. While the primary purpose of POCA in relation to the instrumentality of an offence is to deter people from using property for crime, that purpose cannot legitimise the forfeiture of every instrumentality of an offence. Deterrence as a law enforcement objective is constrained by the principle that individuals may not be used in an instrumental manner as examples to others if the deterrence is set at levels beyond what is fair and just to those individuals. To do otherwise would be to breach the constitutional principle of dignity. In each case, therefore, care needs to be taken to ensure that the purpose of deterrence that the legislation serves does not produce a disproportionate impact on the owner of the forfeited property. It is for this reason that the deterrent purpose of the legislation must be weighed against the effect on the individual owner, in light of the relevant offence. In this respect, the extent to which the forfeiture manifestly is directed towards preventing organised crime will be highly relevant. The disjuncture between the basic purposes of POCA and the effect on the individual concerned should never be too great.

The first applicant, through the second applicant (Shelgate Investment CC), of whom he was the sole member, ran an unlicensed gambling operation in contravention of the KwaZulu-Natal Gambling Act 10 of 1996 on certain premises subsequently forfeited under the Prevention of Organised Crime Act 121 of 1998 (POCA). The premises were used for both a legal trade, and for operating gambling machines without a licence—an illegal trade under the Gambling Act. The first applicant was arrested and charged under that Act, pleaded guilty and paid an admission of guilt fine. Further, his gaming machines were seized and destroyed. The NDPP subsequently launched proceedings for civil forfeiture in respect of the premises.

In the Constitutional Court, the applicants sought leave to appeal against the decision of the Supreme Court of Appeal (*National Director of Public Prosecutions v Mohunram and Others* 2006 (1) SACR 554) upholding an appeal against a High Court decision and replacing it with one declaring the immovable property belonging to the second applicant, forfeit to the State in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA) on the ground that it was an 'instrumentality' of an offence. The issues that fell to be decided were: (a) whether the property concerned was an instrumentality of an offence; (b) the meaning of 'offence' in the context of civil forfeiture authorised by Ch. 6 of POCA, and (c) whether the forfeiture sought was disproportionate. There was no dispute regarding (a), but the Court disagreed as to whether such forfeiture was disproportionate. On the facts, the majority (per Moseneke DCJ, Mokgoro J and Nkabinde J concurring, with separate concurrences per Sachs J, O'Regan J and Kondile AJ) held that it was. Accordingly the appeal was upheld and the order of the Supreme Court of Appeal was replaced with one dismissing the application.

The decision of the Supreme Court of Appeal in *National Director of Public Prosecutions v Mohunram and Others* 2006 (1) SACR 554 (SCA) was set aside and substituted.

The SWIFT banking system and other similar systems around the world are under-utilized as a means of tracking, freezing and obtaining the return of the

proceeds of grand corruption. The reasons for this are usually a combination of lack of political will to follow up on loot and a paucity of laws that can be enforced by skilled specialists in the recovery of the loot of grand corruption. The UN will be giving consideration to solving these shortcomings in the system when it holds its special session on corruption, currently scheduled for June 2021. The emergency procurements necessitated by the pandemic are a vast breeding ground for corruption in procurement. This unfortunate state of affairs ought to spur on the UN in its deliberations.

CHAPTER 20

Appointment Procedures that Ensure Independence

In a perfectly governed world, which ours is not, the politicians will all seek office to serve the people. They will universally respect the separation of powers and the need for checks and balances on the exercise of power. They will recognize the need for independent anti-corruption machinery of state that enjoys secure tenure of office because they will acknowledge that grand corruption is a form of power abuse and a killer. They will uphold the rule of law and will seek to answer the time-honoured question: 'Who guards the guardians?' in a constructive and fool-proof manner.

As we do not have a perfectly governed world, structures that operate in a way that supports the achievement of the ideals of the rule of law and constitutionalism are needed if modern states are to be in a position to counter the corrupt effectively and efficiently. The bonanza the Covid-19 pandemic affords kleptocrats is a good reason to review anti-corruption entities and their performance with the purpose of taking steps to create strong institutions of governance in line with UN SDG #16.

The procedures according to which all 'guardians' of constitutionalism are appointed and protected in their secure tenure of office are critical to the success of anti-corruption efforts in the post-pandemic world. A system which cannot be manipulated to undermine independence and secure tenure of office is needed. Too frequently a 'safe pair of hands' is put in charge of the anti-corruption entity and the powerful are then able to enjoy immunity for corrupt activities simply because there is no will to act without fear, favour or prejudice to bring them and their fellow-travellers to book.

In an ideal system, all senior appointments in the public administration, the criminal justice system and all of the judiciary will be made in a manner that serves the public interest first and foremost. The interests of politicians, especially those who seek office to abuse their power, will be subordinated to the public interest by the establishment of structures that are as unimpeachable as Caesar's wife. These structures are required to appoint judges, senior public servants and the leaders of the criminal justice administration. The appointment making structure or structures will be populated by persons with proven track records and suitable expertise. They will be advised by the best human resources managers and psychologists capable of testing for hidden flaws in candidates, so that socio-paths and psychopaths are not successful in being appointed. The people serving to select and recommend candidates to key positions will be senior and universally respected, drawn from leadership echelons that are not party political in any way. The retired

judges, leaders of faith-based organisations and civil society will enjoy majority representation. No active politicians will be appointed to the selection structures and the best candidates for appointment will, on their own merit, rise to the top.

Willie Hofmeyr is a long-standing South African lawyer of the struggle for freedom. He started his career as an attorney, became a member of parliament in 1994 and then went on to grace the National Prosecuting Authority where he rose to the rank of Deputy National Director of Public Prosecutions. Since his retirement he has openly advocated (for SA) the establishment of what he wryly calls a 'Commission for Senior Appointments and Dis-appointments' which will in effect guard the guardians, and discipline those who fall from grace by their alleged misfeasance or malfeasance while in office.

There are structural ways of ensuring independence. A non-renewable term of office is one of them. Another is a reporting line to a multi-party body (like parliament) and not to a monolithic one (like the executive when one party enjoys a majority in parliament). A culture of independent-mindedness can be built in institutions which value their role in society. These are the type of institutions whose leading personnel seek to uphold the rule of law rather than the interests of particular political parties and politicians.

Hofmeyr's suggestion has fallen on barren ground given the desire of the ANC to secure what it calls 'hegemonic control of the levers of power in society.' That hegemony is not attainable when independent judges, public servants and prosecutors see their allegiance as being to the law and the Constitution and not to the political programme of any political party, whether in power or not. In constitutional democracies political parties do not rule, they govern. And in governing they are bound to act within the strict confines of the constitutional dispensation in place on pain of having their laws and conduct struck down as invalid by courts that are answerable only to the law and the constitution.

The attitude of the courts in SA, and in particular its apex court, the Constitutional Court, to appointment procedures that secure independence and tenure of office for anti-corruption personnel is instructive to all who grapple with the issues of political interference, influence and manipulation of those who make a career of corruption busting. The SA Constitutional Court is the only court of stature to have grappled with these issues.

The majority judgment in *Glenister II* deals extensively with the issues of independence and security of tenure for anti-corruption machinery of state.

In *Glenister III* there was further judicial consideration of, and also debate in relation to, the thorny issues of appointment procedures. Unfortunately the two justices who co-authored the majority judgment in *Glenister II*, as mentioned above, could not agree on what they meant by it.

They had directed parliament to pass remedial legislation to bring the structure and operational rules applicable into line with the various requirements they set out. Deputy Chief Justice Moseneke sided with the majority on all points in the litigation impugning the remedial legislation. Cameron J, who disagreed with

the majority on some points, spells out the issues on which he differed from the majority in his separate judgment.

However, the majority in *Glenister III* saw the issue differently and expressed itself in an extract from the judgment of the Chief Justice Mogoeng Mogoeng as follows:

> Of concern to us should only be whether the ministerial policies accord with the notion of adequate independence. If the minister has determined a policing policy that can coexist productively with an adequately independent anticorruption unit, then the application of that progressive policy by the national commissioner in terms of s 207(2) can in no way undermine the adequacy of the independence of that unit.
>
> [18] The oversight role of the minister accords with political accountability which is not inimical to adequate independence. This involvement and that of the national commissioner, in the affairs of the DPCI, do not constitute a degree of management by political actors that threatens imminently to stifle the operational independence of the DPCI.
>
> [19] About the location of the DPCI *Glenister II* also had this to say:
>
> 'We further agree that s 179 of the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit within the National Prosecuting Authority (NPA) and nowhere else. The creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was not in itself unconstitutional and thus the DPCI legislation cannot be invalidated on that ground alone. Similarly, the legislative choice to abolish the DSO and to create the DPCI did not in itself offend the Constitution.' [Emphasis added.]

By keeping the DPCI within SAPS, Parliament was acting in line with the decision of *Glenister II* to the effect that the minister's powers in terms of s 206 of the Constitution may productively coexist with the location of an adequately independent DPCI within SAPS. The question whether the location of the DPCI within SAPS falls within a range of possible measures 'a reasonable decision-maker in the circumstances may adopt', having regard to public perception, does not arise. That issue was settled in *Glenister II*.

> [20] To the extent that the exercise of control over and management of the police by the national commissioner in terms of s 207(2) may impact negatively on the adequacy of the independence of the anticorruption entity, it is how that control and management are exercised that might be unconstitutional. On a reading of the *Glenister II* dicta that I have quoted, the constitutional imperative of adequate independence and the exercise of the s 207(2) power can coexist comfortably.
>
> [21] The words 'provided only that the anticorruption unit, whether placed within the police force (as is the DPCI) … has sufficient attributes of independence' and 'thus the DPCI legislation cannot be invalidated on that ground alone' sum up the location issue. Whatever evidence one may seek to rely on to prove that invalidity ought to result from location alone cannot on these dicta assist the proponent of that viewpoint. The invalidation of the DPCI legislation will always require more than location and no degree of contortion can detract from this reality. As long as the challenge is premised on location as the only ground for invalidation, worse still in circumstances where reliance is sought to be placed on the public perception about levels of corruption that precede the *Glenister II* era, the application is bound to fail. It is a closed chapter that corruption is

rife in South Africa and that it is a practical possibility for an adequately independent anticorruption entity to be comfortably located within SAPS.

The majority reasoned as follows as regards conditions of service:

Conditions of service

[47] HSF, relying on *Glenister II*, raised a concern about 'the conditions of service that pertain to members, in particular its Head'. It went on to say that those conditions of service exposed the DPCI to 'an undue measure of political influence'. *Glenister II* also said that 'before the statutory amendments now at issue, the head of the DSO, as a deputy NDPP, enjoyed a minimum rate of remuneration which was determined by reference to the salary of a judge of the High Court. By contrast, the new provisions stipulate that the conditions of service for all members (including the grading of posts, remuneration and dismissal) are governed by regulations, which the Minister for Police determines. The absence of statutorily secured remuneration levels gives rise to problems similar to those occasioned by a lack of secure employment tenure. Not only do the members not benefit from any special provisions securing their emoluments, but the absence of secured remuneration levels is indicative of the lower status of the new entity.' [Footnotes omitted.]

This issue must be put in its proper context. A comparison was made between the provisions of the SAPS Act that deal with the conditions of service of all members of the DPCI and those that applied to the NDPP, the Deputy National Director of Public Prosecutions (deputy NDPP) assigned to be the head of the DSO and the members of the DSO. It is to the relevant provisions of the NPA Act that I now turn for a proper comparison of the conditions of service of different categories of employee under these dispensations.

[48] Section 17(1) and (3) of the NPA Act provides:

(1) The remuneration, allowances and other terms and conditions of service and service benefits of the National Director, a Deputy National Director and a Director shall be determined by the president: Provided that—
   (*a*) the salary of the National Director shall not be less than the salary of a judge of a High Court, as determined by the president under s 2(1) of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act 88 of 1989);
   (*b*) the salary of a Deputy National Director shall not be less than 85 per cent of the salary of the National Director; and
   (*c*) the salary of a Director shall not be less than 80 per cent of the salary of the National Director.

(3) The National Director is entitled to pension provisioning and pension benefits determined and calculated under all circumstances, as if he or she is employed as a Director-General in the public service.

These guarantees of salary relate to the NDPP and the deputy NDPP. They also applied to the head of the DSO, who was a deputy NDPP, as well as the directors of public prosecution (DPPs) in the provinces and other directors at that level. Their allowances, other terms and conditions of service, as well as service benefits, were and continue to be determined by the President.

[49] As in the case of the NDPP, the deputy NDPP, the head of the defunct DSO, and the DPPs, the remuneration packages of the national head, deputy national head and provincial heads of the DPCI are clearly determined. They are pitched at the levels no less than that of the highest-paid deputy national commissioner, the highest-paid divisional commissioner and the highest-paid deputy provincial commissioner of SAPS, respectively.

> Their remuneration, allowances and other conditions of service are determined by the minister in consultation with the Minister of Finance. In the case of the deputy national head and provincial heads, they are determined in a similar way but after consultation with the national head. These remuneration scales are subject to parliamentary approval and cannot be reduced without Parliament's concurrence.
>
> [50] The conditions of service of deputy DPPs and prosecutors, excluding remuneration, were and are still determined in terms of the Public Service Act. Their salary scales have always been determined by the minister after consultation with the NDPP and the Minister of Public Service and Administration with the concurrence of the Minister of Finance by notice in the Gazette. As for the special investigators of the DSO, their remuneration, allowances and other service benefits were determined by the minister in consultation with the national director and with the concurrence of the Minister of Finance. All other conditions of service that applied to them were prescribed by the NPA Act.
>
> [51] Members of the NPA and the DSO below the level of the NDPP, the deputy NDPP, in the case of the DSO the head and the DPPs, did not therefore have statutorily secured remuneration levels. These were determined by the minister in consultation with several other functionaries. The members of the DPCI below the levels of the national head, the deputy national head and the provincial heads are in a similar position. Of significance is that s 24(1)(m) of the SAPS Act provides for the regulation of 'the grading of posts and remuneration structure, including allowances or benefits of members'. Furthermore, s 24(2) provides for the making of different regulations for different categories of member or personnel and ss (4) for consultation with the Minister of Finance in relation to monetary issues.
>
> [52] It has always been the duty of a cabinet member responsible for the anticorruption unit, in consultation with other executive functionaries, to determine the conditions of service, more importantly salaries and allowances of members below the levels of the provincial director of the NPA. Not surprisingly, this is also the case with these employees or members below the level of the provincial heads in the DPCI. There is no fundamental difference between the determination of the conditions of service and remuneration scales of these comparable levels of personnel of the NPA, the DSO of old, and the DPCI. On the contrary, there is substantial similarity.
>
> [53] There is thus no merit in the contention that the provisions relating to the conditions of service of members of the DPCI are, unlike their NPA and DSO counterparts, incompatible with the requirements of adequate independence necessary for an anticorruption entity. I find these conditions of service to be constitutionally valid.

And that is how the law on the topic stands in SA today.

The majority judgment in *Glenister III* has come in for trenchant criticism by the University of Pretoria's Professor Koos Malan and the author. In the online politicsweb publication, we write a trenchant criticism which is set out in full in Appendix Six to this book.

The need to revisit the judgment in order to formulate a new National Anti-Corruption Strategy is under consideration in SA by a working group formed by the executive led by President Cyril Ramaphosa. Whether that strategy will address the criticisms raised in the article quoted above remains to be seen. The National Executive Committee of the governing ANC has called on the national cabinet to establish a permanent stand-alone entity to 'deal with' corruption and organised crime in an independent fashion 'without fear, favour or prejudice'. Whether

anything comes of this initiative also remains to be seen. Cynics dismiss it as mere political posturing with no serious intent, while others welcome the ANC reaching the same page as the Courts on the importance of independent anti-corruption machinery of state.

CHAPTER 21

The Role of Various Forms of Oversight in Countering Corruption

In the previous chapter of this book we have seen how the establishment of effective and efficient anti-corruption entities that are STIRS compliant is, at least in part, the work of a legislature that is aware of the need for independence and security of tenure among the ranks of those employed in the discharging of the obligation of the state to contain corruption and, eventually, to eradicate it.

It is unnecessary to repeat the references to oversight that appear in the judgments cited. Instead, it is important to have regard to international efforts to provide oversight. All too often at national level the official oversight functions of organs of state are not as effective and efficient as they should be. This is perhaps understandable in those systems in which members of parliament strive to get themselves promoted to positions in the executive branch of government and are accordingly prepared to turn a blind eye to the excesses of the executive to which they aspire.

When official channels of oversight fail or limp along, it is the task of civil society to participate in oversight too. Opposition members of parliament have an especially onerous task in that, although outnumbered, they have the standards of the law to uphold and implement in the face of majority protection of the excesses of the executive and the public administration.

At the international level the provisions of UNCAC suggest that a state party review of anti-corruption entities is indicated from time to time. The provision in UNCAC Article 5.3 is worded in somewhat tentative and clearly unenforceable terms as a 'nice to have' additional, but not compulsory. step:[1]

> Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption

Presumably endeavouring without success and without making any tangible change is still an endeavour; certainly no states parties have ever been criticised or reprimanded by the UN for failing to comply with this open-ended and somewhat vague requirement.

It is possible that the FACTI Panel appointed to investigate matters of corruption in the international sphere will make recommendations for the reform of the provisions of UNCAC.

The provisions of Article 5.4 are in the same tone:

> States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and

> regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

The institution on the continent of Africa of the African Peer Review Mechanism (APRM) has created a vehicle for compliance with Article 5.4 in those states which are prepared to submit themselves to peer review and to act on recommendations that the review missions make. Some forty African states are members of the APRM.

As Rwandan President Paul Kagame has noted:[2]

> The APRM is a unique and rather bold endeavour in the history of mankind. Never before have statesmen and stateswomen, who are still in power, ever subjected themselves voluntarily to both internal as well as external scrutiny. And that is what African leaders set out to do.

Professor SKB Asante, a Fellow of the Ghana Academy of Arts and Sciences, was given the honour of writing the Foreword to the book *The African Peer Review Mechanism: Lessons from the Pioneers* by Ross Herbert and Steven Gruzd of the SA Institute of International Relations. He observed in the Foreword that:

> Since the turn of the twenty-first century, Africa has been going through what may be termed a major governance revolution, a revolution that is quite different from the struggle for political independence. Political independence has always been viewed by African leaders as a vehicle for the development of the economies of their various countries. But as economic independence does not automatically follow political independence, there is a new struggle in governance to achieve this goal. For there emerged many post-independence leaders who typically believed that they could rule over societies on their own terms without having to consult and include their citizens in political governance. Some of them even turned the presidency into a lifetime position, while one-party political systems flourished on the continent. By the late 1980s, most African states found themselves caught in the grips of a crisis of governance and political legitimacy.
>
> The need for a new governance regime in Africa to address these challenges led to initiatives in the areas of governance and democracy as reflected in the agenda of the New Partnership for Africa's Development (Nepad), which signified the advent of a new dawn in Africa's governance regime.
>
> To ensure that progress on democracy, human rights, good governance and sound development practices highlighted in the Nepad initiative become irreversible, the APRM has been adopted as an African self-monitoring mechanism. It is one of the most original concepts emerging from the Nepad document, which has captured the attention of the Group of Eight (G8) and other aid donors at a time when the focus of the international community is shifting elsewhere, signifying the unique position of the APRM in African development discourse.

The authors themselves point out pitfalls of the review process:

> As the official APRM Country Guidelines note:
>
> The organisation of public participation in the APRM process is in itself a central aspect of enhancing the state of governance and socio-economic development in the participating country. Such interactions can build trust, establish and clarify mechanisms for ongoing engagement and empowerment of stakeholders. Governments have their own fears too.

> They are universally anxious about what civil society, the media and the political opposition might do with the APRM. They worry about what impact a negative report might have on aid, investment flows and elections.
>
> Governments, therefore, cannot simply declare that the past should be forgotten and the APRM is a completely positive, open exercise. They need to demonstrate that they have turned a new page by carefully managing the establishment of APRM institutions in ways that are fully transparent, fair, competent and free of political interference. But how, precisely, should governments send the right signals? Which forms of organisation will be welcomed by civil society and which will likely foster pessimism and protest?
>
> This book attempts to answer these questions in an effort to assist the APRM in realising its purpose. We hope that readers in government, civil society and within continental institutions find value in the following pages as a constructive guide to the process. Its recommendations are meant to strengthen this endeavour in the belief that the APRM is immensely important to Africa's future. If the APRM is seen to fail, it could have devastating consequences for the continent.

When it comes to the oversight of matters concerning corruption, particularly grand corruption, it comes as no surprise that the process is even more fraught. Herbert and Gruzd observe:

> Fourth, in discussing corruption, the APRM affects political fortunes. Corruption is the single most potent political campaign issue in many countries. And for those who profit illicitly from corruption or use it to generate the political party funds needed to win elections, the APRM's focus on corruption is political in more than one sense.

A salutary example is the review concerning corruption in South Africa. The review ended in 2006 with a report which identified specific crosscutting issues around the phenomenon of corruption in SA.

The first issue identified was the tricky question of private funding of political parties. This issue had been litigated without success by The Institute for Democratic Alternatives in South Africa (IDASA) and as at the time of writing in 2020 there is now brand new 2020 legislation on the statute book in SA regulating private funding of political parties. The relevant bill awaited signature on the desk of the president for an intolerably long time. This delay leaves a great deal of space open for clandestine ownership of political parties by crooked people in business. It is known that Gavin Watson of Bosasa, a firm involved in the capture of the prisons system of SA, made a donation of R500 000 to the presidential campaign of Cyril Ramaphosa, current president of SA. His main rival, Nkosasana Dlamini-Zuma was assisted and was allegedly sponsored by alleged tobacco smugglers in her unsuccessful presidential campaign. There is, having regard to connections of this nature, accordingly little political will to reform a system that is working for active politicians. Dlamini-Zuma and the alleged smuggler are accused by the official opposition of travelling together to the UK and to Greece. The latter admits assisting the former in her failed election campaign. Pictures of the two looking comfortable together have been published in the media.

The second issue highlighted is the lack of legislation to regulate the transition of public-sector employees to the private sector. This type of legislation is required to prevent or ameliorate conflicts of interest arising. The seamless transition of the

head of government communications to the private sector to head Gupta television and eventually 'buy' it before collapsing it is evidence of the lack of progress on this front.

Thirdly, the APRM panel saw bribery of foreign officials by SA businesspeople as a red flag. This is a time honoured process; in Europe in the twentieth century the practice was so acceptable as to qualify for a tax deduction. While this is no longer the case in Europe, in SA there has been no move to sanction the bribing of foreign officials by local businesspeople.

Fourthly, the improvement of co-ordination and roles of different anti-corruption bodies was identified as problematic. Instead of implementing the decision of the Constitutional Court in *Glenister III* the government has persisted in dividing and ruling the anti-corruption bodies in ways that have crippled efforts to bring the corrupt to justice. The Scorpions anti-corruption unit was dissolved as part of the Zuma presidency's state capture campaign. Their replacement, the Hawks, have failed to land a single 'big fish' on corruption charges in over a decade of existence. Once again, a lack of political will to deal with corrupt elements in politics, government and business has led to the recommendations of the panel being ignored.

Fifthly, the need to strengthen the capacity and independence of the anti-corruption bodies was identified by the panel. This feature was relied upon in the *Glenister* litigation after such independence as existed was undermined by transferring investigation of corruption from the prosecution service (the Scorpions) to the police (the Hawks) at which was successfully impugned for its lack of constitutionality. The government has done as little as possible to implement the steps which would ensure independence of operatives in the anti-corruption space in SA. Connivance in this on the part of the judiciary has not helped the cause of those opposing corruption.

Finally, promoting access to information and the protection of whistle blowers were also highlighted as areas requiring attention. The default position of the state remains the refusal of access to information and no substantial steps have been taken to improve the lot of whistle blowers, especially those who are not acting as employees when they blow the whistle.

It can be seen from this brief review of the anticorruption aspects of the APRM report on SA that when it comes to dealing with corruption, the oversight provided by the AU is of indifferent efficacy.

It falls to civil society organisations to remain alert to the wiles of the corrupt. Herbert and Gruzd describe the role of civil society in the quest for good governance in the following terms:

> The early APRM countries highlighted a variety of civil society concerns surrounding peer review, which have grown out of recent political history. The African Charter on Popular Participation in Development and Transformation—one of the standards adopted by the APRM—puts it this way:

> 'The political context of socio-economic development has been characterised by an over- centralisation of power and impediments to the effective participation of the overwhelming majority of the people.'
>
> Despite decades of multi-party democracy, many states are yet to fully overcome that legacy, and it will affect the perspective of any civil society body asked to participate in the APRM. Civil society is affected by its own institutional self-conception. Many civil society groups and the media conceive of themselves as watchdogs for the public interest. Governments, particularly those that see themselves as liberators fighting in the public interest, often resent the civil society presumption that governments need to be monitored. For the APRM to work, governments need to put that resentment aside and accept that it is healthy and appropriate for civil society to want to verify what government says and what it does.
>
> Indeed, modern democratic theory is built on the assumption that unchecked power will result in abuse of rules and resources, and all sectors of society—citizens, business, the police, military, parliament, executive and judiciary—all require legal restraints and oversight institutions. The APRM acknowledges this through the Questionnaire's call for effective separation of powers, oversight, transparency and accountability.

Herbert and Gruzd have also developed a checklist for civil society participants in the APRM process which is included in this book as an appendix due to its usefulness to civil society worldwide. The checklist is one anybody seeking to exercise proper oversight of anticorruption efforts can use to good effect and is included in this volume as Appendix 6.

The culture of corruption with impunity that infects the world can only be countered successfully if a critical mass of people are prepared to ask the relevant questions in the exercise of civil oversight of the need for strong institutions of state that are able to combat the corrupt with success. The corrupt are involved with the commission of crimes that need to be dealt with by the state. Too often the state is prepared to turn a blind eye to corrupt activities on the part of leading politicians and their friends and colleagues in business. This misstep is reason enough for civil society to take charge of the reform of the system via oversight and by drawing attention to weaknesses that can be corrected through remedial legislation, regulatory changes, better co-ordinated leadership and the appointment of corruption busters who are STIRS compliant.

Edmund Burke famously remarked that:

> The only thing necessary for the triumph of evil is for good men to do nothing.

Equally pertinent, but not as well-known is his statement that:

> When bad men combine, the good must associate; else they will fall one by one, an unpitied sacrifice in a contemptible struggle

Grand corruption, kleptocracy and attempts at state capture can only succeed when the combinations of bad people are allowed to get away with their crimes because the good do not heed the advice of Burke.

Ordinary members of civil society have it within their power to make a great deal of difference to the incidence of corruption by taking an active interest in the activities of all branches of government in the war on corruption. There are

parliaments which seek the active participation of the public in law making processes; the executive branch of government is overseen by parliament and therefore indirectly by the public. The courts can always be turned to when the activities of other branches of government are perceived to be unconstitutional. The political will to do the necessary needs to be cultivated.

CHAPTER 22

The Need to Nurture the Political Will to Eradicate Corruption

Activism against corruption takes many different forms. The conditions on the ground, the pervasiveness of a culture of impunity for corrupt activities, the strength or weakness of existing anticorruption measures and the entities in place to counter the corrupt all combine to inform the strategies of those willing to create the necessary political will to make a positive difference in the struggle against the corrupt.

There is no shortage of anticorruption laws, treaties, protocols, institutions and entities.

There is however a worldwide shortage of the political will necessary to counter the corrupt.

It is the absence of the political will to counter corruption that lies at the heart of the failure to address the issues in a pro-active and constructive manner. Where the political will has been inculcated, ways are found to deal effectively with the corrupt, where there is no political will present, the corrupt continue to enjoy impunity and their numbers swell exponentially when it becomes apparent to more and more strategically placed people that there are no adverse consequences for acting in a corrupt manner.

Owing to the fact that corruption is always at least a bilateral crime (it can be multilateral) of a clandestine nature, its lack of visibility is a problem. All too often the absence of awareness of being a victim of crime in those most directly affected by the diversion of funds intended for their benefit to the secret accounts of the corrupt bedevils the investigation of corruption. The corrupt try, without any reasonable excuse, to characterise corruption as a 'victimless crime'. They do so in order to justify and advance their agendas. They delay, deflect and attempt to thwart investigations in ways designed to ensure that all public interest in the wrongdoing involved wanes with the passage of time. Then, they claim that 'justice delayed is justice denied' and seek to interdict their prosecution.

As corruption is a crime, it is the function of the state to prevent, combat, detect, investigate and prosecute those who are corrupt. In the event of the prosecution succeeding, it can be expected that the state will administer such punishment as the court prescribes, whether in terms of forfeiting the proceeds of corruption, repaying the victims or spending time incarcerated. A combination of these forms of punishment is possible, depending on the circumstances of each case. The task of civil society is not to take the law into its own hands (that would be criminal)

but to encourage the state to fulfil the various functions required to counter the corrupt.

Where it is perceived that the corrupt are not receiving the equal treatment that the law requires, it is necessary for concerned citizens to take up the cudgels against the corrupt. The duty of the state to prevent and combat all forms of crime is at the heart of the social contract in modern societies. It means that there ought to be no culture of corruption with impunity in any properly governed society. It is for this reason that strong institutions of governance have been identified as one of the seventeen UN SDGs. These sustainable development goals are all in jeopardy of being achieved, either timeously by 2030 or at all, if corruption is allowed to run rampant through the world.

The UN is alive to the problems of corruption. The United Nations Office on Drugs and Crime (UNODC) is an agency of the UN that deals with issues concerning drugs and crime. The United Nations Convention Against Corruption (UNCAC) is a treaty against the commission of corruption. The FACTI Panel is the response of the leadership of the General Assembly of the UN to the need for financial accountability, transparency and integrity. Without the necessary integrity being in place, corruption is allowed to continue to the detriment of the achievement of the SDGs and to peace that is secure, progress that is sustainable and prosperity that is equitably shared. So concerned is the UN that its General Assembly has arranged a special session on corruption scheduled for June 2021. The FACTI Panel is a part of the preparation for the special session. It can reasonably be hoped that an international law definition of grand corruption and an investigation into the establishing of an International Anti-Corruption Court may be some of the fruits of the deliberations of the UN General Assembly.

Those in civil society that would prefer to leave the world a better place than they found it are alive to the need to counter the corrupt and to end their culture of committing corrupt acts with impunity.

What then can the ordinary citizen do to help rid society of the scourge of corruption?

It is said that voters get the political representatives that they deserve. This truism points to the need to ensure that aspirant political representatives are not themselves involved in corruption and that they have subscribed to a sound anti-corruption manifesto which they make freely available to those whose vote they seek. All citizens should be astute to vote for candidates and political parties with clean track records when it comes to corruption. Allowing those with questionable ethics, the 'big man' politicians and the freeloaders (who go into politics not to serve the public but to enrich themselves) to win office is a recipe for disaster in the countering of corruption.

Once they are elected, political representatives must be held to account by those who supported them. It is the duty of the voting public to ensure the fulfilment of the anticorruption agendas and manifestos of those they elect to public office.

Reminding them of their pre-election promises is a good starting point on the road to accountability.

Quite apart from the electoral process, it is the duty of elected politicians to exercise oversight over government officials and the activities of the executive branch of government too. Asking the difficult questions, interrogating the vaguely worded annual reports, auditing the official accounting documents that don't balance and requiring criminal investigation when irregularities appear, these are all difficult tasks that parliamentarians must perform. It is helpful of the public interest for activists to feed awkward questions to opposition parliamentarians, especially in states in which the opposition is small and under-resourced.

The political will to reform anticorruption architecture can also be nurtured by making use of the services of official watchdog organisations. An Ombud, a Human Rights Commission and an Auditor General can be approached with the citizens' concerns about the corrupt state of affairs in governance at all levels. These services are provided to the public free of charge and are generally under-utilized. As the public purse pays for them it makes sense for the public to use them to best advantage in the war on corruption.

In some jurisdictions there are complaints bodies that can be approached when corruption in public service is suspected. A Public Service Commission, a complaints body to deal with allegations of wrongdoing by the police, an inspecting judge of prisons and similar organisations are called into existence for the public benefit and need to be used by the public to improve their lot on the corruption front. In some jurisdictions administrative courts provide speedy and inexpensive justice to those who are victims of maladministration by officials.

In situations in which legal reform is indicated, petitions, representations to parliament, the advocacy of the appointment of an official commission of inquiry (or failing that a privately run one) are strategies available to awaken the political will to deal properly with the problems that corruption poses. In Africa the APRM is available to citizens of most countries.

Often with reform initiatives, a carrot-and-stick approach is possible. The carrot is the enhanced stature of the political leaders and the country flowing from a focused approach to reforming the law to bring the corrupt to book. Most politicians, like most people, love to look good in the eyes of the public—it enhances their prospects of re-election. The stick is the fear of failure evidenced by a downgrade by ratings agencies, the loss of foreign aid, sovereign debt issues and the scaring away of potential foreign investors when corruption remains unaddressed.

Opposition politicians can be organised to present a private members motion proposing suitable reform of the law. This stratagem places the government in a dilemma; voting against a sound proposal to reform anticorruption architecture is electorally dangerous because no political party can be seen to be soft on corruption. All too often lip-service is paid by politicians to anticorruption reforms while in practice they kick the can down the road because they realise that their own selfish interests are not served by getting tough on corruption. The fear of losing

popular support due to opposing sound reforms can impel governing parties to support reform.

Finally, there is always public-interest litigation available to the truly committed anticorruption elements of society. Public-interest litigation that is strategically fought and is well-timed can have a salutary effect on the trajectory of corruption. Human rights lawyers and NGOs can be approached to take on cases of this nature.

While there are many tools available to those wishing to inculcate a culture in which the political will to counter corruption is grown, the task is not an easy one and the road to success can be long and winding. As the alternative to building the necessary political will is a limping or failed state, the task is not to be shirked.

CHAPTER 23

Excursus on Corruption in the Judiciary

In October 2019 KAS convened a workshop in Durban to concentrate the attention of delegates on the thorny issues that relate to corruption in the judiciary. A year later the same topic was ventilated in detail at a SADC lawyers' conference as summarised in Appendix Seven. The workshop complements the topics covered in the earlier conferences and workshop.

Since Roman times, the question: 'Who guards the guardians' *(quis custodiet ipsos custodes)* has been posed as a challenge to the rule of law and the fair administration of justice. The long-established rules require that judges be imbued with the qualities of impartiality, independence and integrity. Systems need to be designed with these three qualities in mind. Those who do not measure up to the exacting standards of these three 'Is' ought not to be appointed to the Bench. If some are inadvertently so appointed, mechanisms must be in place to counter the deleterious effect their presence on the Bench can and does have. Strategies need to be put in place to prevent and deter corrupt and errant behaviour in judges.

There can be no gainsaying that the activities of corrupt judges are an inevitable blight on any system intended to deliver fair outcomes to those involved in disputes, whether criminal or civil. The undermining of integrity and impartiality through the appointment of judges who are regarded by the executive as 'a safe pair of hands' or 'executive-minded' is the start of the rot that has accompanied the decline of many countries in Africa and around the world. Just as politicians should take office to serve the people they represent, judges are solemnly obliged to uphold the law and the constitution that they are bound to defend by their oaths of office.

One of the measurements in the World Justice Programme's (WJP) Rule of Law Index is called 'absence of corruption in the judiciary.' Absence of corruption in the judiciary is in turn one of the 64 features of governance that is used in compiling the Index. The spider graphs that are published by the WJP keep track of the levels of judicial corruption as perceived by the experts and lay-people who are interviewed by the WJP researchers each year as they compile the index. Trends are discernible from time to time. Overall, the judiciary tends to fare better than legislatures and executive branches of government, but there is no cause for complacency.

The Rule of Law Index can be viewed in its latest form on the website of the WJP.[1] The judiciary is factor 2.2 on the 'absence of corruption' scorecard.

The best way to prevent the rot is to put in place an appropriate appointment procedure that is operated by personnel and officials imbued with the qualities one seeks in all judges. An independent, impartial body that has decision-makers of integrity is the ideal starting point for ensuring that judges who are appointed

by it, or on its recommendation, are capable of living up to the standards expected of them by the rule of law.

The key to success in the judicial appointments process is to ensure that the body making the appointments goes about its work transparently, accountably and in a manner that is responsive to the public need for an independent and impartial judiciary. It is preferable to exclude politicians from membership of the appointments body. Where this is politically impossible, the influence of politics in the appointments body should be kept to a minimum. Candidates should succeed on merit and be fit and proper persons for all roles in the judiciary. Fidelity to the rule of law and constitutionalism is what the law requires of judges, not fealty to some or other political agenda.

Ideally, the workings of the appointments body should be presided over by retired judges of good standing with civil society and business leadership, faith-based organisations, labour, the legal professions and academia all contributing their voices to the decision-making process. A small sifting committee, imbued with the necessary expertise and authority should be chosen from within the appointments body. The sifting committee should be tasked with checking the credentials of applicants and with arranging for psychometric testing of all applicants who survive the sifting process. Those applicants who pass the psychometric tests and a call for public input on their pedigrees must then subject themselves to participation in a public interview process. In this way chancers do not get past the sifting committee and the psychometric testing weeds out those psychologically unsuited to the duties of the judiciary. Public input could reveal dark skeletons of the past and the diligence of the sifting committee brings about a happy situation in which the most meritorious applicants make it to the interview stage.

Too often the appointments process is in the hands of amateurs and politicians; psychometric testing of aspirant judges is unheard of, even though it is widely used in the business sector before senior appointments are made. The politicization of the selection process does the rule of law no favours.

The idea of creating a special body, call it the 'Commission for Senior Appointments and Dis-appointments', to preside over the selection of judges, leaders of the prosecution service and senior personnel in the police, *inter alia*, has been put forward by retired Deputy National Director of Public Prosecutions Willie Hofmeyr in South Africa. It is an idea worth pursuing as it holds the prospect of a more professional and less politically charged process for finding the most meritorious candidates of integrity, to perform the ponderous work demanded of an independent, impartial judiciary.

At the workshop in Durban the retired Chief Justice of Zambia, Ernest Sakala, delivered the keynote address. In it he stressed that the independence of the judiciary is important for the proper administration of justice. Independence serves the right of all persons to the fair adjudication of their disputes. Independence should not merely be regarded as an insulator for the judiciary; it is through independent adjudication of disputes that the people receive proper delivery of their right to a

fair trial or unbiased adjudication of their civil disputes, without fear, favour or prejudice.

The next business of the workshop was to receive country reports from delegates familiar with the state of play in their countries. Reports were received on the situation as regards judicial corruption in several African countries which included Malawi, Uganda, Kenya, Zambia, Botswana, Namibia and South Africa.

It is possible to extract a few over-arching themes from the discussions that the country reports elicited.

The first theme related to the phenomenon known as state capture. It appears that the culture of corruption with impunity is facilitated and fuelled by the capture of the criminal justice administration. As the work in the criminal justice administration is done by police investigators, specialised prosecutors and judges who sit in cases involving grand corruption, it makes perfect (but crooked) sense for the kleptocrats to protect themselves against police investigation, prosecution and punishment by the courts. The protection is secured via state capture. This phenomenon has been defined as:

> The efforts of a small number of people, aiming to benefit from the illicit provision of private gains to public officials, in order to profit from the workings of a government.

Or more succinctly:

> *State capture* is a type of systemic political corruption in which private interests significantly influence a state's decision-making processes to their own advantage.

South Africa and Hungary are regarded as the prime current examples of attempts at state capture. Clearly, no properly functioning judiciary should be prone to capture of this kind. The fact that the South African judiciary consistently makes findings that do not favour the kleptocrats in that country suggests that the capture of the state in South Africa does not extend to the judiciary. There are however tell-tale signs that some in the judiciary share the 'transformational vision' of the ANC rather than that of the Constitution itself. These have manifested themselves in judgments concerning language and cultural rights, the right to ownership of minerals and the less attractive features of the decision in *Glenister III* which have been discussed elsewhere in this book.

When state capture proceeds to the point at which the judiciary does the bidding of the executive, a future of a Zimbabwean kind beckons. That dire fate ought to awaken resistance to the capture of any state.

Executive-mindedness in judges was also identified as a problem. The executive prefers to have judges with this type of outlook. If the executive plays a large role in the appointment of judges, it can be expected that executive-minded judges will be appointed. The ideal is to have an objective appointments body appointing "lawyers' lawyers" to the judiciary, those who will scrupulously hold themselves to the standards of the law and the constitution in their deliberations and judgments.

In some jurisdictions an over-concentration of power in the Office of the Chief Justice has led to mischief that could be avoided if suitable checks and balances

on the exercise of power are put in place. Even Chief Justices should not be left without checks and balances on the exercise of their powers.

All too frequently ambiguous and vague terminology is used to describe the powers of opaque disciplinary bodies which are meant to stand guard over the probity of the judiciary. While it is so that it should not be an easy matter to discipline a judge, the system for disciplinary steps should not be so convoluted and loaded against a complainant as to make it almost impossible to have a disciplinary complaint properly and fairly adjudicated. The perception of a 'closing of ranks' must be avoided. For sitting judges to sit in judgment of the alleged misconduct of their colleagues creates complications in the disciplinary process best avoided by using retired judges in the adjudicative roles.

The enormous inequalities that exist in systems of discipline tend to load the dice in favour of the judge complained of rather than the complainant. It is expensive to obtain legal relief in ordinary litigation; in litigation against judges the complainant is left, all too often, with the feeling that the entire system is so designed that the scales of justice tip in favour of the judge whose misconduct is under scrutiny.

There is an infamous exchange between two senior judges who were sitting together on a disciplinary panel constituted to ascertain, *inter alia*, whether a judge president arraigned to appear before them was a tax evader. Part of the exchange took place during a break in proceedings when the judges were unaware that the recording machine was faithfully continuing to do its work.

The exchange is recorded in a longer report which is available on the Accountability Now website.[2]

The extract relevant to the complaint laid by a small opposition political party, the African Christian Democratic Party (ACDP) is as follows:

> The fourth question from the ACDP, aimed at possible tax evasion, read: 'Was any additional income received by the Judge President disclosed by him in his income tax returns?'
>
> In other words, has there been transparency on the part of Judge Hlophe in his dealings with the tax-man? This is an important question, as tax evasion is a crime involving dishonesty. It was also perfectly legitimate for the ACDP to raise it and to expect to have it properly investigated and answered fully. No judge who commits a crime of this nature is competent to continue in office.
>
> This is how the possibility of tax evasion is dealt with in the questioning of Judge Hlophe on 13 September 2006 by a special committee of the JSC consisting of President Howie, Judge President Ngoepe and Nthai SC.
>
> Howie P: Did you declare it (the Oasis income)?
>
> Hlophe JP: To the best of my knowledge Sir, my tax is up to date and I brought proof thereof…
>
> Howie P: My question was, did what you declare include the remuneration from Oasis?
>
> Hlophe JP: I don't remember what was the arrangement between myself and Oasis with regard to tax in particular but I have not had any queries raised from the tax authorities.

> Howie P: Would you just check, we don't want tax details that don't have anything to do with this. The question is simply whether the receipts from Oasis were declared.
>
> Hlophe JP: Okay.

At a later stage in the proceedings, in an exchange between Ngoepe JP and Howie P (while Hlophe JP is not present) the former, apparently unaware that the recording equipment is faithfully doing its work, has the following to say:

> 'The reference to the tax returns … I don't know where that is going to lead … that, which may be something else altogether … I was becoming quite uncomfortable about such direction because what if somebody hears that he has not disclosed that in his tax returns which means a criminal offence and really …'

Howie P responds: 'That is not a complaint.'

It is abundantly clear from paragraph 4 of the ACDP complaint set out above that possible tax evasion is indeed a complaint. The passages above show that Judge Hlophe has assiduously avoided directly answering the questions asked of him by President Howie and that the latter has been closed down on this line of questioning by an 'uncomfortable' Judge President Ngoepe in their discussion during the proceedings on 13 September 2006, an edited version of which is set out above. To make matters considerably worse, it also emerges that Judge Hlophe used the vehicle of a trust, the TNG Trust, to accept receipt of the income from Oasis earned by him (he is not asked why) and that, in his own words, in a follow-up letter of 13 July 2007:

> 'My application for tax amnesty is currently pending before SARS with regard to some income, which was not timeously declared. I am currently awaiting the outcome of this application.'

On the record made available by the JSC absolutely no effort of any kind is made to investigate any of this startling information.

There is no 'amnesty' available in respect of income not timeously declared. The income to which Judge Hlophe refers in the passage quoted above from his letter to the JSC is apparently his Oasis income.

It is perhaps speculation to suggest that the Oasis income was not declared until after its existence was made public by Noseweek. If the JSC had properly investigated the ACDP complaint about possible tax evasion, the need for such speculation would fall away. As matters stand, there is doubt as to whether or not the Judge President of the Cape is a tax evader, like Al Capone, and as to whether he only came clean when exposed by Noseweek. This is unacceptable. The questions asked by President Howie ought, in the public interest, to be properly and fully answered.

The so-called 'application for tax amnesty' by Judge Hlophe, to which the JSC turned a blind eye, ought to be made public, so that the relevant timeline and nature of the income not timeously declared can be made known.

It can certainly not be his judicial salary, for this is subject to PAYE deductions at source. If it is other outside income, not from Oasis, the public is fully entitled to know about it and its origin. If it is Oasis income which was not declared until after publicity was accorded to the goings on between Judge Hlophe and Oasis, the inference of tax evasion becomes irresistible. This is especially so as the Oasis accounting records refer, erroneously, to receipt by the 'Ting Trust' of the money earned by Judge Hlophe. On the available evidence, the question posed by the ACDP is still wide open, which is a most unsatisfactory outcome.

The exchange recorded in the passage quoted above is evidence supporting the complaints by delegates to the workshop held in Durban that the mechanisms for

adjudicating complaints against judges are weak in some jurisdictions, as illustrated above, and absent in others. Those who guard the guardians should themselves be fulsomely independent, scrupulously impartial and unbending in their integrity.

Judge President Hlophe was evidently not properly investigated as a tax evader; some years later it came back to haunt the disciplinary structures of the SA judiciary when he became involved in an ongoing spat with all of the justices of the Constitutional Court over his attempts to influence the outcome of a case in which then aspirant president Jacob Zuma featured as a litigant. Since then Zuma has served two terms as president of SA, but the disciplinary steps against Hlophe JP trundle on at a snail's pace.

Hlophe JP now stands accused (in January 2020) by his deputy of attempting to put pro-Zuma judges onto the Bench determining a review of the Russian nuclear power plant procurement process. He did not succeed and denies the accusations of impropriety on his part.

If he were serving in Botswana or Namibia, the digitisation of allocation of matters for hearing in the courts would have rendered it impossible for him to steer the review matter towards those whom he perceived to be executive-minded members of his Bench, those sympathetic to ex-President Zuma. The digitisation removes the allocation decision-making process from human agency thereby removing the temptation to stack the Bench against a pesky litigant.

It is relevant to this long-standing saga to note that had the Hlophe JP affair taken place in Kenya, the rules there require that the disciplinary inquiry be finalised within six months.

In June 2020 the shadow minister of justice in SA, Advocate Glynnis Breytenbach wrote about the Hlophe affair in the media in the following terms:

> The judge president of the Western Cape High Court, John Hlophe who was appointed to lead the Bench in 2000, has had a career overshadowed by a variety of controversies.
>
> This is something that should never become a behavioural norm for one who pronounces judgment in our courts. The judiciary needs to be seen to uphold the laws, not just in court, but also in all aspects of life, and be seen to be free from bias or favour. Judges must be persons of integrity, independence and impartiality.
>
> One of the controversies surrounding Hlophe is his alleged attempt to unduly influence Constitutional Court justices Bess Nkabinde and Chris Jafta to find in favour of Jacob Zuma and the Thint company in an appeal in 2008. This complaint has yet to be dealt with some 12 years later.
>
> But even prior to that, reports of highly unethical, biased, unlawful, and even criminally illegal behaviour have been stacking up against Hlophe.
>
> In 2005, it was reported he called an attorney, Joshua Greeff, a 'piece of white sh*t'. He was also reported to have boasted that he had assigned a case about rights to education to a particular judge because he was likely to 'f**k it up'.
>
> In 2006, the Judicial Service Commission received a complaint Hlophe (or a family trust set up for the purpose) had been receiving a monthly retainer from the Oasis Group, a frequent litigant in the Western Cape High Court, and he had failed to declare this benefit, either to SARS or to Judge Siraj Desai before making a ruling in an application involving the same group's request for permission to sue his colleague for defamation.

Questionable court judgments

In an unrelated case in the same year, Hlophe denied having knowledge of 'bursary' payments being made toward his son's education by a firm of Cape Town attorneys, regular litigators in the Western Cape High Court.

Questionable court judgments litter the space between his appointment in 1995 and the 2008 complaint by the Constitutional Court justices.

Twelve years after the justices' complaint, the case is still to be adjudicated—due to a highly questionable, yet successful, Stalingrad strategy employed by Hlophe that has involved numerous court applications and counter-applications as well as appeals.

Currently, the Judicial Conduct Tribunal is set to sit in December 2020, and it is hoped the 12-year-long impasse will finally be brought to an end.

2017 saw an allegation levelled against Hlophe of improper conduct, in the form of a conflict of interests, when he assigned an urgent application to himself, despite not handling the urgent roll that day, where the applicant in whose favour he pronounced was being represented by Hlophe's own attorney.

Moving on to 2020: an allegation as serious as the 2008 complaint by the Constitutional Court justices surfaced in the form of a complaint by Western Cape Deputy Judge President Patricia Goliath.

Her complaint alleges gross misconduct, with the details of the acts ranging from improperly influencing judicial appointments, preferential treatment of family members, assault and workplace bullying, not to mention attempted gerrymandering of the allocation of the nuclear procurement review to judges sympathetic to Zuma.

Hlophe has denied the complaint of assault on oath. His victim has also sworn an oath that the assault took place and he is corroborated by several judges and by a contemporaneous affidavit. Both can't be right; if Hlophe has sworn falsely, which is more than probable, he has committed the crime of perjury.

It is now more and more apparent, if it had not been before, that there is rot beneath the surface where Hlophe is concerned, and his shenanigans over the past two decades make him a menace to the proper administration of justice and to the delivery of the guaranteed right to a fair trial as entrenched in the Bill of Rights.

There is a desperate need for swift, sure and fair disciplinary measures to rid our courts of their questionable characters. It is an indictment on those of us concerned with the disciplining of judges Hlophe has faced no consequences for so long. Too much has been swept under the carpet, too little has been done to bring him to book.

South Africans look to the courts to protect rights afforded by the Constitution and to also be the moral compass of our society. Given the recent past of attempted state capture and other massive criminal enterprises operating with impunity in South Africa, we cannot afford a tainted Bench of questionable integrity.

Other points that came under discussion at the Durban workshop included the highlighting of the salutary procedures in place in SA and Namibia, where all complaints against judges are required by law to be on oath. There is always the danger that the unhappy loser of a court case will fabricate a complaint against the judge who found against him. By insisting upon complaints on oath the authorities have eliminated or at least reduced baseless complaints as the complainants will be alive to the criminality of making false allegations on oath.

The conference felt that whistle-blowers on judicial malpractice need to be protected by the law and all too often are not. Most whistle-blower protection legislation relates to the workplace and the employer/employee relationship, a relationship not

too frequently applicable to those well-placed to blow the whistle on judicial corruption. Remedial legislation to broaden protection of whistle-blowers is required in many jurisdictions.

It is however important to respect the doctrine of the separation of powers so that other branches of government do not interfere in the investigation of allegations of malfeasance by judges. The corollary of this position is that the judiciary has to be equipped to investigate and prosecute well-founded allegations of corruption on the part of its members. The sweeping of complaints under carpets, kept for that purpose by Judicial Service Commissions, does not serve the interest of the public, the Bench and the rule of law.

The establishment of Ethics Committees and ongoing training for the members of the judiciary, particularly the junior members, were thought by conference to be steps worth taking in the interests of cultivating high standards of judicial conduct.

The idea of a peer review system in which the sort of cover-up chronicled above can be placed before a panel of senior judges at the request of a dissatisfied complainant was also discussed as a means of ensuring the integrity of the process of disciplining judges. Judicial review of missteps taken is cumbersome, slow and expensive.

Ways of deterring errant behaviour in judges were also discussed in Durban. Among these were the improvement of conditions of service of judges, proper support and equipment for the purpose of enhancing their productivity, rewarding judges for outstanding service and excellence in their work as well as ongoing training of judges to keep them abreast of legislative changes and important new decisions. By enhancing the status of judges through the inculcation of values that uphold good governance and the rule of law, it is possible to eliminate or radically reduce the instances of corruption in the judiciary that currently blot the copybook of the Bench.

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Chapter 23: Excursus on Corruption in the Judiciary

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2. https://accountabilitynow.org.za/the-justice-john-hlophe-inquiry-papers-going-nowhere-fast/

APPENDIX 1

Resolutions taken at the Cape Town Conference

CAPE TOWN DECLARATION OF 5 NOVEMBER 2015

1. Noting the corrosive and pervasive nature of corruption in the world today, both in the private and in the public sectors.
2. Identifying corruption as a symptom of moral depravity, inimical to respect for and promotion of human rights, especially those of the poor and marginalised.
3. Recognizing that it is the duty of states, commercial enterprises and all right thinking people to prevent and combat corruption because corruption is generally a serious and deplorable crime.
4. Appreciating that constitutional democracy under the rule of law and social stability are not served when corruption is endemic.
5. Noting that the widely accepted criteria for effective and successful anti-corruption entities include specialization by, training of, independence for, guaranteed resources for and security of tenure of staff of anti-corruption entities.
6. Acknowledging that corruption in Africa has reached levels that threaten and undermine economic progress and growth throughout the continent despite the adoption and domestication of international, continental and regional instruments of international law that commit most countries in Africa to prevent, combat, investigate and prosecute corruption.
7. Concluding that corruption with impunity is inhibiting investment, increasing the cost of conducting business, undermining service delivery and exacerbating poverty in Africa and that corruption must be curbed to facilitate higher and more equitable economic growth.

CONFERENCE RESOLVES THAT:

(*a*) Governments should establish, strengthen, promote and, where appropriate, constitutionally entrench anti-corruption entities that comply with the criteria noted in clause 5 above, both structurally and operationally.

(*b*) In the formulation of policy and laws, corruption should universally be regarded as an infringement of human rights, which is both immoral and unethical.

(*c*) Existing anti-corruption entities should be assessed and reviewed for their structural and operational compliance with the criteria noted in clause 5 above for the purpose of making adjustments and reforms where they are required.

(*d*) Greater protection and incentivising of whistle-blowers, whether or not they are employees, should be considered in order to fortify this important aspect of the combating of corruption through appropriate investigation, prosecution and punishment of the corrupt in both the private and public sectors.

(*e*) The nurturing of anti-corruption entities, both in the state and in civil society, through public education and the stimulation of the necessary political will to regard corruption as immoral, unethical and as a crime that violates human

rights and undermines constitutionalism, should be encouraged through all means available in all forms of media.

(*f*) A sanctions system, such as that developed by the World Bank, should be considered for implementation at the level of national jurisdiction in relation to all public procurement in whatever sphere of government, including procurement by state owned enterprises.

(*g*) The private sector and civil society organisations should be encouraged to adopt and implement anti-corruption compliance programmes as contemplated by the Organisation for Economic Co-operation and Development.

(*h*) Governments should establish a framework for the open and comprehensive declaration of assets and interests by all political office bearers and public officials.

APPENDIX 2

Resolutions taken at the Johannesburg Conference

THE BOKSBURG DECLARATION OF 24TH NOVEMBER 2016

A. Conference takes note of the resolutions passed by the Conference on Combating Corruption held in Cape Town in November 2015;
B. Conference acknowledges that generating the political will to tackle the menacing scourge of corruption effectively is vital to the success of anti-corruption initiatives;
C. Sensitising and empowering ordinary citizens to create the ripple effect necessary to conquer corruption is at the core of activism against corruption;
D. It is the responsibility of political parties, the civil service, the media, civil society organisations, trade unions, commerce and industry in Africa to devise programs and strategies that will ensure the fight against corruption is everyone's business;
E. The role of faith-based organisations is critical to the re-establishment and promotion of sound moral, ethical and spiritual values;
F. Through its investigation and exposure of corruption, the media plays a pivotal role in popularising the struggle against corruption;
G. Traditional leaders throughout Africa who govern with integrity and responsiveness to the interests of those they lead have a vital role to play in conquering corruption;
H. Properly focussed interventions and mechanisms with a multiplicity of strategies at national, regional, continental and worldwide levels are an efficient way of taking on the corrupt;
I. Machinery of state must comply with the internationally recognised criteria for effective corruption busting.

Conference accordingly resolves that

1. National audits of the anti-corruption machinery of state should be encouraged to ensure that the internationally recognised criteria for anti-corruption entities are universally complied with in Africa;
2. Media campaigns and advocacy, designed to create awareness of the internationally recognised criteria for and the need to create compliant machinery of state, need to be organised;
3. Traditional leaders, civil society, the civil service, trade unions and political parties all have an active role to play in campaigning against corruption;
4. The mobilisation of faith-based organisations around the effects that corruption has on the poor and the vulnerable is critical to the success of the struggle against corruption and the elimination of poverty in Africa;

5. Steps must be devised and popularised at country level to secure implementation of the strategies set out in resolutions f, g and h of the Cape Town Conference. Politicians and public servants must be encouraged to champion one or more or all of the said strategies which are:
   (*a*) A sanctions system, such as that developed by the World Bank, should be considered for implementation at the level of national jurisdiction in relation to all public procurement.
   (*b*) The private sector and civil society organisations should be encouraged to adopt and implement anti-corruption compliance programmes as contemplated by the Organisation for Economic Cooperation and Development.
   (*c*) Governments should establish a framework for the open and comprehensive declaration of assets and interests by all political office bearers and public officials
6. The international community of nations must use its capacity to monitor and investigate global financial movements via the Society for Worldwide Interbank Financial Telecommunication (Swift) as a means for identifying illegal movements of funds implicated in corrupt activity around the world. This capacity must be used to secure the prosecution of individuals and companies who are involved in corruption. Every effort must be made to recover funds which are the product of corrupt activity and to return these funds to the lawful authorities in their countries of origin.
7. All delegates at conference commit themselves and the organisations they represent to 'say no to corruption' and 'yes to integrity'.

APPENDIX 3

Resolutions taken at the second Entebbe Conference

WORKSHOP RESOLUTIONS ON THE AFRICAN LEGAL FRAMEWORKS FOR PREVENTING, COMBATING, INVESTIGATING, PROSECUTING AND PUNISHING THE CORRUPT THE DELEGATES GATHERED IN ENTEBBE:

(*a*) NOTED the resolution taken at the Pan African Conference on Combating Corruption held in Cape Town on 5 November 2015;

(*b*) FURTHER NOTED the Boksburg Declaration of 24 November 2016 (both of which are attached marked 'A' and 'B' respectively)

(*c*) IDENTIFIED the ongoing lack of political will to tackle grand corruption adequately in Africa and elsewhere on the planet;

(*d*) ACKNOWLEDGED the increasingly international character of grand corruption;

(*e*) ACKNOWLEDGED the serious and debilitating impact on ordinary people of petty corruption;

(*f*) RECOGNIZED that adequately independent effective anti-corruption machinery of state that is 'STIRS' criteria compliant, as set out in Paragraph 5 of the Cape Town Declaration, is the primary tool in the combating of corruption;

(*g*) STRESSED that a legislative and regulatory framework that embodies regional and international best practice is vital to the successful combating of corruption;

(*h*) NOTED that it is in the effective and efficient implementation of laws designed to combat corruption that there is the greatest deficit, even in countries which have state of the art legislative and regulatory regimes;

(*i*) REAFFIRMED the substance of the work done in Cape Town and Boksburg as set out in the documents attached marked 'A' and 'B'.

FURTHER, THE DELEGATES:

(*j*) REAFFIRMED the principle that adherence to the Rule of Law as the best way to balance the need for sustainable development and the protection of fundamental human rights;

(*k*) REAFFIRMED the important role of a national Constitution as a social contract entrenching the national value of integrity, an orientation against corruption and the independence of Constitutional institutions;

(*l*) STRONGLY ENCOURAGED the promotion of a culture of integrity that makes corruption inimical to the values of the nation through sustained formal and civic education;

(*m*) STRONGLY RECOMMENDED, given the complex nature of corruption and its causes, the adoption of multidisciplinary approaches and strategies to understand and respond to this scourge;

(*n*) CALLED FOR coherent legal frameworks; strong and independent institutions, adequately equipped to hold everyone accountable.

THEREFORE, THE DELEGATES RESOLVED:

(1) That all political parties should affirm their commitment to the fight against corruption by including such commitment in their manifestos and constitutions—and their actions;

(2) That governments of our countries adopt and implement a coherent National Anti-Corruption Strategy to give effect to their legislative and policy obligations and responsibilities. As far as is possible, we recommend that governments harmonise their domestic legislation for internal coherence and harmonise their practices with the best practices of their regions;

(3) That procurement processes should be open and transparent at all levels and action should be taken against all parties found in violation. Any disqualification from the tendering process for reasons related to actual or attempted bribery (or related corrupt practices) must lead to disqualification from further contracting with government at all levels;

(4) That the legal framework must ensure that Anti-Corruption entities adhere to the following criteria:

(*a*) That they be specialised and focused on combating corruption;

(*b*) That they have properly trained personnel;

(*c*) That they are legally, structurally and operationally independent;

(*d*) That they be adequately resourced (as a guideline we recommend setting aside a minimum of 0,3% of the national budget); and

(*e*) That the members of the Entity have security of tenure.

4.1 Notwithstanding appointment by the Executive, we insist that the structural and operational autonomy of the national Anti-Corruption entity must be guaranteed;

4.2 Furthermore, we demand that the entity must be safeguarded, in law and in practice, from political interference and influence;

(5) That specialised anti-corruption courts should be established and operationalised in each jurisdiction that are appropriately staffed by dedicated and qualified personnel;

(6) That the following operating principles for investigations should be adopted:

(*a*) All complaints of corruption must be investigated; and b. Where there is the decision not to prosecute, an automatic review would lie to an oversight body comprising members with appropriate financial, legal and other skills drawn from multiple stakeholders to which the prosecuting authority must justify its decision

(7) That countries should adopt minimum sentences to serve both as a guide to sentencing authorities and as a deterrent to those seeking to engage in corrupt activities;

(8) That action must be taken against both corruptor and corruptee, given the transactional nature of corruption. Upon successful prosecution, the names of private persons and public officers and companies should be entered into a publicly available National Corruption Register.

(9) That the sanction against those found culpable should be appropriate and commensurate to the nature and seriousness of the offence and should include, but not be limited to:
   (*a*) Long-term custodial sentences;
   (*b*) The forfeiture to the State of the proceeds of corrupt acts;
   (*c*) Restrictions on standing for public office;
   (*d*) Restrictions on doing business with the state; and
   (*e*) Publication in a National Corruption Register that is publicly available.

(10) That governments should augment and strengthen the protections for whistleblowers and anti-corruption human rights defenders in order to reinforce a culture of accountability;

(11) That governments should take steps at national level to emulate the sanctions system implemented by the World Bank as referred to in Cape Town Conference of 2015 Resolution No. (*f*). In the case of slow or delayed uptake of this recommendation, we propose to lobby for the amendment of the UNCAC to include those measures;

(12) That membership of, and access to the benefits of international and regional organizations such as the UNO, AU, WTO, IMF, BRICS and World Bank should be contingent upon the creation and implementation of a national anti-corruption environment, in all countries, that is fully compliant with this resolution and the content of the documents attached marked 'A' and 'B'.

(13) That establishment of an International Anti-Corruption Court, compliant with the principle of complementarity should be considered as an alternative to end the culture of impunity for malfeasance that amounts to grand corruption or state capture;

(14) That membership of and access to the benefits of the organizations mentioned in paragraph 11 above should be made dependent upon membership of the IACC whether or not its complementary jurisdiction is in fact exercised in any given country and without derogation from the thrust of the Cape Town Conference of 2015 Resolution No. (e).

ADOPTED ON THIS 19TH DAY OF OCTOBER 2018 IN ENTEBBE, UGANDA

APPENDIX 4

Presentation by Kevin Malunga — first Entebbe Conference

1. The public sector budgetary control framework in SA

1.1 Introduction

In South Africa political factors and economic policies have led to a situation where the economic divide between an affluent class and a marginalised underclass (primarily along racial lines), have expanded over a long period of time. This state of affairs thus has a direct bearing on not only economic policies and budget priorities but more importantly, on budget control at national, provincial and local levels of government. The Constitutional imperatives on the Government to address these imbalances, as well as a commitment to the Constitutional promise of a better life for all South Africans, requires the government to ensure effective and efficient spending of limited financial resources to ensure the realization of specific objectives and concrete targets to meet socio-economic and political demands.

These objectives and targets are reflected in the governments' annual operational and capital budgets. Budget control is not only a public administration principle, but is also linked to economic principles of public finance and public management accounting.

The aim of this paper is to show how, in our experience as the Public Protector (ombudsman) in South Africa, the concept of budget control in terms of the various processes and systems of financial monitoring aimed at ensuring effective allocation, collection and efficient utilising of public funds, is interdependent and interlinked with the development of a strategies for strengthening the rule of law, judiciary systems and legal infrastructure, effective and efficient civil services, and good governance in the public and private sector.

1.2 South African Constitutional and legislative framework for budget control

Sections 213 and 215 to 219 of The Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) require national legislation to establish a national treasury, to introduce uniform treasury norms and standards, to prescribe measures to ensure transparency and expenditure control in all spheres of government, and to set the operational procedures for borrowing, guarantees, procurement and oversight over the various national and provincial revenue funds.

As part of the national legislative framework envisaged by the Constitution, the Public Finance Management Act No. 1 of 1999 (PFMA) is one of the most important pieces of legislation passed in the new democratic dispensation in South Africa. The PFMA promotes the objective of good financial management in order to maximise service delivery through the effective and efficient use of the limited by introducing:

(*a*) generally recognised accounting practice;
(*b*) uniform expenditure classifications; and
(*c*) uniform treasury norms and standards.

The PFMA also gives effect to other principles and standards provided in the Constitution, relating to, inter alia,

(*a*) Limits to exclusions and withdrawals from the National Revenue Fund through an Act of Parliament; (Section 213);
(*b*) Budgets and a budgetary process that seek to 'promote transparency, accountability and the effective financial management of the economy, debt and the public sector' and aim to 'prescribe' budget formats for all the spheres of government (Section 215);
(*c*) Public procurement processes 'in accordance with a system which is fair, equitable, transparent, competitive and cost-effective' (Section 217); and
(*d*) intervention by the National Government when an organ fails to perform an executive function related to financial management, and circumstances under which funds may be withheld (Sections 100 and 216).

In terms of the Constitution the National government must, through national legislation, determine uniform treasury norms and standards, which are monitored and enforced by the National Treasury. In addition to implementing the budget of the national government, the National Treasury but also plays a financial oversight role over other organs of state in all spheres of government.

1.3 Budget control, good governance and corruption

Deficiencies in the processes and monitoring systems aimed at ensuring effective allocation, collection and (from an oversight perspective) the efficient utilising of public funds may associated with —

(*a*) The implementation of unstable fiscal policy that may lead to deficit spending;
(*b*) Overspending on the allocated budget which in turn affects the forthcoming budget as an implicit consumption of future unplanned revenue;
(*c*) Mismatch between policy goals and expenditure allocations, making the Medium-Term Revenue Framework (MTEF) immaterial and rendering the revenue insignificant;
(*d*) Domestic governance failure that 'weaken budget discipline and financial management'; resulting in irregular and unauthorised expenditures;
(*e*) Weak fiscal transparency and other measures intended to promote public debate about the design and results of fiscal policy, to make governments more accountable for the implementation of fiscal policy; for the exercise of the authority provided to them, the basis upon which decisions are made, and their results and their costs; and
(*f*) A defective public expenditure management system contributing to an environment where there is increasing danger of substantial corruption.

According to the World Bank the failure to link policy, planning and budgeting may be the single most important factor contributing to poor budgeting outcomes at the macro, strategic and operational levels in developing countries.

Decision-making around government revenues, strategic resource allocation and expenditure have historically been within the exclusive purview of the top level of government on the basis of political prerogatives and administrative imperatives, free from public scrutiny.

However as a result of increasing global support for good governance norms and standards that emphasise greater transparency, participation, and accountability in all government matters, as well as the introduction of modern public finance management systems and good practices in countries around the world, the concepts of transparency, participation, and accountability have gained significant prominence in the discourse about fiscal decision-making today. The IMF Code of Good Practices for Fiscal Transparency include systems of Open Budget Preparation, Execution, and Reporting that provide access to and public scrutiny of fiscal policy objectives, the macroeconomic framework, the policy basis for the budget, and identifiable major fiscal risks.

The features that we seek to promote in a culture of good governance, namely transparency, accountability and participation are directly related to the functions and obligations of governments to ensure effective budget control processes and systems. From an oversight perspective, accountability institutions such as the Auditor–General and the Public Protector are more concerned with the constitutional imperatives and rationale behind the accountability of government beyond fiscal decision-making—when the implementation of these decisions moves the elements of budget control (policy, planning and budgeting) into the nexus of public administration and into the hands of persons or entities entrusted with ensuring that public resources are utilised efficiently, effectively and economically.

It is within this context that the principles of good governance in the Public Service, as embedded in section 195 of the Constitution are crucial as they support fiscal responsibility, improve financial management and ensure that public funds are accounted for and government resources are used efficiently, effectively and economically. The principles of transparency, integrity and accountability are important because they support both external and internal oversight so that fiscal scrutiny is conducted.

The basic argument is the promotion of the values and principles of good governance in respect of budget control and expenditure, enables the citizens to hold their government accountable for the use of public resources and to steer public policy priorities toward sectors that are key to human development outcomes. Secondly, they help to focus attention on strategies to limit wasteful spending and corruption

According to reports from the Auditor-General (South Africa) the absence of these values, particularly a lack of transparency and accountability are indicators of

an environment conducive to transgressions or poor performance by officials and accounting officers, including

(*a*) Financial misconduct;
(*b*) Unauthorised, irregular as well as fruitless and wasteful expenditure;
(*c*) Possible fraud and Corruption;
(*d*) Poor work performance by suppliers; and
(*e*) Poor work performance by senior management, chief financial officers and accounting officers of an institution.

In South Africa, as in the rest of the world, there are growing concerns about the massive consequences of non-adherence to sustainable economic practices in the Public Sector. It diverts public funds into unnecessary, unsuitable, uneconomic and actually, 'undemocratic' projects with the primary objective to serve the interests of a few individuals at the expense of the country and its citizenry.

The National Development Plan 2030 (South Africa) (NDP) stresses that Corruption is generally recognized as a serious threat to the rule of law, the stability and security of societies. It jeopardizes the fair distribution of resources since it undermines fundamental democratic values and institutions and impedes social, economic and political development and the enjoyment of human rights. The NDP emphasises that

> The costs of corrupt practices fall most heavily on the poor because they degrade the quality and accessibility of public services. State systems of accountability have been uneven, enabling corruption to thrive. This is not specific to the public sector. It is a broader societal disease.

While enhanced regulation and stricter law enforcement have been the usual response to misconduct and corruption in the public sector, the very essence of corruption, which is invariably committed in secrecy, with few witnesses, if any, and between willing participants, means that the normal crime-busting agencies are ill-equipped to deal with it. South Africa, like other countries, has embarked on a significant reorientation to promote ethics and the principles of good governance, stressing openness, transparency, information, competition, sanctions, incentives, clear rules and regulations as adjuncts to the limitations of law.

It is increasingly evident that effective frameworks for controlling mishandling of public funds have to embrace programmes for the development of strategies for strengthening the rule of law, judiciary systems and legal infrastructure, effective and efficient civil services, and good governance in the public and private sector, which include exchanging information and experiences.

A values-based approach alone, however, is inadequate: corruption is as much about systems as about individual conduct. While prevention and control through the enhancement of systems of functional internal controls are vital, the governance process seeks to speak to the single most important factor in the combating of fraud and corruption — the human element. Hence, codes of conduct, administrative law mechanisms, whistle-blower protection, effective auditing, monitoring

and law enforcement systems, and training in and support of ethical conduct are essential components of an ethical environment.

2. The role of the public protector and constitutional institutions supporting democracy as institutions of accountability

2.1 The establishment of a national integrity framework

Early in its democracy South Africa recognized the need to build a National Integrity framework as key cornerstone in its fight against corruption. Such an approach has its origins in October 1997 when Cabinet mandated a Ministerial Committee to consider proposals for the implementation of a National Campaign Against Corruption. Consequently, a National Anti-Corruption Summit was convened in April of 1999

Since then, South Africa has responded by implementing an array of legislation and the creation of democratic institutions as essential armour in its endeavours to build national integrity and fight corruption. It is acknowledged by most stakeholders that a comprehensive policy and regulatory framework is in place that provides for a Generic Integrity Framework through international and national instruments such as

(*a*) United Nations Convention against Corruption (UNCAC)
(*b*) Global Programme against Corruption designed by the Centre for International Crime Prevention (CICP), in collaboration with the United Nations Interregional Crime and Justice Research Institute (UNICRI),
(*c*) Transversally applicable (national level) constitutional provisions of the Constitution such as fundamental rights (Bill of Rights, etc) founding values in section 1, principles of public administration in section 195, procurement regulation under section 217 and fiscal prudence guidelines.
(*d*) Transversal legislation and directives including—
  (i) The Constitution of the Republic of South Africa Act, 1996
  (ii) The Prevention and Combating of Corrupt Activities Act, 2004
  (iii) Prevention of Organised Crime Act, 1998
  (iv) Protected Disclosures Act, 2000
  (v) Promotion of Access to Information Act, 2000
  (vi) Promotion of Administrative Justice Act, 2000
  (vii) Witness Protection Act, 2000
  (viii) The Public Finance Management Act, 1999
  (ix) Financial Intelligence Centre Act, 2001

A specific Integrity Framework for Local Government is also provided though—
(*a*) The Municipal Finance Management Act, 2003;
(*b*) The Constitution—sections 53, 152, 195 Chapter 3 & 7;
(*c*) The Local Government: Municipal Structures Act, 1998;
(*d*) The Local Government: Municipal Systems Act, 2000;
(*e*) The Local Government: Municipal Demarcation Act, 1998; and

(*f*) Codes of Conduct for Councillors and Municipal Employees

The NDP also noted that, in addition to progressive laws, South Africa has created a number of institutions that deal with corruption and hold public officials to account. These include oversight institutions such as the Auditor-General and the Public Protector that were established in terms of chapter 9 of the Constitution to strengthen democracy.

The Public Protector South Africa is national Ombudsman-like institution, established under section 181 of the Constitution, which forms part of the national integrity framework. The Public Protector is part of a network of oversight and accountability bodies that include the Auditor-General, Public Service Commission, the Judiciary, Financial Intelligence Centre, Legislature, media and society. These bodies play an important role in enforcing democratic values of good governance, the Rule of Law and quality of life.

While an integrity framework is largely in place to deal with incidents of the violation of the legislation and codes referred to above in both the public and private sectors, there is general consensus that an open, responsive and accountable public service is critical to building a 'resilient' anti-corruption system.

Achieving this requires strengthening the accountability institutions that are already in place and tackling corruption across society. Through these institutions 'government departments are under scrutiny and observance by the public in support of good governance so that the rights of the public are not undermined '(NDP).

2.2 Constitutional mandate of the Public Protector

Established under chapter 9 of the Constitution, the Public Protector has the power under section 182 of the Constitution to strengthen and support constitutional democracy by:

(*a*) investigating any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(*b*) to report on that conduct; and
(*c*) to take appropriate remedial action.

The Public Protector's mandate covers all organs of state at national, provincial and local levels, including local government and extends to state owned enterprises, statutory bodies and public institutions. Court decisions are excluded.

Section 182(4) enjoins the Public Protector to be accessible to all persons and communities

The investigation of the mishandling of public funds within the Government sector is therefore within the ambit of the jurisdiction of the Public Protector to the extent that if public officials are involved in the commission of these offences, it would undoubtedly also amount to improper conduct on the part of that official as described in the Constitution.

The Constitution anticipates mandate expansion through legislation, and legislation passed since establishment almost 20 years ago has resulted in the Public Protector being a multiple mandate agency with the following 6 key mandate areas:

(*a*) Maladministration and appropriate resolution of disputes under the Public Protector Act 23 of 1994(PPA). The maladministration jurisdiction transcends the classical public complaints investigation and includes investigating without a complaint and redressing public wrongs (Core);

(*b*) Enforcement of Executive ethics under by the Executive Members' Ethics Act of 1998(EMEA) and the Executive Ethics Code (Exclusive):

(*c*) Anti-corruption as conferred by the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA) read with the PPA(Shared);

(*d*) Whistle-blower protection under the Protected Disclosures Act 26 of 2000. (Shared with the Auditor General and to be named others;

(*e*) Regulation of information under the Promotion of Access to Information Act 2 of 2000;(PAIA) and

(*f*) Review of decisions of the Home Builders Registration Council under the Housing Protection Measures Act 95 of 1998.

Except under the EMEA, anyone may lodge a complaint with the Public Protector against any organ of state and the service is free. The complainant need not be a victim of the alleged improper conduct or maladministration. The Public Protector may institute an investigation on own initiative and does not need to receive a complaint.

The Public Protector understands its mandate as involving righting administrative wrongs of the state by redressing service and conduct failure. The Constitutional mandate of the Public Protector to investigate and report on improper conduct or improprieties in state affairs translates to a multi-pronged approach to handling complaints to ensure

(*a*) correction of transgressions by organs of State,

(*b*) a proper diagnosis and correction of any administrative inadequacies, including systemic failures

(*c*) that proper redress is provided in cases requiring remedial action.

The Public Protector's anti-corruption mandate derives from its broad mandate relating to investigating and correcting improper and prejudicial conduct in state affairs as per se 182 of the Constitution and the Public Protector Act of 1994; and its power as the sole agency for enforcing the Executive Ethics Act and the Executive Ethics Code.

Some of the conduct that the Public Protector ordinarily investigates would constitute corruption. The Public Protector's role in anticorruption is also recognised in the key anticorruption statutes including the Prevention and Combating of Corruption Act, the Protected Disclosures Act ant the Public Finance Management Act. For example, the Prevention and Combating of Corrupt Activities Act specifically gives the Public Protector the authority to investigate any improper or

dishonest act, or omission or offences referred to in the Act, with respect to public money.

The Public Protector has long history of playing an effective role in the combating of corruption. This is not surprising as maladministration often involves abuse of power for personal gain, which is corruption. The approach of the Public Protector is two pronged. The first element of the approach is ensuring remedial action and ending impunity where the state's action has been improper or prejudicial. The second element is to introduce or support systemic improvements with a view to promoting good governance.

The Public Protector takes a broader view of incidents and allegations of corruption within the Public Service to include cases of maladministration where the law as such is not broken, and yet a person is aggrieved and may require a remedy. Corruption in the broader sense may refer to incidents where an official involved in the processing of a tender fail to reveal an interest that he/she may have in the outcome of the tender, or where an improper delay is caused, either intentionally or through the gross negligence of an official. While conduct of this nature would not generally be regarded as offences in terms of the criminal definitions thereof, it would qualify as improper conduct in terms of the mandate of the Public Protector and would require remedial action.

3. A growing concern for sustainable economic public procurement practices

3.1 Overview

Globally, governments spend enormous amounts of money on the award of state contracts through public procurement processes. Experts estimate that Governments spend 45 % to 65% of their budgets and 13 % to 17 % of their GDP on procurement. In South Africa the national budget is now exceeding ZAR1 trillion

The high degree of discretion afforded to public officials in executing procurement programmes, and the involvement of many private sector entities in the process, all contribute to its susceptibility to corruption. Corruption in public procurement is the primary cause of poverty in Africa, fostered by poor governance and weak legislation. According to World Bank and African Union surveys, public procurement corruption costs Africa $148-billion a year and worldwide it is estimated to be $390–400 billion per year.

In South Africa, a recent report of the Auditor-General found that unauthorised expenditure of public funds amounted overall to ZAR2.9-billion (per year), irregular expenditure a staggering ZAR28.3-billion, while fruitless and wasteful expenditure rose to almost ZAR1.8-billion.

The consequences are obviously immense.

Auditor General's observation on irregularities in relation to tender and procurement related matters highlight the following:

For example, some decisions could be based on procurement favouritism, tender irregularities or unethical conduct. Managerial leadership indecisiveness on tender

processes could negatively affect the value for money principle and good governance in a country. The OECD (2005:41) argues that procurement should be considered as an integral issue in governance and accountable, transparent and ethical procurement practices and processes should help to reduce inefficiencies and corruption. In this particular view by OECD, it is clear that governance systems could be negatively affected if procurement processes are secretive and ineffective, and that could affect governance within the Public Service

As a rule, all acquisitions in governments are subject to procurement regime that requires value for money, equal treatment, transparency, competitive bidding and ethical conduct. Procurement procedures must endeavour to use public resources efficiently and carry out public procurement in the spirit of the law. The managerial bodies of the government agencies are responsible for the adoption of procurement procedures and the legality of the activities.

Public procurement is afforded constitutional status in South Africa. Section 217 of the Constitution requires that the state must contract for goods or services in a manner which is fair, equitable, transparent, competitive and cost-effective. The Constitution further provides that procurement could be utilised as a policy instrument, i.e. to, for example, address past discriminatory policies and practices. Legislation must furthermore be enacted to make provision for the use of procurement as a policy tool.

The National Regulatory framework includes—

(*a*) the Constitution (sections 217, 9 and 33);
(*b*) The Preferential Procurement Policy Framework Act, 2000;
(*c*) The Preferential Procurement Policy Framework Regulations, 2001;
(*d*) The Public Finance Management Act ,1999;
(*e*) The Municipal Financial Management Act, 2003;
(*f*) The National Treasury Regulations (2005) and practice notes;
(*g*) The Broad Based Black Economic Empowerment Act, 2003, Codes and Scorecard;
(*h*) Provincial Preferential Procurement Policies, regulations or practice notes;
(*i*) The Promotion of Access to Information Act, 2000; and
(*j*) The Prevention and Combating of Corrupt Activities Act, 2004.

The regulatory framework translates to the following public procurement principles and requirements.

(*a*) A competitive system
(*b*) A 'cost-effective' system
(*c*) The principle of fairness
(*d*) Equity

3.2 Procurement related complaints and allegations to the Public Protector

Public Protector deals with a substantial number of complaints relating to unethical conduct on the part of officials as well as executive authorities include allegations relating to—

(*a*) tender irregularities, maladministration and corruption;
(*b*) nepotism;
(*e*) unlawful and fruitless expenditure corruption and mismanagement of funds;
(*f*) non-compliance with proper supply chain management policies in awarding tenders to service providers;
(*g*) abuse of power
(*i*) breaches of codes of conduct;
(*j*) irregular allocation of stands
(*k*) Money paid to a possible phantom company;
(*l*) Maladministration in connection with employment benefits and a suspicion of unjustified enrichment
(*m*) Possible overpayment made to a company as a result of the fraudulent conduct of officials; and
(*n*) corruption due to misappropriation of budget monies

The complaints and enquiries vary in nature and covers virtually all aspects of the procurement process; from the decision to go out on tender or not, the tender advertisement, the submission and acceptance of tender documents, the adjudication process, the award of the tender and communication of decisions, as well as the cancellation of contracts. Some of the most common issues raised with the office, include the following:

(*a*) Failure to follow procure goods and services through the prescribed supply chain and tender processes—
- the appointment of consultants and advisers, or concluding of agreements and contracts without going out on tender, or deviating from the normal tender procedures, or
- where existing or period contracts are used to obtain services or goods that should have been procured through the normal tendering process.
- Failure to budget or exceeding the budget allocated for the project that is the subject of the procurement process.

(*b*) Complaints relating to the tender advertisements/ tender documents—
- objections to the time allowed for the submission of tenders,
- vague or incomplete description of the tender specifications or irregularities at the level of the Specifications Committee,
- Allegations that competitors or other prospective tenderers might have had an opportunity to directly or indirectly influence the drafting of the specifications to favour their product,
- dates of compulsory site inspections not included in the advertisements,
- limited advertisement of tender invitations (access to the tender bulletins),

- failure to advise tenderers of a postponement of the closing date.

(*c*) Adjudication/ consideration of tenders

- Bid assessment and Bid evaluation Committees not properly constituted, disclosure forms not signed or participation by members not duly appointed
- Incomplete or inadequate record keeping of minutes and records;
- Undue delays between the closing time and the date of notice of acceptance to the successful tenderer,
- No communication to tenderers on the outcome of the tender or notification if a tender was cancelled.
- No or vague responses to requests for reasons from unsuccessful tenderers for the award of a tender,
- Challenges to the validity and correctness of the tenders of competitors in respect of their compliance with the specifications, verification of the claimed preferences,

(*d*) Prima facie allegations of corruption, fraud or bribery

(i) The Public Protector distinguishes between two main categories of improper conduct:

- Service failure
- Conduct failure (integrity violations)

(ii) 'Conduct failure' in respect of supply chain and financial management typically involve allegations of

- Bribery,
- Corruption;
- Fraud;
- Favouritism
- Abuse of power;
- Nepotism
- Conflict of interest;

3.3 Examples of procurement related investigations

(*a*) *Report No. 1 of 2012/2013, Yes We Made Mistakes*

The Public Protector investigated a complaint against the Western Cape Premier, Ms Helen Zille regarding the awarding of a 'communications tender' (in December 2010) worth R1 billion to an advertising agency, TBWA / Hunt Lascaris (TBWA) without following proper procurement procedures and prescripts.

The Public Protector upheld a complaint of maladministration against the Department. She found that the failure by the Department to employ proper demand management as required by Treasury Regulation 16A3 in respect of the procurement process constituted maladministration. The failure by the Department to employ proper demand management resulted in fruitless and wasteful expenditure. The failure by the Department to keep records of the proceedings of the BEC constituted maladministration.

The Public Protector took appropriate remedial action in terms of section 182(1)(*c*) of the constitution, aimed at—

Improving the Supply Chain Management (SCM) system of the Department

- Improve the skills and the capacity of the SCM Division of the Department;
- Improve the record keeping of the SCM Division of the Department;
- Ensure that the officials of the SCM Division and the members of bid committees are trained on the prescripts of the National and Provincial Treasuries in respect of demand and acquisition management;
- Take corrective measures to prevent a recurrence of the failure in demand management process referred to in this report.

(*b*) *Report No. 10 OF 2012/2013: On a Point of tenders*

The Public Protector investigated three complaints in which it was alleged that Mr Julius Malema (then President of the ANC Youth League) used his political position to influence the awarding of tenders by the Department of Roads and Transport and other departments of the Limpopo Provincial Government to certain companies in which he has a stake and received kickbacks in that regard.

The Public Protector reserved her findings on whether or not the awarding of the tender constituted a corrupt practice as envisaged under the Prevention and Combatting of Corrupt Activities Act. The Public Protector was of the view that the crime of fraud had been committed. She found that the awarding of the tender by the Department to On-Point was unlawful, improper and constituted maladministration. She further found that certain individuals or entities benefitted improperly from the unlawful, fraudulent and corrupt conduct of On-Point and maladministration of the Department.

The remedial action required that HOD immediately cancel the agreement between the Department and On-Point in terms of clause 23.1(a) of the General Conditions of Contract and Treasury Regulation 16A9 and instruct the State Attorney to institute legal proceedings against On-Point and its shareholders that benefitted from the awarding of the tender, in order to recover any amount to which the Department is entitled to

(*c*) *Report 20 of 2013/14*

Report on an investigation into an allegation of maladministration by the Department of Public Works, Roads and Transport in Mpumalanga in the awarding of tenders for shop leases in Pilgrims Rest. (19 December 2013)

The Public Protector investigated the alleged illegal awarding of tenders, improper issuing of eviction notices, lack of responsiveness by the department to representations that were made prior to the issuing of eviction notices and threats of forced evictions.

The Public Protector, inter alia, found that the Department failed to apply proper demand management as required by Treasury Regulation 16A3 and the PFMA in respect of the procurement processes

This constituted maladministration and led to a situation where the decisions of the Bid Evaluation Committee were not duly authorized and therefore ultra vires and invalid

In terms of the appropriate remedial action in accordance with section 182(1) of the Constitution the HOD must—

(*aa*) Cancel the awarding of the contracts for shop leases in Pilgrims Rest;

(*bb*) Embark on a new procurement process for the conclusion of lease contracts for buildings on the Pilgrim's Rest Heritage Site that are currently without any valid lease agreements;

(*cc*) Ensure that the procurement process complies with the relevant statutory prescripts as well as the standards of fairness, equitability, transparency, competitiveness and cost-effectiveness as required by section 38 of the PFMA and section 217 of the Constitution; and

(*dd*) Ensure that the process is 'heritage compliant' to minimise any adverse effect on the maintenance and conservation of the Pilgrim's Rest Heritage Site, and with due regard to the interests of all stakeholders

4. Possible areas for improvement in the public procurement system

(a) Education

Judging from the number of general enquiries received by the Public Protector, we have to conclude that there are still a fair number of prospective and specifically unsuccessful tenderers to whom the public procurement system is a mystery. They do not know where to look for tender invitations, where to get tender documents, how to complete the forms, what to expect, and also what is expected from them. Unsuccessful tenderers go through an enormous number of tenders without knowing how to establish where there might be deficiencies in their tender submissions.

(b) Providing of reasons (transparency and accountability)

The Public Protector receives quite a number of tender complaints where the complainant never communicated with the Department to find out why he/ she was unsuccessful. In our experience Departments were however, generally reluctant to furnish tenderers with reasons for their decisions. The Appeal Court confirmed towards the end of 2000 (Transnet vs Goodman) that an organ of State is obliged to furnish reasons for the award of a tender if requested to do so. As a result it was decided, depending on the circumstances, and the time frame, that we should advise a complainant or prospective complainant at the earliest opportunity to approach the relevant Department for reasons why he/ she was unsuccessful, etc.

The problem remain however, that the unsuccessful tenderer would usually only be notified of the award of the tender, and be able to obtain reasons, after the successful tenderer has been notified of the acceptance of his/ her tender, and the contract is concluded between the parties. Even if the unsuccessful tenderer has information at his/ her disposal to prove that the product offered by a competitor does not meet the specifications, or that the competitor exaggerated in his/ her capacity or ability to perform, or he/ she is claiming preferences that he/ she is not entitled to, the award of the tender can in the absence of substantiated allegations of corruption or fraud, only be reversed by a court of law.

In terms of the current legal position the onus is on the unsuccessful tenderer to request reasons for the award of a tender. In theory the process might be regarded as more fair and transparent if a tenderer is notified in advance that his/ her tender is not recommended for acceptance, and reasons are furnished and he/ she is afforded an opportunity to provide any information or raise any objection that should be taken into account in the decision making process, or before the contract is concluded.

(c) Improved oversight and strengthening government procurement operations

The Government through the President and the Minister of Finance recently announced a number of procurement reforms.

(*a*) Min Gordhan said the chief procurement office had been established and had made progress on several fronts, including development of a standard lease agreement to address defects in government property transactions.
(*b*) Infrastructure procurement processes and documentation were being standardised, and an inspectorate to monitor procurement plans and audit tender documents was being established.
(*c*) Processing of vendors' tax clearance certificates to ensure compliance was being enhanced, procurement of health equipment, drugs, and medicines was being centralised to effect savings, and the business interests of government employees were being analysed.

Globally, countries are reviewing their present public financial management and public sector procurement frameworks to establish dedicated institutions providing oversight and strengthening government procurement operations. The European Union encourages member states to create specific public procurement watchdogs. Other countries have already adopted oversight systems for public Procurement, including:

(*a*) The Procurement Ombudsman system in Canada and the Netherlands,
(*b*) the Public Procurement Authorities in Ghana, Nigeria & Tanzania;
(*c*) the Contractor General systems in Jamaica and Belize;
(*d*) Public Procurement Commission in Albania; and
(*e*) The National Competition Authority in Sweden which also monitors public Procurement.

The benefit of having a dedicated oversight system, (which is currently shared between the Public Protector and other accountability mechanisms) is increased and dedicated capacity to:

- Review Public Procurement practices to ensure greater fairness, openness and transparency,
- Attend to complaints and appeals from suppliers and tenderers
- And provide a forum for alternative dispute resolution for speedy and cost-effective remedies and enforcement outside the judicial route

5. Conclusion

The concept of 'good governance' is essential for fulfilment of constitutionally promised quality of life for all people in South Africa, particularly through delivery on socio-economic rights and Millennium Development Goals (MDGs);

Maladministration and corruption, particularly in public procurement, are key factors derailing service delivery thus delaying fulfilment of our constitutional dream, which includes redressing apartheid imbalances, gender inequalities and other inequalities.

From the overview of the legislation it is evident that government has put in place a comprehensive and regulatory framework to ensure state must contract for goods or services in a manner which is fair, equitable, transparent, competitive and cost-effective. However, reports by the Auditor General and research by oversight bodies such as the PSC by has consistently shown a decided weakness in implementation of the framework.

The next phase of the effort to ensure adherence to sustainable economic procurement practices should be focused on the successful institutionalization of principles of accountability, integrity and responsiveness in public service, anchored in stewardship service ethos.

5.5 It is important that we as integrity institutions remind governments and their officials of the promises that they make to provide a better life for all its citizens, and to instil that 'FIDELITY' to their public purpose and values in order for 'integrity ' to became a reality and not just another publicly approved panacea.

APPENDIX 5

Critique of the Judgement in Glenister III

The Concourt contribution to sacrificing the rule of law on the altar of transformationism

BY PROF KOOS MALAN AND PAUL HOFFMAN

Helen Suzman Foundation v President of the RSA; Glenister v President of the RSA 2015 (1) BCLR 1 (CC)

1. Introduction

The South African public is constantly bombarded with revelation after revelation concerning the deep-seated and wide-ranging grand corruption in our affairs of state and the public administration, ably abetted by the private sector. These revelations are now accumulating, to what effect remains to be seen, in the records of the various commissions of inquiry and investigation panels—Zondo, Nugent, Mokgoro, Mpati, and Mufamadi. They explore the ingredients of the toxic mix of corruption that have become the most distinctive characteristic of the South African state under the government of the tripartite alliance led by the African National Congress.

However, the deeply corrupt condition of the South African state is nothing new. It has come a long way. Evidence demonstrating the descent of the country to 'the heart of darkness' has also long been available—evidence that, correctly considered and applied, could have helped this corruption-battered country to have tackled the corrupt in all sectors a long time ago. This evidence was available at least as far back as 2014 when the Constitutional Court gave judgment in in *Helen Suzman Foundation v President of the RSA; Glenister v President of the RSA* 2015 (1) BCLR 1 (CC), generally known as *Glenister III*.

Unfortunately, the Constitutional Court, the final protector of our rights and the august guard against corruption was affronted by (the majority) and/or unmoved by (the minority) this evidence. In the eyes of the majority of the justices of the Court the evidence was irrelevant, vexatious, and scandalous. Therefore, it was ruled inadmissible. Moreover, the majority was so indignant about the attempt to present this evidence on the deep-seated corruption that it punished the party who sought to tender this evidence with an unpleasant and extraordinary adverse costs order. There was no basis in law for the majority of the Court to have done so.

On the contrary, having ruled in the way it did, the Court was in dereliction of its judicial responsibilities and has let down those it is meant to serve—the South African public. Now that we are inundated by all the confirmatory evidence of large-scale corruption, the dismissive approach of the majority of the justices of

the Constitutional Court in *Glenister III*, in which it indignantly refused to receive evidence of the same kind needs to be revisited urgently with a view to correcting the stance taken. When a former deputy minister of finance credibly reveals under oath that he could not trust the police, the prosecutors and the intelligence services to protect him when his life was under threat, it is time to take stock. The most pertinent questions to answer are:

Why did the Constitutional Court so furiously elect to turn a blind eye to the so-called scandalous evidence back in 2014—evidence of the same kind that is now the daily staple of the commissions and the panels?; What were the real reasons for the Court's reasoning—the real reasons which were never revealed in its heated judgment. Most importantly, does the Court now have the impartiality, integrity and independence to recognise its error and correct it?

In *Glenister III* the main question was whether the amendments to the legislation that provides for the Directorate for Priority Crime Investigation (DPCI), popularly known as the Hawks, complied with the constitutional requirement of independence (from the executive). A large part of the dispute dealt with in paragraphs 15–38 (9C–18E); 116–149(43G–52G) and 199–219 (63C–68B) concerned the law of evidence. It dealt with the admissibility or otherwise of evidence that Mr Hugh Glenister, the second appellant, sought to present in support of the assertion that the location on the DPCI within the South African Police Service (SAPS) would, in the circumstances then prevailing (and still present) in South Africa, not satisfy the requirement of independence of the DPCI since the SAPS (including DPCI) was corrupt, and managed and controlled by a corrupt executive, deployed from the ranks of a corrupt governing alliance in terms of its illegal, insofar as the public administration is concerned, cadre deployment policies that have no regard for merit and were directed at securing hegemonic control for the governing party of all the levers of power in society.

This evidentiary question was expressly dealt with by the justices of the Constitutional Court in the judgments that they delivered in this case. However, there was another matter that loomed large, arguably one of the most fundamental matters in the present-day South African public discourse, that the Court also dealt with but which was never overtly articulated. This matter concerns the clash of values between those espoused in the Constitution and those subscribed to by the tri-partite alliance that governs at national level and seeks the hegemonic control of all levers of power in society in pursuit of its National Democratic Revolution (NDR).

While using what it calls 'dexterity of tact' with due regard to the 'balance of forces' in society, the alliance pursues its revolutionary agenda while paying lip service to the contrary values of the rule of law and of the Constitution. The wide-ranging evidence that Glenister sought to adduce in support of his case cast a long shadow of doubt on the constitutionality of the NDR, the probity of government and the credibility, effectiveness and efficiency of its newly tweaked anti-corruption machinery of state.

In its earlier judgment in *Glenister II*, in which the Court ordered parliament to make the decision of a reasonable decision-maker 'in the circumstances' to regularise the adequacy of the independence of the state's anti-corruption machinery, the criteria for doing so were spelt out for the guidance of the executive and legislature. These criteria clash with the revolutionary longing for hegemonic control of the levers of power at the core of the NDR. The amending legislation revealed the innate inability of the alliance to surrender control of the anti-corruption machinery of state, choosing instead to keep the DPCI on and located within SAPS.

The various judgments in this case on the admissibility of Glenister's evidence also represented responses to the doubt cast by the evidence on the overall corrupt trajectory of the NDR. The majority rejected, with considerable indignation, the evidence as scandalous, vexatious and irrelevant for the annoyance and embarrassment that it caused. The majority went further and also meted out punishment to Glenister, in the form of a somewhat diluted adverse costs award, for questioning the political narrative in this way. Public-interest litigants are not usually mulcted in costs.

Our discussion commences with a concise factual background to the case in part 2. Part 3 deals with the judgments, specifically on the question of the admissibility of Glenister's evidence. In part 3.1 the judgment of the majority is scrutinised and part 3.2 deals with the judgments of the minority which starkly contrast with that of the majority and also represents a sharp criticism, if not an outright rebuke, of the majority's reasoning. In part 4 we set out our own take on the majority's condemning ruling of Glenister's evidence and bring to light what we view to be the actual reason lurking behind the majority's ruling namely its unwillingness to grapple with the criticism of the NDR and the corruption of the executive, the SAPS and the DPCI. The revelations of state capture, grand corruption and kleptocracy, which have emerged subsequent to the hearing of the case, render the Glenister evidence, which was rejected as inadmissible by the majority of the court, no more than that of a canary in a coal mine warning of the toxicity to come.

As will concisely be shown in part, 4 the NDR is inconsistent with the values, tenets and principles of the Constitution and the supremacy of the rule of law. Its pursuit has gutted fealty to oaths of office and the state's obligation to respect human rights as is illustrated by the levels of corruption in high places and the willingness of deployed cadres of the NDR to loot and mal-administer the public purse in a manner that amounts to theft from the poor.

2. Concise factual background to the case

The demise of the Directorate of Special Operations (DSO), also known as the Scorpions, and its replacement with the Directorate for Priority Crime Investigation (DPCI), or Hawks, is a protracted saga. The DSO was a special unit for the combat of corruption and various forms of organised (white collar) crime, located within the National Prosecuting Authority (NPA). It was established in terms of section 7(1)(a) of the National Prosecuting Authority Act 32 of 1998 as amended. The origin

of the demise of the DSO was a resolution of the African National Congress (ANC) in December 2007 at its Polokwane conference. The resolution was to disband the DSO urgently and to replace it with a new body. Following the Polokwane resolution the DSO was abolished by the National Prosecuting Authority Amendment Act 56 of 2008 and replaced with the DPCI in terms of Chapter 6A of the South African Police Service Amendment Act 57 of 2008. The DPCI is located within the South African Police Service (SAPS).

The abolition of the DSO and its replacement with the DPCI unleashed a spate of litigation in which the Gauteng businessman, Mr Hugh Glenister, played an important part. This litigious activism led to the Constitutional Court judgment of *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*). In this case the majority of the Court ruled that the legislation failed to secure for the DPCI the required minimum degree of independence from the executive, thus rendering it unconstitutional. In its main judgment the Constitutional Court also expressed an opinion on the state of corruption in South African society when it stated as follows (per Ngcobo CJ):

'Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights. Organised crime and drug syndicates also pose a real threat to our democracy.' (para 57 666E).

Following the majority judgment in *Glenister II,* the South African Police Act was further amended by the South African Police Service Amendment Act 10 of 2012 in order to address the scruples of the Constitutional Court in *Glenister II*. The appellants in the present case were not satisfied that these amendments complied with the criteria set in the judgment in *Glenister II*. The Helen Suzman Foundation (HSF) argued that various provisions of the amended act still fell short of ensuring the required independence of the DPCI and successfully challenged the constitutionality of some of these provisions in the High Court in *Helen Suzman Foundation v President of the Republic of South Africa and Others; In Re: Glenister v President of the Republic of South Africa and Others* [2013] ZAWCHC 189; 2014 (4) BCLR 481 (WCC).

Glenister did not restrict his attack on the legislation to selected provisions of the amendments in the way the HSF did. He challenged the legislation in much bolder terms, arguing, as will be indicated later, that the entire legislative scheme of the Act was unconstitutional, since it still locates the Hawks within the SAPS and therefor under the control of the executive. In support of this argument Glenister sought to adduce documentary and expert evidence to show that, in the circumstances prevailing, the location of the anti-corruption entity within SAPS was not the 'decision of a reasonable decision-maker' expressly required by the majority judgment in *Glenister II*.

In the High Court the respondents, having boldly and irregularly elected not to traverse its merits, moved for this evidence to be struck out. The High Court granted this application and dismissed Glenister's application relating to the location of the

DPCI within the SAPS. It also granted a highly punitive cost order against Glenister in respect of the successful striking out of the evidence that he wished the Court to consider (para 6 7A–B). So scandalised did the High Court feel that it even toyed with the idea of awarding costs against the legal team employed by Glenister.

In the Constitutional Court three issues had to be dealt with:

1. The HSF's application for the confirmation of the declaration of the constitutional invalidity of several sections of the amendment Act ruled unconstitutional by the High Court;
2. The HSF's application for leave to appeal against the decision of the High Court not to declare invalid other sections, the constitutionality of which had been challenged in the High Court;
3. The third issue related to the application by Glenister for leave to appeal against: (a) the High Court's order dismissing his challenge to the constitutionality of the very location of the DPCI within the SAPS and the entire scheme of Chapter 6A in terms of which the DPCI was established; (b) the order striking out the additional evidence he sought to rely on; (c) the consequential punitive cost order made against him; and (d) the failure to award him costs for the successful HSF application (para 7 7C–E).

The present discussion focusses on the third issue, more specifically on whether or not the application to strike out the evidence sought to be presented by Glenister was justifiable as well as on the plausibility or otherwise of the punitive cost order against Glenister. Mogoeng CJ with whom five justices (Moseneke DCJ, Jafta J, Khampepe J, Leeuw AJ and Zondo J) concurred upheld the order that the evidence be struck out as well as the punitive cost order, which it reduced from the attorney and client scale to the party and party scale. Froneman J supported by Cameron J and Madlanga J held that the evidence should not be struck out and that Glenister should not be visited with a punitive cost order. This minority judgment was in part supported by Van der Westhuizen J.

3. The response to Glenister's evidence

3.1 The majority judgment

Glenister argued that as long as the DPCI is located within the SAPS, given the circumstances upon which he relied, it cannot possibly be a sufficiently independent anti-corruption unit as required by the Constitution in terms of the interpretation in *Glenister II*. According to section 206(1) of the Constitution a member of the Cabinet must be responsible for policing and must determine national policing policy. Section 207(2) provides that the National Commissioner of the SAPS must exercise control over and manage the police service in accordance with such policy. Glenister sought to present evidence that would show that the prevailing public perception is that the SAPS is the most corrupt institution in South Africa and that the governing party, Cabinet and Parliament are also corrupt.

This evidence is confirmed recently by the latest research of the ISS which, inter alia, describes the police as the least trusted institution in South Africa. The placement of the DPCI within the corrupt SAPS that is controlled by a government which, as the evidence adduced from experts was intended to show, is justifiably perceived as corrupt, can by necessary implication only give birth to a corrupt or compromised anti-corruption unit. The public will thus not have confidence in the capability of the DPCI to fight corruption, free of manipulation by their corrupt masters.

Hence, locating the DPCI within the SAPS, in particular, does not fall within the range of constitutionally acceptable measures that any reasonable decision-maker would take in the circumstances. In the face of the evidence of corruption in the SAPS and government, in general, it is not a viable option at all to place the DPCI within the SAPS because there can simply be no independence within the SAPS unless sections 206(1) and 207(2) of the Constitution are amended. (Paras 15, 16)

The essence of the majority's response to this contention was that the question surrounding the constitutionality of the location of the DPCI within the SAPS was res iudicata since that issue had already finally been decided in *Glenister II* in which the majority judgment was penned by Moseneke DCJ and Cameron J. In support of this argument, the majority (which included Moseneke DCJ but not Cameron J) referred to the Constitutional Court's dictum in *Glenister II* (para 162) on the location of the DPCI where the Court stated that section 179 of the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit within the National Prosecuting Authority (NPA) and nowhere else. The Court said there:

'The creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was not in itself unconstitutional and thus the DPCI legislation cannot be invalidated on that ground alone' (quoted in para 19 (10G).

When Parliament resolved to keep the DPCI within the SAPS, it was therefore acting in line with the decision of *Glenister II* (para 214) that the Minister's powers in terms of section 206 of the Constitution may productively co-exist with the location of an adequately independent DPCI within the SAPS. The Court stated in para 191 of *Glenister II*:

> The question whether the location of the DPCI within the SAPS falls within a range of possible measures 'a reasonable decision-maker in the circumstances may adopt', having regard to public perception, does not arise. That issue was settled in *Glenister II*. (Para 19 (11A).

The same applies to the control of the National Commissioner of the SAPS over the DPCI in terms of section 207(2), which according to the majority was also a matter already settled in *Glenister II*. The majority stated:

> To the extent that the exercise of control over and management of the police by the National Commissioner in terms of section 207(2) may impact negatively on the adequacy of the independence of the anti-corruption entity, it is how that control and management are exercised that might be unconstitutional. On a reading of the *Glenister II*

> dicta that I have quoted, the constitutional imperative of adequate independence and the exercise of the section 207(2) power can co-exist comfortably. (Para 20 (11B–C).

Glenister, however, sought to present wide-ranging expert evidence in support of his contention that there is a justified public perception that it would be impossible to secure sufficient independence for an anti-corruption entity if it is located within the SAPS, because the SAPS is corrupt—one of the most corrupt institutions in South Africa –'(m)anaged and controlled, in terms of sections 206(1) and 207(2) of the Constitution, by a 'corrupt Executive'… deployed from the ranks of a 'corrupt ruling party' in terms of its cadre deployment policies that have no regard for integrity and meritocracy.' (para 23 11I–12A). This evidence, as the Court correctly pointed out, was the basis of Glenister's entire case. Glenister's case would therefore collapse upon the striking out of the evidence. (para 23 12 A–B).

The High Court summarised the evidence sought to be presented by Glenister in the following ten points:

1. That …prior to 2009 the then Deputy Minister of Justice, Adv J de Lange, conceded that South Africa's criminal justice system was 'dysfunctional'.
2. That Mr Clem Sunter, a 'well known and well respected scenario planner', has recently revised his predictions for the future of South Africa and has concluded that there is a one in four chance that it will become a failed state.
3. That from 'public utterances' made by the President he is 'less than pleased' with the findings in *Glenister II*. This inference is drawn, inter alia, from the President's 'failure to repudiate the scurrilous opinion' of his Deputy Minister of Correctional Services, published in a newspaper article on 1 September 2011.
4. That corruption is rife can safely be accepted in light of comments made by winning entrants in a competition about anti-corruption strategies sponsored by Glenister himself, as well as comments made by the Institute for Accountability in Southern Africa (whose members include Glenister's legal team) and who have been 'particularly vocal' about the available strategies for the implementation of the findings in *Glenister II*.
5. That Mr David Lewis of Corruption Watch has 'found' that the Police Service is at present the most corrupt institution in South Africa.
6. That the last three National Police Commissioners are all 'loyal deployees' of the ruling party, which is 'illegal and unconstitutional'.
7. That the ruling party's website reflects that its goal is the 'hegemonic control of all of the levers of power in society'.
8. That the DPCI is corrupt and inefficient and finds itself, constitutionally, 'under the control of a Minister (who is himself compromised) who serves in a Cabinet that is not without its own challenges when it comes to issues of corruption and corruptibility'.
9. That the National Head of the DPCI is 'another deployed cadre' of the ruling party and that his track record 'is not unblemished' if regard is had to various newspaper articles attached to support this allegation. Various other political

figures are also vilified; and parliamentary exchanges and the like are included to indicate levels of corruption and inefficiency.

10. The respondents and the court are referred to seven separate websites which apparently support the aforementioned allegations.' (12E–J, fn 24).

In a nutshell it boils down to Glenister seeking to show, back in 2014, that the South African government, the leadership of the African National Congress and the law enforcement agencies of this country engage in serious corruption; SAPS is one of the most corrupt institutions in South Africa and the criminal justice system is dysfunctional.

Glenister's argument on the alleged perception of the public on the independence of the DPCI was premised on the argument in *Glenister II* that public confidence that an institution is independent is a constitutive component of its independence (*Glenister II* para 207), referred to in para 31 (14E).

Glenister's evidence referred to a collection of incidents relating to President Zuma, some cabinet members, members of Parliament, high-ranking leaders of the ANC, the leadership of the NPA, the SAPS and the DPCI. The majority judgment was very critical of the quality of the documentary evidence that Glenister relied on and also found the purpose for which this evidence was collected and sought to be used suspect. The majority stated:

> Reliance is placed on, …documents… generated by individuals whose objectivity on the dissolution of the DSO is arguably suspect, speculative newspaper articles and people assembled by Mr Glenister to present arguments supportive of his stance on the constitutional validity of the DPCI — the only question to be decided being which presentation undermines the DPCI best. Senior Government functionaries are loosely labelled as loyal deployees appointed in terms of the cadre deployment policies of the ANC which are effectively equated to dishonest or corrupt individuals (para 25 (12E–13B).

The majority was also critical about Glenister's contention that the governing party was pursuing a totalitarian programme (this being in pursuance of the NDR) to seize control over all aspects of societal power including the DPCI. The Court was faced with a contention of an '(u)ncited ANC's strategy and tactics in terms of which it seeks to take firm control of all levers of power in society and that the DPCI is one such lever of power that is sought to be taken over by the ANC through the DPCI legislation' (para 26 (13B–C).

Having concisely summarised the concepts of scandalous, vexatious and irrelevant evidence (para 28 (13E–G) the majority held all this evidence fell within these categories of inadmissible evidence and then stated:

> The allegations in the struck-out material amount to reckless and odious political posturing or generalisations which should find no accommodation or space in a proper court process. The object appears to be to scandalise and use the court to spread political propaganda that projects others as irredeemable crooks who will inevitably actualise Mr Clem Sunter's alleged projection that South Africa may well become a failed state. This stereotyping and political narrative is an abuse of court process. A determination of the constitutional validity of the DPCI legislation does not require a resort to this loose talk. These assertions or conclusions are scandalous, vexatious or irrelevant. Courts

> should not lightly allow vitriolic statements of this kind to form part of the record or as evidence. And courts should never be seen to be condoning this kind of inappropriate behaviour, embarked upon under the guise of robustness. (paras 29–30 (13G–14B (Footnotes omitted))).

The majority's interpretation of Glenister's contention (and supporting evidence) that the location of the DPCI within the SAPS is not convincing enough to show that it would not command the required public confidence in its autonomy to satisfy the requirement of independence (para 31 (15A–C)).

The majority was also of the view that evidence on this public perception was already available when *Glenister II* was heard and that there was therefore no new evidence that could show that the location of the DPCI as such within the SAPS would have the effect of it falling short of the required independence of the institution. (paras 32–34 (15C–16F).

In spite of the fact that there is a well-established principle to refrain from granting costs in constitutional matters, the majority was so displeased with the huge stack of '(h)earsay, opinion, speculative, scandalous and vexatious evidence…' that served no purpose apart from being manifestly inappropriate and frivolous to '(p)roject the public perception about corruption that was stale news already when *Glenister II* was decided.' (para 37 18A–C) that it refused Glenister leave to appeal against the order of the High Court to strike out the additional evidence sought to be led by Glenister with costs in the Constitutional Court and the High Court, including costs of three counsel save to the extent that it diluted the extremely punitive nature of the High Court order.

3.2 The minority decision—and rebuke of the majority view

The minority judgment by Froneman J, supported by Cameron J (and in part by Van der Westhuizen J) rejected the majority's argumentation. Although the minority did not hold the evidence Glenister sought to present as sufficient for ruling in his favour, it held the evidence to be relevant and admissible. Froneman J also showed that the majority's interpretation of the judgment of *Glenister II* which formed part of the majority's reasoning to hold the Glenister's evidence inadmissible, was clearly wrong. Froneman J rejected the majority's view that the question of the public perception of corruption in the SAPS and government was a so-called 'closed chapter' that was settled already in *Glenister II* and therefore could not qualify as a relevant issue in the present case.

That view of the majority was in fact based on wrong interpretation, which is nothing but '(a) re-interpretation that is at odds with what the judgment (in *Glenister II*) actually says' (para 125 (46C). Froneman J referred to para 162 of the majority judgment in G*lenister II* where it was stated: 'The creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was *not in itself unconstitutional* and thus the DPCI legislation cannot be invalidated *on that ground alone*. Similarly, the legislative choice to abolish the DSO and to create the DPCI did

not in itself offend the Constitution.' (Para 118B–C emphasis added.) Froneman J also cited a dictum from paragraph 214 in *Glenister II* which reads:

> The Constitution requires the creation of an adequately independent anti-corruption unit. It also requires that a member of the Cabinet must be 'responsible for policing'. These constitutional duties can productively coexist, and will do so, provided only that the anti-corruption unit, whether placed within the police force (as is the DPCI) or in the NPA (as was the DSO), has sufficient attributes of independence to fulfil the functions required of it under the Bill of Rights. The member of Cabinet responsible for policing must fulfil that responsibility under section 206(1) with due regard to the State's constitutional obligations under section 7(2) of the Constitution (para 118 (44D–E para 118; footnote omitted.)

Froneman J emphasised that it is clear from these dicta that the placing of the corruption-fighting unit within the SAPS will not stand the test of independence under all circumstances. Even though the location of a corruption-fighting unit within the SAPS is not in principle offensive to the requirement of independence of such unit, specific evidence might in fact show that in given circumstances such independence will be impossible if the unit is placed within the SAPS. He stated as follows with regard to the mentioned dicta in the *Glenister II* judgment:

> The judgment does not state that the creation of a separate corruption-fighting unit within the SAPS will withstand any constitutional attack. It says that something else will be needed in order to sustain that kind of constitutional challenge. Mr Glenister sought to show that the additional factor was that the current extent of corruption in our body politic was of the kind that showed that the location of the DPCI within the SAPS was not a possible option for a reasonable decision-maker. In other words he contended that this evidence showed that locating the DPCI within the SAPS meant that it could not have 'sufficient attributes of independence to fulfil the functions required of it under the Bill of Rights. (Para 119 44F–G)

Glenister II therefore did not hold that there could be no challenge to the location of the DPCI within the SAPS. It held only that the mere fact of its location within the SAPS was not sufficient to sustain a constitutional challenge. Neither does *Glenister II* preclude the presentation of evidence in support of a constitutional challenge based on something more than the fact of the DPCI is located within the SAPS. It does not preclude the presentation of evidence that proves that there is a justifiable public perception of corruption that shows that the location of a corruption-fighting unit within the SAPS could within specific circumstances not command public trust in the independence of such institution. This, according to Froneman J is precisely what Glenister sought to do namely to introduce additional evidence of corruption and the public perception of the extent of that corruption in order to substantiate his constitutional challenge that, currently, it is not a reasonable option to locate the DPCI within the SAPS. (Para 123 45F–H). The judgment of *Glenister II*, Froneman J emphasised, allowed that someone (Glenister in the present case) to do that.

In rejecting the majority's view that the evidence of public perception that Glenister sought to present pertained to a perception that had already existed at

the time of *Glenister II* and that this evidence could therefore not take the matter any further (and for that reason did not qualify as relevant), Froneman J pointed out that all the evidence was in the first place not the same as that which had been before the Court in *Glenister II*. The legal grounds for the challenge here had been created by *Glenister II* and thus the issues heralded by the evidence had not all been decided in *Glenister II*. Froneman J pointed out that the majority based its decision to strike out Glenister's proposed evidence on the wrong grounds. When dealing with an application for striking out evidence the truth of the evidence plays no role.

The only question then is whether the evidence is admissible. The question of veracity or otherwise is dealt with only at the end of the case (para 127 (46D–E). The majority judgement was premised on a basic error in this respect because even though corruption had been held to be rife in South Africa and stringent measures had been held to be required to contain this malady before it descends into something terminal, that does not follow—as the majority held—that further probing into the possible extent of corruption is now a 'closed chapter' and an issue that 'was settled' in *Glenister II* (para 128 (46F): 'What if the corruption is so 'rife' that the very idea of locating the DPCI within the SAPS—an otherwise perfectly acceptable option for 'reasonable decision-makers'—becomes unthinkable because those controlling the SAPS may themselves be part of the corruption?' (para 127 46F–G).

Froneman J correctly pointed out that the very idea that this situation might exist, will be scandalous for South Africa. That scandalous notion, however, does not entitle the courts to bar concerned persons from seeking to present evidence to sustain an assertion of that kind (para 129 (47A), which is exactly what Glenister sought to do in his application to have the whole scheme of the SAPS Amendment Act declared unconstitutional (para 130 (47B):

> He tried to show that the corruption at the very centre of our political life is so pervasive that the unthinkable may be true: our elected Government is trying to undermine the independence of our constitutional institutions in order to attain its own unconstitutional aims. The location of the DPCI within the SAPS is allegedly part of this unconstitutional endeavour (para 130 47B–C).

Although this is a grave assertion against values that are held dearly under the Constitution that does not mean that the Court is entitled simply to turn a blind eye to it. (Para 131 47D) On the contrary, it is the duty of the court—'(t)o treat the challenge on its merits, not to denigrate it out of hand as scandalous and vexatious because it seeks to portray the Government, the leadership of the governing party, the ANC, and the law enforcement agencies of this country as corrupt' (para (131 47D).

The court is duty-bound to do the same in relation to the submissions that a previous Deputy Minister of Justice described the criminal justice system, which includes the SAPS. as 'dysfunctional' and that ''(a) 'corrupt SAPS' (is) managed and controlled … by a 'corrupt Executive' … deployed from the ranks of a 'corrupt

ruling party' in terms of its cadre deployment policies that have no regard for integrity and meritocracy' (para 131 47D–E).

Froneman J in fact rebuked the majority view. By implication he accused the majority of reneging their core responsibility as a court to treat the challenge on its merits, and to have vilified the proposed evidence out of hand as scandalous and vexatious because it seeks to portray the Government, the leadership of the governing party, the ANC, and the law enforcement agencies as corrupt. Instead of going about in that way, Froneman J underscored the basic duty of a court of law, stating:

> What we need to do is to make a dispassionate analysis of these assertions, assess whether they are relevant and then test whether the evidence presented in support of them is in accordance with our principles and rules of evidence and procedure. In doing that we need to look carefully at what 'vexatious' and 'scandalous' mean in the context of an assertion that corruption lies at the core of the issue at stake. Presenting evidence of corruption in that kind of situation will of necessity involve making assertions that may be regarded as abusive or defamatory or may convey an intention to harass or annoy, but surely that cannot be a legitimate reason to prevent a litigant from attempting to present that kind of evidence. (para 132 (47F–G).

Froneman J then considered and found that various aspects of the evidence that Glenister sought to present, but had been held to be scandalous, vexatious and irrelevant by the majority, were in fact relevant and admissible.

In the first instance Glenister asserted that it is the goal of the ANC to establish 'hegemonic control of all the levers of power in society' (para 134 (48G) and relied on the ANC website and an extract from an address of the National Executive Committee of the ANC on 8 January 2011 confirming it. The address sets out the goals of the ANC and states:

> We reiterate … that we place a high premium on the involvement of our cadres in all centres of power … We also need their presence and involvement in key strategic positions in the State as well as the private sector, and will continue strategic deployments in this regard. (Para 134 39A–B).

Froneman J held that this evidence was relevant and stated:

> If the ruling party has stated that it wishes to control all levers of power in society, it may be inferred that the location of the DPCI within the SAPS is not a reasonable option because the potential for control over the DPCI through cadre deployment in the SAPS would undermine the adequate structural and operational independence required of a dedicated anticorruption unit. The ANC's own statements, relied upon by Mr Glenister, can hardly be described as vexatious or scandalous within the meaning of the rule (para 135 (49C–D footnotes omitted)

He also held that admission of the evidence would also not cause the respondents prejudice.

> There was no prejudice to the Minister that could not have been met by admitting, denying or explaining the strategy of cadre deployment on affidavit. It is an accepted rule of our law that a party who seeks to strike out evidence must nevertheless on affidavit deal with the allegations made that he seeks to strike out. The Minister did not comply with this requirement at all in the striking out application. This is an instance

> where there was nothing that prevented him from putting up evidence on affidavit to counteract the evidence adduced by Mr Glenister. (Para 136 49D–E; footnotes removed.)

Secondly there was the evidence of the statement of the former Deputy Minister of Justice that the criminal justice administration is 'dysfunctional', which Froneman J also held not to be irrelevant and not to have been struck out. 'The SAPS forms part of the criminal justice system. If it is also 'dysfunctional' this fact must be of some relevance to the question of the location of the DPCI' (para 137 (49F–G).

The third item of evidence relates to media reports on statements made by the President and the former Deputy Minister of Correctional Services in relation to the Constitutional Court's findings against government in *Glenister II*. The President was reported to have stated that the judiciary should not, when striking down legislation, use this as an opportunity to change policies determined by the Executive. In another instance the President was reported to have stated his preference for the minority judgment in *Glenister II* in favour of government suggesting that there is uncertainty about what to do when there is more logic in the dissenting judgment than in the majority judgment.

In yet another media report the former Deputy Minister of Correctional Services also criticised the *Glenister II* majority judgment. Lastly, evidence is offered of the former President's response to a question posed in Parliament which included the following statement by the then President: '[The ANC representatives] have more rights here because we are a majority. You [i.e. the opposition] have fewer rights because you are a minority. Absolutely, that's how democracy works' (para 138 49–50C).

All this evidence was relevant to substantiate Glenister's constitutional challenge that it is not a reasonable option to locate the DPCI within the SAPS, because these statements—

> (i)ndicate resistance or non-acceptance of the legal position and point to a continued intention to exercise political control over anti-corruption activities. What Mr Glenister seeks to show is that there is a disregard for constitutional democracy and the Judiciary at the highest level of Government. For that reason he asserts that there is great danger if the DPCI is subject to political control by those who hold these views. In those circumstances the location of the DPCI within the SAPS cannot be a reasonable option for reasonable decision-makers (para 139 (50D–F).

Once again there was no prejudice to admit the evidence as these allegations could have been denied, admitted or explained on affidavit. Neither would it in any way be vexatious or scandalous to require members of the Executive to explain statements that may be interpreted as expressing disregard for the basic tenets of our constitutional democracy (para 140 (50F–G).

Fourthly, there is the affidavit and report of Professor Gavin Woods (Woods Report), director of the Anti-Corruption Education and Research Centre at Stellenbosch University, which was struck out incorrectly. Referring to a raft of items of alleged corruption in government the Woods report dealt in detail with the public perception of corruption at the highest political level in South African

society on the basis of which the view is expressed that '[i]n South Africa the Executive leadership … are perceived as tolerating corruption and fraud and on many occasions they have been seen as rewarding parties involved in corruption' (para 143 (51E) Froneman J concluded:

> This is a report by an expert based on research he conducted. It is relevant to determine the level of corruption at the highest political level in our society and the general public's perception of corruption at that level. The proper way to counteract the views in the Woods Report was to challenge, on affidavit, Professor Woods' qualifications, methodology and conclusions.

Fifthly, Froneman J made the same finding in relation to the so-called Newham affidavit which included a number of annexures illustrating the work of the Institute of Security Studies (ISS) in the field of corruption in South Africa, including a monograph on the problem of systemic corruption in South Africa (particularly in the police service); a report on the public's perceptions of the levels of corruption and other crimes in the SAPS based on the findings of a study undertaken by the ISS; a report evincing the view of police officers at three Gauteng police stations on police corruption, which in particular shows that 66 of the 77 respondents believed corruption exists on a large scale in the SAPS; an ISS article on the poor leadership within the SAPS and its impact on the effective performance by the SAPS of its mandate; an ISS article addressing the lack of political will to address corruption in South Africa; the ISS submissions to the Portfolio Committee on Police on the SAPS Amendment Act when it was still a Bill, including reasons for the opinion that an adequately independent anti-corruption entity could not be located in the SAPS (para 145 51G–52B).

Van der Westhuizen J aligned himself broadly with the judgment of Froneman J, but for the reasons set in in paragraphs 214 to 216 (66H–67E) disagreed with Froneman J's ruling admissible the evidence of the former Deputy Minister of Justice and the Woods report (the second and the fourth items above dealt with in the judgment of Froneman J).

4. The majority turning a blind eye to the unfolding of the National Democratic Revolution

The reasoning dealt with in part 3 revolved around and was articulated in terms of the law of evidence. However, on closer analysis something distinctively more profound was at stake here—something profoundly ideological and political. That is the very credibility of the redeeming grand narrative/history about South Africa that has been told since the advent of its renowned constitutional transition of the 1990's. The evidence that Glenister wished to tender challenged that grand narrative and challenged the foundations of the NDR. The majority, faithfully guarding the narrative and the tenets of the NDR was unable to tolerate this attack. The majority refused to consider the evidence and therefore avoided grappling with the manner in which the Zuma administration was going about implementing the NDR.

Grand narratives/histories are totalising and intolerant. They proclaim but one truth, namely that told that by the narrative in question; they leave no room for an alternative interpretation of the past, or for the proclaimed redeeming event—the revolution—the splendid new society envisaged or proclaimed by the narrative concerned. They are legitimising in that they clothe the new dispensation heralded by the redeeming event with legitimacy, thus giving it a protective shield against any possible alternative views of the perceived redeeming event and for the splendid dispensation. Since the grand narrative/history encapsulates the true and only story, different views do not represent alternative interpretations of history. They are untrue stories, false doctrines, heresies or apostasy that cannot be considered and must be silenced.

States also have their own statist histories and these histories may assume the same kind of character as these generalised grand narratives. Hence, they may also claim but one historical truth for that state and all its inhabitants, the story of a dismal past overcome by heroic events that have brought that bad past to an end; of a splendid present and future premised on the articles of faith encapsulated in a sacred and anchor document, interpreted by the narrative's own priesthood and heralding one encompassing society living by those articles.

This is particularly true in respect of the present South Africa which has its own encompassing grand narrative/history—the official South African grand narrative as contained in the NDR, which has long been the programme and policy of the tripartite alliance. It was told in the sweeping and touching phrases of the postscript to the interim constitution. The postscript encapsulated the authoritative *true* (his)story of South Africa and it was thereafter told on numerous occasions by the Constitutional Court.

It also echoes loudly elsewhere in the legal, in particular the constitutional discourse as well as in legislation, text-books and articles and has been regurgitated *ad nauseam* time without number by a flock of true believers. The official grand narrative, apart from being the official history of South Africa told in terms of the assumptions of the present constitutional order—that is, in terms of the contemporary official statist historiography—is a redemptive gospel upon which the present South African state is premised. The relevant passages from the preamble of the interim constitution which is the corner stone of the official grand narrative read as follows:

> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex…

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge…

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation…

With this Constitution and these commitments, we, the people of South Africa, open a new chapter in the history of our country.'

The narrative is very simple—a broad generalisation. It is characterised by a simple periodization: a protracted evil past, a miraculous intervention that brought that past to an abrupt end, and a splendid new order that has dawned with that intervention in which order we are now happily living as a unified society, the South African nation. The redeeming event was encapsulated in the interim constitution and has finally been rounded off in the present Constitution—the final conclusion of the dreadful old past and the infallible decisive word about the foundation for the newly redemptive order, and hence referred to with veneration as the *Final* Constitution.

Disciples of the NDR have no difficulty, somewhat gymnastically, reconciling their striving for hegemonic control of all the levers of power in society with the principles and precepts of the Final Constitution. The notions of the rule of law, the separation of powers, checks and balances on the exercise of power; a free media, an independent judiciary and the respect for human dignity, the promotion of the achievement of equality and the enjoyment of the rights guaranteed to all in the Bill of Rights are in fact deeply incompatible with the collapse of party and state into a hegemonic order as envisaged by the NDR. Others regard the Final Constitution as no more than a beach head in the striving toward the realisation of the goals of the NDR. A temporary position taken up with 'dexterity of tact' pending the arrival of a time when the 'balance of forces' is more conducive to the victory of those pursuing the NDR.

South Africa's past is summarised as that of a deeply divided society characterised by strife, conflict, untold suffering and injustice and of a land in which there were divisions and strife that generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts… The constitutional transition heralded the interim constitution (finally secured in the Final Constitution) proclaiming to put a final end to this bad past. Thus, the postscript declares that the Constitution provides a historic bridge between that bad past and the bright future; that the adoption of this Constitution lays the secure foundation for transcending the dismal past; and that with the Constitution the people of South Africa open a new chapter in the history of their country.

The postscript also describes how this future that has now begun would unfold. It is a future founded on human rights, democracy peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex and by the need for understanding, reparation and ubuntu and not marked by vengeance, retaliation, and victimisation. Thus, the recitation of the grand narrative began. The past was irredeemably and unqualifiedly evil; the constitution was the unquestionable redeemer from that bad past; the future, based

on the secure foundation of the interim constitution and is now perfected by the present (Final) Constitution would be bright and happy. The Constitution also forged a new encompassing South African society.

The Constitutional Court, as the supreme guardian of the Constitution obviously, also assumes of the role of the primary guardian of the constitution's redeeming message and tells the truth of the new South African society—the South African nation. The Constitutional Court had proven to fulfil this role with vigour and conviction.

Thus Mohamed J states: in *Makwanyane* 1995 6 BCLR 665 (CC) that the Constitution:

> (r)epresents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimized racism…The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; …The past accepted, permitted, perpetuated and institutionalized pervasive and manifestly unfair discrimination against women and persons of colour…The past permitted detention without trial…The past permitted degrading treatment of persons…The past arbitrarily repressed the freedoms of expression, assembly, association and movement… The past limited the right to vote to a minority… The past… (para 262 758C–G).

All that is past has been abolished by the Constitution. All that is now forbidden and unconstitutional since the Constitution now provides a transition—a redeeming bridge leading away from these grossly unacceptable features of the past to a conspicuously contrasting vision outlined in the postscript. (See further the observations made by De Vos P 'A bridge too far? History as context in the interpretation of the South African constitution' *South African Jnl on Human Rights* 17 (2001) 1–33 specifically at 9–13) to this grand narrative as told by the Constitutional Court.

The story of the redemptive force of the Constitution was picked up and the redeeming gospel eagerly recited and praised by some academic commentators. Karl Klare in one of the most celebrated contributions to the South African constitutional discourse was struck by the post-liberal character of the Constitution which he discovered in the social rights (over and above the traditional civil and political rights) in the Bill of Rights; the substantive conception of equality; the numerous affirmative duties that the state owes to rights bearers to enhance an array of social conditions; the horizontality of the Bill of Rights which would be able to permeate the democratic values and norms of the Constitution into the private sphere; and participatory decentralised governance, multiculturalism, including the protection of language diversity and respect for cultural tradition. (Klare 'Legal culture and transformative constitutionalism' *South African Journal of Human Rights* (1998) 151–156).

Apart from bringing the dreadful past to an end, the Constitution also forged a single unified truly South African nation that has never before been achieved.

Justices of the Constitutional Court have elaborated on the characteristics of this nation. The nation has common aspirations and ideals (Didcott J in *S v Makwanyane* 1995 6 BCLR 665 (CC) para 190 (740J); Mahomed J in *Makwanyane* para 262 (758B–D; Ngcobo J (as he then was) in *Kaunda and Others v President of the Republic of South Africa and Others* 2004 10 BCLR 1009 (CC) para 155 (1048F); Mokgoro J in *Jaftha v Schoeman and Others* and *Van Rooyen v Stoltz and Others* 2005 1 BCLR 78 (CC) para 28 (90 B–C); Sachs J in *Matatiele Municipality and Others v President of the RSA and Others* 2006 5 BCLR 622 (CC) para 97 (622I); Mokgoro J in *Jaftha* para 28 (90D); The nation shares the same communal values. (Ngcobo J in *Kaunda supra* 1551048F, Mokgoro J in *Jaftha supra* para 28 (90E); The nation also has its own ethos—a national ethos Mahomed J in *S v Makwanyane* supra para 262 (758A–B); para 263 (758I–J); Ncgobo J in *Kaunda supra* para 155 (1048F–G); Sachs J in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 1 BCLR 1 (CC) para 625 (183D); Sachs J in *Doctors for Life v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) 1470A–B; Mokgoro J in *Jaftha supra* para 28 (90D); The nation is moving in a moral and ethical direction. Mahomed J in *S v Makwanyane supra* para 262 (758A–B); Ngcobo J in *Kaunda supra* para 155 (1048F–G.); The nation even has a soul. (Sachs J in *Matatiele Municipality supra* para 97 (853A)

In spite of the bold certainty which the narrative has been ringing, there is mounting evidence that ominously decries—debunks—the truth of claims of this magnificent official grand narrative, even evidence showing that the narrative was untrue in material respects right from the moment when it was told for the first time; that the unified nation with its own moral and ethical direction and own soul might, of which the justices of the Constitutional Court once so eloquently spoke about, have after all, never come into being; that the bridge that the interim constitution was supposed to be in terms of the celebrated metaphor of Etienne Murenik (Murenik 'A bridge to where—introducing the interim Bill of Rights' 1994 (10) *SA Jnl on Human Rights* 31–48) was not a bridge to the splendid new dispensation which the official grand narrative proclaimed but, to a broken new world—one with its own increasingly serious maladies and one in which the very existence of the perceived splendid order might be in jeopardy.

Political and legal analyses abound with such evidence. Democracy in South Africa is flawed. There is one party domination, not meeting the standards of sound multiparty democracy proclaimed by the Constitution itself (Choudhry ''He had a mandate', the South African Constitutional Court and the African National Congress in a dominant party democracy' 2009 (2) *Constitutional Court Review* 1–86 at 19–23). Even more upsetting is that South African democracy is increasingly turning into a violent democracy (Von Holdt 'South Africa: the transition to violent democracy' *Review of African political economy* (December 2013) 589–604). It is marred by crime, which is increasingly turning violent and is now also struck by large-scale so-called xenophobic violence which has thus far claimed the lives of many foreigners.

The present crime wave is now turning South Africa into a land marked by the abuse of human rights instead of the champion of human rights, which the official grand narrative proclaimed it to be. Hence our democracy, often fondly described as our young democracy, might not be so young in the first place, but rather so sick. Then there is the evidence that Glenister wished to present in the present case. Much of the information contained in that evidence had been in the public domain for years, although not presented before in a court of law. The ANC's programme of cadre deployment is a case in point. This programme is repeatedly expressly proclaimed by the authors of that programme, the ANC, in official documents of the party and readily available on the website of the ANC and featured in the evidence that Glenister wished to present to the court and referred to at least by the minority judgment (Para 134) The majority held this evidence to be scandalous and vexatious, '(r)eckless and odious political posturing or generalisations which should find no accommodation or space in a proper court process. The object appears to be to scandalise and use the court to spread political propaganda…Mr Clem Sunter's alleged projection that South Africa may well become a failed state. This stereotyping and political narrative is an abuse of court process' (para 29 (13G–H).

That, however, as the minority aptly pointed out, does not imply that the evidence should have been ruled inadmissible. Thus it stated: 'Presenting evidence of corruption in that kind of situation will of necessity involve making assertions that may be regarded as abusive or defamatory or may convey an intention to harass or annoy, but surely that cannot be a legitimate reason to prevent a litigant from attempting to present that kind of evidence' (Para 132 (47F–G).

It was not Glenister's evidence that was scandalous or vexatious, nor the conduct of Glenister's legal team that was unacceptable. What was scandalous and what would have caused embarrassment and annoyance in the evidence is the subject matter—the events—that the evidence was about. And the annoyance and embarrassment that it could cause was the standard annoyance and embarrassment that the evidence of opposing parties cause to each other when they join issue in litigation on a daily basis in South Africa and elsewhere in the world. We therefore subscribe to the conclusion reached by the minority that there was no basis in the law of evidence to rule Glenister's evidence inadmissible and that the majority therefore erred in ruling it inadmissible.

5. Conclusion

The basis for the majority's view appears to have been founded not in the law of evidence but in something else. The content of the evidence that Glenister sought to adduce was certainly annoying, embarrassing and scandalising. It also had political implications which might have amounted to political posturing and relaying a story of a badly performing South African state. It may have been an embarrassment to the veracity and the credibility of the specious grand narrative upon which the constitutional order is based which has so faithfully and passionately been told

by the Constitutional Court itself. It could certainly be annoying in that it showed that the grand narrative is in part false, thus casting doubt not only on the veracity of the narrative itself, but also on the narrators, which include the Constitutional Court.

Glenister's evidence of the manner in which the NDR was unfolding in the Zuma era, if accepted and regarded as admissible, would certainly have pointed to the fact that there was 'something rotten in the state of Denmark' and that the location of an anti-corruption entity within the rotten SAPS was not indicated. The fact that no prosecution of a 'big fish' has followed an investigation by the DPCI is proof enough that the majority erred in rejecting the admissibility of the evidence tendered by Glenister.

We would submit that the majority was keenly aware of the failure of the respondents to counter the evidence put up by Glenister—and it could not countenance the admissibility of such audacious unanswered information. The majority seemed to be keenly conscious of the role of the Constitutional Court as the supreme custodian of the official grand narrative, more so than their guardianship of individual norms of the Constitution and the law. Hence, they silenced this heretic dissenting narrative suggested in the evidence of Glenister and pilloried that narrative by imposing a punitive costs order against Glenister, thus also showing to Glenister and prospective doubters what might befall them when the official grand narrative is challenged, regardless of the evidence that they might be offered to reveal the baselessness of the official grand narrative.

The majority used the vocabulary provided by the law of evidence to protect the official narrative and to silence and punish the factually unanswered challenge to the official grand narrative that accompanied Glenister's evidence. The minority on the other hand decided the matter on the basis of a proper application of the relevant law of evidence and was therefore less sensitive to the derogatory impact of this on the official grand narrative.

The lack of efficacy of the DPCI both before and after the handing down of the judgment in November 2014, the revelations of the Guptaleaks, the evidence before the Zondo, Nugent and Mpati commissions, the work of investigative journalists on grand corruption in South Africa and the premature end to the presidency of Jacob Zuma all tend to show that the majority decision on the admissibility of the evidence tendered by Glenister was both novel in legal principle and wrong on the facts and the law as it was before the majority so ruled. The majority's decision needs to be revisited and corrected.'

APPENDIX 6

APRM Checklist for Civil Society

Civil Society Checklist

The following is a summary of the key issues that civil society groups should be aware of before, during and after their national APRM process. Issues are arranged as questions that CSOs should be asking.

How the national governing council is selected and led:

- Should the governing council follow an Eminent Person model, or be representative of all major constituencies?
- Should civil society elect its own representatives or should government select based on nominations?
- Does the governing council have a civil society majority and a civil society chair in keeping with the APRM Supplementary Guidelines?
- Does the Focal Point allow the council to make the decisions on research and writing of the report, as outlined in the Supplementary Guidelines, or does he/she attempt to control or lead the council?
- Do the selected civil society representatives have sufficient professional and managerial experience?
- Are they credible and widely accepted as non-partisan?
- Will the civil society representatives be able to work full time on the APRM for an extended period or can provision be made for full-time secondment?
- Should council members be paid, and if so, what is a fair amount and payment system?
- Is the proposed council too large for efficient decision-making?
- Should government representatives be non-voting members, as in Kenya?
- If the council is divided into subcommittees, does civil society retain a majority on the subcommittees?
- Can subcommittees take decisions on important matters such as research, editing and writing without consulting the wider council membership?

How the national governing council operates Independence:

- Is the local Secretariat to be chosen by the governing council or by government?
- Are its staff members to be drawn from business and civil society rather than from government?
- Who chairs the council?
- Where should council and local secretariat offices be located—inside government or at independent premises?
- To what extent can the council take spending decisions without seeking government approval for specific forms of research or consultation?

- If civil society members have full-time jobs and cannot attend all meetings, how are decisions taken? Can they nominate alternates?
  Transparency and council operations
- Should council meetings be public? Should they be open to the media?
- Are governing council meetings, decisions and debates properly recorded and the minutes made publicly available?
- How should decisions be taken if all members cannot attend a meeting?
- If the Secretariat is located in government offices what measures ensure that it takes direction from the council and not from government?
- Is it permissible for an executive committee to take decisions without consulting the wider membership?
- Has the council formally discussed research methods and committed the research and consultation to paper?
- Has the research and consultation plan and the associated budget been circulated for comment before finalisation?
- Does the council have a website for displaying all public inputs, survey results and draft thematic reports?

Budgeting

- Does the council require legal status to approve spending? If so, have the necessary laws been passed? If not, what provisions have been made to ensure that the council has autonomy in its conduct of research?
- How should council decisions relate to national tendering and procurement laws?
- Are the funds adequate to conduct all of the forms of research and consultation required by the APRM?
- Has adequate provision been made for a citizen survey?
- Has adequate provision been made for desk research to ensure that the APRM takes on board the recommendations of the national development plan, MDG plans, Poverty Reduction Strategy Papers and other reviews?
- Has adequate provision been made to allow for printing and distribution of desk research and draft reports well before public consultations and expert workshops occur?
- Is there provision for funds to assist civil society organisations in drafting their own APRM submissions, to cover costs for facilitators, rental of meeting space, and/or hiring of editors to help write a submission?
  Processes for research and consultation—Research mix
- What combination of technical research, desk research, surveys and public consultation methods should be used?
- Does the research plan reach all regions, ethnic groups and ages effectively?

- Does the research plan identify the particular experts, interest groups and government officials needed to deal with the main issue clusters in the Questionnaire?
- Does the research plan incorporate a well-planned public opinion survey based on a representative sample that reaches all regions, ages and ethnic groups?
- Has time been allocated for conversion of the APRM Questionnaire into a robust survey instrument that is translated into local languages?
- Does the country have a statistically representative survey sample system or must one be created?
- Does the research plan provide enough time, staff and resources to answer the many technical questions in the APRM concerning the constitution, separation of powers, trade policy, monetary policy, budgetary procedures, human rights, social development indicators and local or provincial government administration, among other subjects?
- Does the research plan make provision for use of independent Technical Research Institutes to summarise public inputs and ensure that the APRM Questionnaire is properly answered without political interference?
- Are the criteria for selection of Technical Research Institutes clear and appropriate, given the demands of the Questionnaire?
- Are the Technical Research Institutes allowed to subcontract if necessary to obtain specialised expertise?

Writing and editing

- Are there written guidelines to ensure that the style, sections and use of evidence and footnotes are consistent across the four APRM thematic areas produced by different research institutes?
- Are there clear rules about how summarising longer technical reports produced by the Technical Research Institutes should be done to prevent the removal of controversial issues or evidence?
- Research institutes are typically responsible for drafting the Country Self-Assessment Report and Programme of Action but precisely how are final revisions done?
- If the council revises the draft, precisely how is the text edited and who approves? Should the council edit and government members comment on the edits? If the Secretariat edits the text and it reports to government, what controls does the council have to prevent edits from taking out controversial issues?
- Have clear editing guidelines been agreed so that the final report acknowledges sources and continues to reflect different opinions?
- Does the final report include specific comments, quotes and points of view when there are divergent views on certain aspects of governance or does it attempt to assert one consensual voice?
- Are the sources of data and opinion clearly footnoted?
- Validation

- Does the research plan make provision for time and funds to circulate the draft Country Self-Assessment Report for comment?
- Does the research plan include separate seminars of adequate length to validate the draft Country Self-Assessment Report and Programme of Action, which may run to hundreds of pages and require discussion of many specialised aspects of governance?

Programme of action

- Does the research and consultation plan include adequate time for development of a comprehensive Programme of Action?
- Have government departments been given authorisation to participate in the process so that civil servants are free to comment about needed reforms and provide evidence of how to improve existing programmes?
- Has the desk research phase clearly noted recommendations made in other national reviews and the status of their implementation?
- Have researchers investigated the reasons that have delayed or weakened implementation of past reforms to determine how the Programme of Action should take account of these obstacles?
- Is the Programme of Action realistically costed?
- Does Programme of Action provide detailed separate documents for each action item? Do these stipulate the management, resources, timing, technical obstacles and preliminary steps required, such as writing and passing legislation and obtaining budget authorisation?
- Is responsibility clearly assigned?
- How should it be handled when the testimony and/or evidence suggests that existing reform programmes are not working?

Adequate time

- Does the envisioned time frame allow adequate opportunity for civil society, business and other interested parties to make written submissions?
- Is there provision to halt the process for elections?
- Are consultation meetings advertised well in advance to give citizens a fair chance to participate?
- Are all public submissions, the Country Self-Assessment Report and Programme of Action made public in a timely way?
- Are participants in validation meetings afforded access to the draft Country Self-Assessment Report and the proposed Programme of Action with sufficient time to allow for meaningful comment on their contents?
- Does the research and validation plan allow adequate time for senior government officials, research agencies and civil society to debate draft reports and recommendations? This would require at a minimum two to three days dedicated to each of the APRM's four thematic areas.

Content — what the reports and programme of action say

The Country Self-Assessment Report

- Does the report answer all of the APRM questions?
- Does it reflect on the country's positive achievements?
- Does it reflect best practices?
- Does it include all of the major problems and their contributing causes?
- Does it reflect the differing views presented in public submissions, including by government?
- Is it fair, comprehensive and technically competent?
- Is the text candid in discussing problems?
- Are there major national problems that are not addressed or are given inadequate explanation?
- Is the assessment based on fair and broad consultation and rigorous technical research?
- Does the final text reflect the version publicly validated by citizens?

Programme of action

- Do the solutions proposed in the Programme of Action offer a realistic potential to address fully the problems identified in the self-assessment?
- Are the actions or methods used to solve problems clearly explained?
- Is the Programme of Action realistically costed?
- Is responsibility clearly assigned?
- Does the Programme of Action acknowledge problems that are very large in scale, socially complex, and without apparent solutions, and make provision for additional research and policy experimentation?

Country review report

- Are there key issues that have been left out of the Country Self-Assessment Report or Programme of Action that the review team should be made aware of?
- Are there key documents supporting these areas that would help the review team understand and assess the missing issues?
- Does the Country Review Team have contact details of key experts and organisations who would add valuable perspective to the Country Review Team deliberations?
- Can CSOs find out and widely share information on who is on the Country Review Team, when they arrive, what hotels they will use and when and where they will hold public consultations?

  How the APRM is institutionalized and monitored:

- Is there a suitable system to independently monitor progress on the Programme of Action?
- Is there a separation between the agency responsible for implementation and the one responsible for monitoring and reporting?

- Has authority for such monitoring and appropriate funding been provided to an appropriate institution?
- Has parliament been involved in monitoring the APRM through the public accounts committee or the auditor-general?
- Has budgetary provision been made to enable effective implementation of Programme of Action items?
- Does the final Programme of Action clearly distinguish which programmes or activities are new as a result of the APRM process?
- Does the final Programme of Action make clear which programmes will be funded through the next national budget and which require new sources of funding.

APPENDIX 7

Fighting Corruption in the SADC Region

Fighting corruption in the SADC region: An independent and impartial judiciary gets the job done better—By Oagile Key Dingake, 2 November 2020

This is an edited version of a speech presented to the Southern African Development Community (SADC) Parliamentary Forum Standing Committee on Democratisation, Governance and Human Rights meeting on 26 October 2020.

Corruption is robbing our region and indeed the entire African continent of its future. The social costs of corruption are incalculable and incontestable. It is on account of the seriousness of this matter that we need to speak frankly and clearly.

A judiciary that is independent and impartial is more likely to be effective in fighting corruption than the one that is not. A judiciary that is the lapdog of the executive cannot enjoy the confidence of the people. The lifeblood of any judiciary is the confidence and trust the people repose in it. As is often said: The judiciary is the last line of defence against any encroachment on rights and freedoms under law. It is incontestable that corruption is a violation of human rights. It deprives people of the resources they need to survive and thrive.

Contextual considerations—political will is critical in fighting corruption

Before discussing the role of the judiciary in fighting corruption, and in order to put the issues of the moment in sharp focus and context, it is important to understand that fighting corruption is fundamentally a political project. The politicians in the executive and legislature must take the lead and the people should trust that they mean what they say when they promise zero tolerance for corruption.

To this extent, we need to seriously pose this question at the very beginning of our discussion: Are our respective national political leaders leading the war against corruption credible? Do they have the moral standing to win the confidence of our people? Are they perceived to be corrupt?

If they are, winning the war would be a Herculean task.

The unspoken tragedy in Africa that keeps corruption alive is that the proceeds of crime and illicit money are the raw material for election campaigns and election buying, with the result that criminal cartels are now buying governments-in-waiting in advance. This phenomenon turns the ruling elites into enemies of their own people, because they are bought in advance to pursue the interests of their sponsors when in power.

That is why regulation of finance campaigning must be the next big thing in our region that independent anti-corruption bodies and civil society must focus on. Perhaps our host, the Southern African Development Community Parliamentary Forum (SADC PF), can initiate a conversation about this issue before it is too late to resuscitate democracy in our region.

The proceeds of crime and the illicit money funding political parties will destroy any semblance of democracy we may have. They subvert the will of the people and make the expression of that will inarticulate. The struggle for political pluralism and democracy in Africa was premised on giving people a choice on who should govern them, and not criminal cartels.

The judiciary on its own, no matter how independent it may be, will not succeed in breaking the back of corruption until we address the political question—the democratic deficit that makes corruption thrive. The national leadership leading the war against corruption may only succeed if it is credible. They must walk the talk and live the promise.

The judiciary has an important role to play in fighting corruption, but the extent to which the judiciary could effectively fight corruption is a function of the state of democracy and political will in any given country. I theorise that the countries with a democratic deficit invariably suffer the misfortune of captured and ineffective corruption-fighting institutions. It is in countries with a democratic deficit that the voices of civil society against corruption, the voices of students, journalists and other voices of change, are violently suppressed. Corruption tends to thrive in countries where there is no freedom of information, where the national leadership is not obliged to declare assets and liabilities, where there is poor governance, where freedom of the media is suppressed and democratic rights curtailed.

Our region's worsening corruption could only be solved by a new generation of politicians who are willing to live the promise of 'zero tolerance' for corruption, combined with civil society players who are willing to make them account. We need a new generation that is committed in word and deed to an open democracy where power resides with the people and the rule of law is respected.

The role of the judiciary

A judiciary that is independent and impartial is the bedrock of a democracy and the rule of law. These values are essential in earning and retaining the confidence of the people. These core values were agreed at a meeting of the Judicial Integrity Group held in Bangalore, India, in February 2001, resulting in what is now commonly referred to as the Bangalore Principles of Judicial Conduct.

The building blocks of a judiciary that can effectively fight corruption start with the manner of appointment of judges. This is because the selection of judges may have an adverse bearing on a judiciary that can credibly and effectively fight corruption. Lack of judicial independence is a major obstacle in fighting corruption. We all know that the role of the judiciary is to enforce the law and hold public officials accountable. However, the lack of judicial independence from the executive is one of the root causes of the judiciary's inability to uphold the law.

The growing phenomenon of cadre deployment—a situation in which the appointment of judges is made purely on political considerations and not merit—undermines the fight against corruption and the rule of law. Appointments of

judges based on political considerations are in themselves a form of judicial capture and should be strongly discouraged.

Tragically, we often read of disturbing reports in which chief justices conveniently empanel 'suitable' justices who can deliver verdicts that are consistent with governments' preferences. Usually the empanelling violates relevant considerations such as experience, seniority and qualifications. This is a heavy indictment on the independence of the judiciary.

Two years ago, in an unprecedented move, four senior Supreme Court judges in India held a press conference to protest against the manner in which the then Chief Justice of India had constituted benches on various high-profile corruption cases.

The findings of the 2016 Africa Integrity Indicators report produced by Global Integrity, an organisation that promotes transparency and accountability around the world, showed that judicial independence is not guaranteed in about half of the 54 African countries.

Global Integrity data is also used to compile the annual Ibrahim Index of African Governance, a project of the Mo Ibrahim Foundation that collects data for every African country and ranks them according to how well they adhere to principles of good governance.

The Global Integrity study has sought to look into the appointment process of judges in many countries, including in southern Africa, and how that may have a bearing on their decisions, and whether those decisions could bear objective scrutiny. The study also looked at whether there are influences over the judiciary from other branches of government.

The results are in the main unsatisfactory.

The study found that the manner in which judges and other players in the law enforcement sector are appointed does not promote independence from the influence of other branches of the government, especially the executive. It concluded that the appointments of judges, magistrates and prosecutors based on political considerations promote fertile ground for corruption to take root, as these appointees may be beholden to political interests and often take decisions that they consider to not be career limiting.

In Cameroon, for instance, the president chairs the highest judicial body, the Superior Council of Magistracy which, among other things, oversees judicial appointments. In some parts of Africa, the president might have the final say in who gets selected for higher courts. In fact, in several countries in the SADC region the president alone has unfettered powers to appoint the chief justice and president of the Court of Appeal.

Appointments sanctioned by the president of a country tend to be determined by political loyalty rather than merit. When such appointees fill the judiciary, experts argue that the likelihood of a government being held accountable is diminished and the door is left open to all kinds of influence, including political pressure, threats and bribery.

Even when the independence of the judiciary may be formally and legally guaranteed, the risk of interference is still present. In Angola, for example, Judge Joaquim de Abreu Cangato, a long-time official of the ruling party apparently with no judicial background, was appointed in March 2000 to the country's supreme court, according to a 2016 report by the Committee to Protect Journalists. This was despite the fact that judicial independence is enshrined in the country's law.

Of the 54 African countries surveyed by Global Integrity, 11% have a 'completely independent' judiciary, while 30% are 'not completely independent'. Among those found completely independent were Botswana, Cape Verde, Mauritius and South Africa. However, a study by the University of Cape Town and Bingham Centre of the Rule of Law in the United Kingdom has found many serious gaps in the manner in which judges in Botswana and South Africa are appointed, and expressed concern about the dominance of the executive in the appointment process.

South Africa has a mixed record when it comes to judicial independence. The ruling by the Constitutional Court, the country's highest judicial body, a few years ago, upholding corruption allegations against the then president, Jacob Zuma, was internationally hailed as a sign of the judiciary's independence. In words now frequently quoted, the Constitutional Court held that: 'The president has failed to uphold, defend and respect the Constitution as the supreme law of the land.' This pronouncement came after the court found that Zuma and his government had failed to comply with the recommendations of the then public protector, Thuli Madonsela, to repay public money spent upgrading the president's private home.

The executive may get it all wrong.

I must mention for completeness that sometimes the executive can get it completely wrong in thinking that its appointees, after being appointed, would serve its personal interest.

South Africa offers one such example. In 2011 Mogoeng Mogoeng, South Africa's Chief Justice, was appointed by Zuma over then Deputy Chief Justice Dikgang Ernest Moseneke, who was widely viewed by some sections of civil society and the legal community as more experienced and better qualified. Civil society organisations and opposition parties opposed the appointment, claiming that the executive was trying to stifle the independence of the court and possibly skew its decisions in its favour. But as the South African Constitutional Court decision showed, judiciary appointments, even by politicians, do not always tie judges' hands.

A merit-based appointment process

A merit-based and transparent process of selection of judges has a positive correlation with the judiciary's ability to effectively fight corruption. It is an essential and critical prerequisite for judicial independence. It necessarily follows that transparency is the key to both judicial independence and accountability.

Transparency entails several factors:

First, judicial accountability is strengthened when judges are appointed on merit using transparent judicial appointment criteria.

It seems incontrovertible that an open and participatory judicial selection system has better prospects of selecting more competent judges. Invariably, judges appointed in such a manner are better placed to administer their judicial functions in a fair and impartial manner. The fact that some judges—notwithstanding the fact that they may not have been appointed based on merit and transparency—have turned out to be independent, should not encourage us to promote a system of selection that is controlled by politicians. That route is fraught with danger and is better avoided, despite the fact that some judges, once appointed, choose their own path.

In the US they say: 'You shoot an arrow into a far distant future when you appoint a justice.'

A famous but probably untrue story is told that a former US president was asked by a journalist whether he ever made a mistake. The president said: 'Yes, I made two mistakes and both of them are sitting in the Supreme Court.'

The president is reported to have been referring to the appointment of Chief Justice Earl Warren and Justice William Brennan, who turned out to be more liberal than the conservative appointing authority had thought.

In Africa Cape Verde is often cited as an example of a country that observes a merit-based appointment system. The country appoints its judges and magistrates through a selection process based on merit.

In 2007, when many African countries were planning judicial reforms, Transparency International looked at corruption in judicial systems in its annual global corruption report, focusing on political interference and bribery involving court personnel. It recommended greater transparency, fair court processes, training of court officials and greater involvement of the civil society.

The report also emphasised the importance of striking a balance between accountability and independence, adding that 'granting judges independence, while subjecting them to effective accountability mechanisms, will deter prosecutorial and police corruption'.

These recommendations form the basis of judicial reform programmes across the continent. Based on the current Africa Integrity Indicators, the continent is making progress, albeit slowly, on judicial independence.

An enabling legal framework

The independence of the judiciary is not all that is required. The judiciary needs an enabling legal framework, which most countries don't have. Enabling laws that may contribute to an effective anti-corruption legal framework may comprise those that:

- Criminalise corrupt activities;
- Enhance transparency in public procurement;
- Require public officials to regularly declare assets and liabilities;

- Identify and prevent conflict of interests;
- Protect whistle-blowers;
- Enable tracing, seizure, freezing and forfeiture of all illicit earnings from corruption;
- Improve access to information (allowing citizens to obtain information from the state);
- Define basic principles for decision-making in public administration (objectivity, impartiality, fairness, proportionality, legality, and the right to appeal); and
- Have a legal framework that enables public-interest litigation.

Experience

It is my experience and that of many colleagues I have spoken to over the years that the reason corruption cases may not be successfully prosecuted is a function of many reasons.

The first has to do with the legal framework that may not optimally promote the sourcing of evidence such as nonexistent or inadequate whistle-blower protection litigation, and inadequate resources, both human and financial, of the authorities charged with investigations, leading to poor investigations and poor evidence. Sometimes the legal framework may not enable tracing of tainted property or forfeiture thereof. Some jurisdictions allow plea bargaining while others don't.

In many instances accused persons are acquitted due to lack of sufficient evidence on account of poor investigations. Some judges have spoken of reluctant or demotivated prosecutors who do not do a good job, often tempting the judge to insist that certain persons not listed as witnesses be called as they may shed more light in the case. This route, though, is fraught with challenges, as it may cast the judge as a prosecutor and therefore not impartial.

Conclusion

In conclusion, it is important for members of parliament to pay attention to passing laws that can aid in fighting corruption. We need laws that protect whistle-blowers, laws on freedom of information, laws on declaration of assets and liabilities, laws on conflict of interests, and laws on public-interest litigation—where people other than those directly involved (concerned members of the public) can file a suit on behalf of the public.

The judiciary has a sacred duty to adjudicate over corruption cases fairly, impartially and without fear or favour. This requires knowledge, competence and judicial courage, a courage and integrity grounded on the oath of office that should see the courts applying the law equally without regard for the status or position of those charged with corruption.

We must remember that independent institutions that operate with integrity are in the interest of every one of us. If as a politician you don't work hard to ensure establishment of independent institutions, what guarantee do you have that your

opponents, once in the same privileged position as you, will not use the institution against you?

It is a matter of grave concern that many of us who often take oaths to uphold the constitution, hardly do so in practice. Quite often, many of us, soon after taking the prescribed oath, forget what that oath enjoins us to do.

We need to commit to doing the right things for our countries. We must do all we can to assist every institution to effectively fight corruption. Judiciaries are temples of justice to which the oppressed, those unduly harassed, those discriminated against, run for protection. You do not want to run to the temple of justice and find that it is run by the clueless or your opponents.

Lastly, on the question of political will, I must say there are times when, in a moment of deep reflection, I wish our leaders could listen to the trees as they sway in the wind! DM/MC

The Honourable Justice Professor Oagile Bethuel Key Dingake is a former judge of the High Court in Botswana and currently Justice of the Supreme and National Courts of Papua New Guinea and the Court of Appeal of Seychelles.

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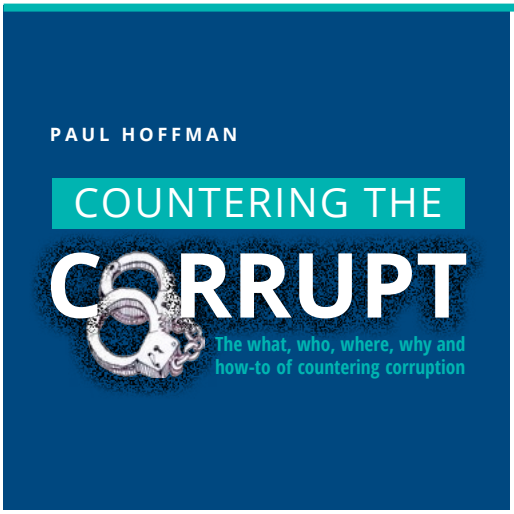

The Konrad Adenauer Foundation has a Rule of Law Programme for Sub-Saharan Africa which has devoted a great deal of time and effort to addressing the scourge of corruption, the number one enemy of the rule of law and of the capacity of states to respect and protect the human rights of their citizens. When public funds are diverted to the pockets of kleptocrats it is the poor who suffer most.

This book sets out to pull together the themes and conclusions of a series of conferences and workshops held in recent years for the purpose of sharing knowledge and seeking solutions to the challenges posed by corruption.

Paul Hoffman is an experienced trial lawyer and anti-corruption activist from South Africa who was lucky enough to attend all of the gatherings that are reported on in this book. His insights are valuable in the year in which the UN General Assembly is planning a Special Session on corruption, and pressure is building for the establishment of an International Anti-Corruption Court.

The book includes chapters by Richard Goldstone on establishing an International Anti-Corruption Court and by Cynthia Stimpel on whistle blowing.

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