CORRUPTION AND REFORM IN DEMOCRATIC SOUTH AFRICA

Marianne Irene Camerer

A thesis submitted to the Faculty of Political Studies at the University of the Witwatersrand, Johannesburg, in fulfilment of the requirements for the degree of Doctor of Philosophy.

Durban, March 2009
ABSTRACT

This thesis evaluates the effectiveness of public sector anti-corruption reform efforts in democratic South Africa. These reforms are contextualized within the international theory, literature and policy debate that has emerged over the past decade on the control of corruption within the context of democratic governance.

To evaluate the effectiveness of anti-corruption reforms the thesis first covers a number of broad themes including: conceptions, causes and consequences of corruption; main theoretical approaches underpinning anti-corruption reforms; and methodologies to evaluate the effectiveness and seriousness of anti-corruption efforts. Specifically focusing on South Africa, the thesis looks at the nature and extent of corruption both pre and post 1994; recent legislative, institutional, and policy interventions to control public sector corruption; and, as an illustrative case study of grand corruption, an in-depth analysis of the government’s handling of allegations of corruption in the Strategic Defense Procurement Package or “arms deal.”

The findings of the thesis are mixed: I argue that democracy is a necessary albeit insufficient condition for effectively fighting corruption. Although South Africa has an impressive array of institutions, laws and policies to counter public sector corruption, the most important ingredient for successful reforms, namely an indication of sustained political will, is not yet fully in evidence. The government’s mishandling of allegations of corruption in the arms deal is a case in point, suggesting chronic weaknesses on the part of institutions such as parliament to safeguard the public interest. Lack of regulation in the funding of political parties remains the “Achilles heel” of anti-corruption reform efforts. So far as concerns further theoretical framing of corruption studies I conclude that a focus on social empowerment (Johnston) in the context of democratic consolidation, including an active civil society and vigilant media, is crucial for the effective fight against corruption in new democracies such as South Africa.

Keywords: Arms Deal, Corruption, Democracy, Governance, Integrity, South Africa.
DECLARATION

I declare that this dissertation/thesis is my own unaided work. It is submitted for the degree of Doctor of Philosophy in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

Marianne Irene Camerer
(Name of candidate)

______________ day of ________________ 2009
For a remarkable woman, my maternal grandmother

Diana May Durrant
PREFACE

My objective in writing this thesis is to position an analysis of the South African government’s handling of allegations of corruption in the arms deal within the broader context of anti-corruption reforms occurring both in South Africa and internationally.

The arms deal has been described as the “litmus test” of democratic accountability and as such this watershed event in South Africa’s democratic consolidation needs to be documented, contextualised and critically analysed to see what lessons can be learned for those serious about understanding and sustaining the fight against corruption in new democracies.

Having had unique access to many of the key players shaping the first decade of the anti-corruption reform agenda in South Africa, I believe I am equipped to write authoritatively about the topic of “Corruption and Reform in Democratic South Africa.”

Over the main period covered by this thesis (1995–2007), I worked as an applied policy researcher responsible for corruption and governance research at the Institute for Security Studies (ISS) in South Africa, a consultant for the United Nations Global Program Against Corruption (in South Africa) and, from 2005 as the co-founder and international director of Global Integrity (www.globalintegrity.org) an international NGO based in Washington DC that gathers independent information on corruption and governance by examining the existence and effectiveness of anti-corruption mechanisms and reforms around the world, including South Africa.

I was intimately involved in the anti-corruption policy process in South Africa. Whilst working at ISS, I interviewed many of the key institutional role-players both before and after the initial arms deal investigation concluded by the Joint Investigating Team (JIT). In May 2001 I was commissioned by the Public Service Commission to conduct a comprehensive review of the various agencies in South Africa with an anti-corruption mandate. Over a year later, in September 2002, as part of Transparency International’s National Integrity System study on South Africa, I conducted further
interviews with key role-players in the anti-corruption arena, asking specifically what lessons had been learned from the arms deal probe. During 2001 I worked alongside a United Nations/South African Government team as the lead consultant on the Country Assessment Report.

Based in the ISS’s Cape Town offices from December 1999, I spent months observing the decline of non-partisanship and increasingly strained relations in the Standing Committee on Public Accounts (SCOPA), Parliament’s most important oversight committee. During this time I was exposed to the way individual politicians and office bearers responded to events around the arms deal investigation and got to know some of the key role-players personally.

Drawing on this rich tapestry of anti-corruption resources the thesis attempts to illustrate the credibility of good governance reforms in South Africa over the past decade when tested against allegations of serious corruption, such as those surrounding the arms deal. The case study approach demonstrates the very real impact that political context and culture has on both the interpretation and functioning in practice of policies, laws and institutions ostensibly designed to protect the public interest.

While my perspective is that of an independent policy analyst, being the daughter and grand-daughter of politicians has unwittingly provided me with a personal and intimate understanding of the political process, the compromises and sacrifices often required by public life, as well as the purposes motivating many political actors to serve the public good through taking up public office.

Growing up in apartheid South Africa and yet coming of age as South Africa shed its abusive past to become a new and proud democracy, has undoubtedly provided further existential material for exploring this topic.

Marianne Camerer
Durban, South Africa
May 2008
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Colleagues and M.Phil. students at the University of Stellenbosch (Department of Philosophy).

The University of KwaZulu Natal, Howard College (School of Philosophy and Ethics).

My entire family, especially my gracious twin sister, Melissa Sutherland, and my maternal grandmother, Diana May Durrant, to whom this thesis is dedicated.

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Finally, Patrick Giddy, for his patience, love and support.
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<td>ANC</td>
<td>African National Congress</td>
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<td>AU</td>
<td>African Union</td>
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<td>APRM</td>
<td>African Peer Review Mechanism</td>
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<td>BAC</td>
<td>Business Against Crime</td>
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<td>BAe</td>
<td>British Aerospace</td>
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<td>BEE</td>
<td>Black Economic Empowerment</td>
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<td>CCAR</td>
<td>Country Corruption Assessment Report</td>
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<td>COSATU</td>
<td>Congress of South African Trade Unions</td>
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<td>CSVR</td>
<td>Centre for the Study on Violence and Reconciliation</td>
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<td>DA</td>
<td>Democratic Alliance</td>
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<td>DIP</td>
<td>Defence Industrial Programme</td>
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<td>DPSA</td>
<td>Department of Public Service and Administration</td>
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<td>DOD</td>
<td>Department of Defence</td>
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<td>DSO</td>
<td>Directorate of Special Operations</td>
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<td>EADS</td>
<td>European Aeronautics &amp; Defence Systems</td>
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<td>ECAAR</td>
<td>Economists Allied for Arms Reduction</td>
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<td>ID</td>
<td>Independent Democrats</td>
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<td>IDASA</td>
<td>Institute for Democracy in South Africa</td>
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<td>IFP</td>
<td>Inkatha Freedom Party</td>
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<td>IONT</td>
<td>International Offers Negotiating Team</td>
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<td>ISS</td>
<td>Institute for Security Studies</td>
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<td>MINCOM</td>
<td>Ministerial Committee</td>
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<td>Umkhonto weSizwe</td>
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<td>MP</td>
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<td>South African Police Service</td>
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<td>SCOPA</td>
<td>Standing Committee on Public Accounts</td>
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<td>SDPP</td>
<td>Strategic Defense Procurement Package</td>
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<tr>
<td>SIU</td>
<td>Special Investigating Unit</td>
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<td>TI</td>
<td>Transparency International</td>
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<td>T-SA</td>
<td>Transparency – South Africa</td>
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<td>UDM</td>
<td>United Democratic Movement</td>
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INTRODUCTION

Chapter One: Context and Outline

1.1 Introduction

This thesis focuses primarily on assessing the South African government’s policy reforms to deal with public sector corruption following the largely peaceful transition to democracy in April 1994. Efforts to fight corruption in South Africa, whether ultimately successful or not, may provide lessons for other new democracies.

Since corruption contributes to the de-legitimisation of the political and institutional systems in which it takes root, it is rightly a central focus of concern in contemporary democracies. Corruption arguably does more damage to democracies than would be the case in authoritarian states as it undermines the latter (Heywood 1997:5). Essentially corruption is a human rights issue. The study of anti-corruption initiatives in South Africa and the assessment of their effectiveness as well as potential limitations makes an important contribution towards good governance and the effective, efficient and equitable allocation of limited resources by African states to their citizens.

1.2 International Context

Since the 1960s attention has been given by both academic and policy-oriented studies to the definition, origins, character and costs of corruption in developing countries (Doig & Riley 1998:48). The corruption in these contexts was often believed to arise from the clash or conflict between traditional values and the imported norms that accompanied modernisation and socio-economic development with bureaucratic corruption seen as an unavoidable outcome of modernisation and development (Mbaku 1996).

This thesis on the other hand is framed by the more recent international debate on good governance and democratic accountability that emerged after the Cold War. According to certain analysts, events in developing countries and the former
Soviet Bloc in the mid and late 1980s markedly changed the academic and policy-oriented debate on the character of corruption and the effectiveness of anti-corruption strategies (Doig & Riley 1998:46). This new context heralded an era of political and administrative reform, structural adjustment and a ‘third wave’ of democratisation in developing and transitional countries.

The growing international concern with controlling corruption needs to be understood within this wider political context. Revelations of widespread political corruption in developed not only developing countries in the early 1990s showed that the claim of Western democracies to be better than communist countries because they operated in a publicly accountable way was false (Heywood 1997:3). Now corruption no longer seemed to be just a temporary disease of modernising societies that literacy, development and good public ethics would cure. The debilitating economic, political and social effects of both petty corruption and grand corruption could be felt everywhere (Doig & Riley 1998).

The ‘C-word’ mentality – i.e. the taboo on discussing corruption openly or frankly in international forums because it might appear that doing so would infringe on the sovereignty of a nation state’s particular set of cultural practices – has mostly passed. Internationally, regionally and domestically anti-corruption initiatives have emerged as a legitimate area of public debate, administrative reform and research attention. A multidisciplinary academic literature has proliferated, sometimes referred to as the ‘corruption eruption’, as researchers find ways to understand and document the various aspects of the phenomenon.

There have probably been more publications on political corruption in the closing decade of the twentieth century than at any other time. The 1990s have seen unprecedented expansion in efforts at measuring and monitoring corruption, as well as mobilising support for controlling it in both the policy world and in universities (Heidenheimer & Johnston 2002). According to Doig and Riley (1998:48), academic fashion has echoed policy-making concerns and ‘moral panics’ about corruption. The current substantial upsurge in academic and policy interest in the (damaging) costs of corruption in the mid 1990s is a product of growing concern about the perceived growth in serious corruption world-wide.
Since corruption is by no means a new phenomenon, the question arises: ‘why is it now such a key issue internationally’? As noted before, the global impetus towards democratisation has uncovered large-scale abuses of power in previously authoritarian regimes and citizens everywhere are demanding greater probity and accountability from their elected representatives. Media investigations of corruption have given rise to higher public expectations of what constitutes an acceptable standard of behaviour amongst public servants (Heywood 1997:4). The phenomena of globalisation and trade liberalisation have given rise to a new transparency in domestic and global markets that brings corruption more quickly to public attention. There is also an understanding that corruption affects everyone in a negative way and that ‘we are all victims’.

1.3 International Leadership

Since 1996, leadership on the issue of tackling corruption amongst key international institutions such as the World Bank and the United Nations has undoubtedly played an instrumental role in placing corruption firmly on the international policy agenda. Towards the end of his first year in office, former World Bank president, James Wolfensohn identified corruption as a major global problem. In the 50-odd countries Wolfensohn visited during his debut year, corruption was the most striking issue of public concern (Doig & Theobold 2000:1).

Since the mid-1990s the World Bank has focused on promoting good governance as a means to prevent corruption. Defined by the World Bank Institute as: ‘the traditions and institutions by which authority in a country is exercised for the common good’, good governance includes:

i) The process by which those in authority are selected, monitored and replaced;

ii) The capacity of the government to effectively manage its resources and implement sound policies, and
iii) The respect of citizens and the state for the institutions that govern economic and social interactions among them (World Bank 2004).

A new anti-corruption policy introduced by World Bank president Paul Wolfowitz (World Bank 2006) was undermined by his recent resignation on the grounds of an ethics scandal that have done both the Bank and its leadership in the anti-corruption arena incalculable harm.

The importance of combating corruption was highlighted in one of Kofi Annan’s early interviews after his appointment as Secretary-General of the United Nations (UN). In December 1996 the UN adopted a declaration against international corruption and bribery enjoining member states to strive to eliminate these and associated pathologies (Doig & Theobold 2000:1). The adoption by the General Assembly of the United Nations Convention Against Corruption in Merida, Mexico on 31 October 2003 further signalled the international community’s commitment to addressing corruption as an issue of global concern.

It is clear that for international organisations such as the World Bank and United Nations, dealing with corruption has now become a core commitment for the reinvigoration of the state’s institutional capacity, for ensuring society’s trust in its leadership and for protecting the fabric of public life (UNDP 1997a; World Bank 1997).

Numerous other international organisations, both inter-governmental and non-governmental, have placed corruption at the top or near the top of their agendas. These include the International Monetary Fund, World Economic Forum, World Trade Organization, International Chamber of Commerce, The Organizations of Latin American States, Organization of Economic Co-operation and Development, the G-7, European Union, African Union, Southern African Development Community, Transparency International and Global Integrity.

Many western countries and the international development agencies they fund have moved the following goals to the top of the agenda: the eradication of poverty, participatory development, and support of human rights. It is increasingly
recognised that such themes are best addressed through participatory, transparent and accountable societies, with an emphasis on sustainable reform, including the promotion of economic development and liberalisation, the improvement of the social, health and educational prospects of populations, and the provision of a responsible and responsive political and legal framework (Doig & Riley 1998:46). This has seen good governance reforms moved to the top of the agenda.

The new international policy agenda of the late 1990s thus involves a number of assumptions about corruption and effective means to reduce it. Corruption in this context is most obviously defined as public office, public sector, or institutional corruption. Anti-corruption reforms are mostly conducted in the context of the national governance framework and involve optimistic expectations of both economic and political liberalisation. It is also assumed that public sector corruption will reduce if the size of the state is reduced, that is, it will be minimised through general economic liberalisation and through political liberalisation such as moves towards liberal, pluralistic politics involving a free press, competitive party politics and the revival or creation of other independent institutions, thereby reducing corruption by making it more vulnerable to exposure (Doig & Riley 1998:47). More detail on these and other theories underpinning anti-corruption reforms are discussed in Part One.

1.4 The Corruption Challenge

With the transition to a democratic dispensation in South Africa underpinned by constitutional commitments to core values such as openness, transparency and responsiveness, the government has grasped the moral high ground by publicly committing itself to tackle corruption, largely blamed on the “legacy of apartheid”. Corruption as a phenomenon has not disappeared with the decline of the old regime and more than a decade later, South Africa faces a critical test: Is corruption being effectively addressed?

In essence this thesis asks the following questions:
• Does democratic South Africa have the systems in place to effectively address corruption?

• Do these anti-corruption systems (laws, institutions, policies, strategies) work in practice?

• Does the necessary political will exist in South Africa to effectively address corruption, wherever it occurs?

1.5 Thesis Propositions

To respond to these critical questions, several propositions provide an analytical framework for the inquiry into the South African arms deal case study in particular, and the institutions that support democracy as well as the anti-corruption reform agenda in general. These are:

First, and most basic, formal institutions in a democracy, structure power arrangements so as to express certain standards, norms and the “rules of the game.”

Second, to prevent abuses of power and promote democratic accountability, formal institutions such as a multi-party parliament and functioning criminal justice system, including specialized anti-corruption agencies, must be complemented by a vibrant civil society and independent media to both check and balance power.

Third, to ensure that they fulfil their mandate to protect the public interest, these institutional and administrative mechanisms require adequate capacity, independence and resources, not only through their formal existence “in law”, but also their effective functioning “in practice”.

Fourth, politics is important. Formal institutions and mechanisms do not emerge in a political vacuum but rather exist and function within a distinctive political culture more or less broadly commensurate with the set of norms associated with the institutions of democratic accountability.
Fifth, political interference and intervention in the legitimate functioning of democratic institutions may occur and serve to undermine their effectiveness and integrity.

Sixth, because of the multiple institutions, interests and centres of power that exist in a democracy (as opposed to a closed political system) corruption and abuses of power will be mitigated and eventually come to light.

The above propositions are tested in two ways: first, by examining the case of anti-corruption reforms in democratic South Africa and second, by examining a specific case, namely the way in which allegations of high-level corruption in the Strategic Defence Procurement Package ['the arms deal'] were handled, or mishandled, by the various institutions in South Africa that purport to prevent abuses of power.

By following the detailed case study of the arms deal it will become clear to the reader how severely the serious allegations of corruption tested (and continues to test) both the integrity and the robustness of the institutions in place in South Africa to uphold democratic accountability and prevent abuses of power.

1.6 Thesis Structure

The thesis consists of four main parts:

**Part One: Theories of Corruption and Control** (Chapters 2–4) looks at definitions and conceptions of corruption (in particular political corruption), conditions and consequences of corruption (both economic and political) and four specific theories of corruption control. The international reform context is discussed briefly as well as general principles to evaluate the effectiveness of anti-corruption strategies, with special attention to evaluating the effectiveness of specialized anti-corruption agencies.

**Part Two: Corruption and Reform in South Africa** (Chapters 5–7) focuses on the case of South Africa, looking specifically at the context of corruption both before
and after transition to democracy in 1994. A brief section on the challenges of measuring corruption (both perceptions and experience) and some of the data around the phenomenon that exists is discussed, before looking at dedicated reform efforts the government has made since the mid 90s. Specific attention is given to the national anti-corruption strategy and new corruption law.

**Part Three: The Arms Deal** (Chapters 8–9) looks at the way in which allegations of high-level corruption in the Strategic Defence Procurement Package (SDPP) were handled by the government. This includes the decision by the president to exclude the Special Investigating Unit (SIU) from the Joint Investigating Team (JIT) and the executive intervention that hindered parliament’s Standing Committee on Public Accounts (SCOPA) from performing its key oversight function and conducting an independent investigation into the arms deal.

**Part Four: Arms and Accountability** (Chapters 10-12) examines the challenges faced by Parliament and individual MPs [members of Parliament] to fulfil their oversight functions and hold the executive accountable. It focuses on the roles of two ANC MPs in the arms deal – Andrew Feinstein and Tony Yengeni – as well as the outcome of the Joint Investigating Team (JIT) report.

The concluding chapter responds briefly to the main thesis propositions by assessing the impact of the South African arms deal on anti-corruption theory and reforms in general, suggesting several outstanding challenges.

**1.7 Research Methods and Sources**

While there is much public discussion about the topic of public sector corruption in South Africa, there is a limited academic literature. Indeed, corruption as an important concept in governance-related studies hardly features until the early 1990s. A number of academics have made important contributions in this regard although more work remains to be done (Bekker 1991; Cloete 1978; Du Plessis 1989; Hiemstra 1994; Keenan 1986; Marais 1990; Posel 1998; Reynolds 1991; Schwella 1991; Streek 1981; Van der Walt 1991; Wronsley 1991). This is not
only a result of South Africa’s peculiar lingering colonial context, but also related to the relatively recent focus on corruption as an area of academic interrogation.


In reality, there is a paucity of dedicated academic research on corruption and its controls in South Africa. Most contributions to understanding corruption in post-apartheid South Africa tend to come from policy rather than academic researchers. NGOs such as the Institute for Security Studies (ISS), Institute for Democracy in South Africa (IDASA), Centre for the Study of Violence and Reconciliation (CSVR), Transparency-South Africa (T-SA), and the Public Service Accountability Monitor (PSAM) have all contributed to the policy literature on the topic and addressed corruption by conducting surveys, issuing reports, hosting seminars and presenting papers at international conferences.

To truly understand the effectiveness of anti-corruption mechanisms, we must move beyond theory. Investigative research and reporting skills applied to actual cases of corruption starkly demonstrate the way in which specific laws and mechanisms established to prevent abuses in power work in practice, or not. It is only by looking at a particular case in detail and at the functioning of institutions in practice that it becomes possible to really understand the dynamics of what works when it comes to fighting corruption. In this way both the theory and practice of anti-corruption are tested. The arms deal case study clearly demonstrates the challenges facing different institutions that support public integrity and democratic accountability, in the face of serious allegations of corruption.
All supporting documentation used in this thesis is in the public domain. A number of sources are drawn on, including:

- A personal collection of corruption material, available electronically in a searchable database.¹
- A comprehensive literature review of corruption and anti-corruption measures internationally and in South Africa.
- South African press clippings and media studies of corruption.
- Anti-corruption and democratic accountability assessment surveys and indices, in particular the Global Integrity Index (www.globalintegrity.org).
- Interviews using an informal interview schedule (in June 2001 and September 2002) with representatives from key anti-corruption agencies.
- Interviews with other stakeholders including the media, civil society and political parties.
- Laws and Bills relating to corruption and accountability.
- Public records such as court judgments, commissions of inquiry, reports from Chapter 9 institutions.
- Minutes of parliamentary committee meetings available on the Parliamentary Monitoring Group’s website (www.pmg.org.za).

¹ www.crl.edu/areastudies/camp/collections/corruption.htm
PART ONE: THEORIES OF CORRUPTION AND CONTROL

Chapter Two: Definitions and Conceptions of Corruption

2.1 Introduction

What is corruption? This chapter examines various types and definitions of corruption in the light of our overall understanding of good governance reform. Universal, relative, petty, grand, episodic or systemic understandings of corruption are briefly discussed before putting forward a working definition that is useful for the remainder of the thesis. A model of political corruption articulated by LeVine (1975) is examined closely with regard to its relevance for the South African context.

2.2 Defining Corruption

One of the more intractable debates in the literature on corruption, that continues to rage, has been over definition (Johnston 1996, Philp 1997, Theobold 1994,). Corruption is a highly complex and diverse phenomenon and there are many different types, forms and levels of corruption. The way in which corruption is understood impacts on the various strategies developed to control it.

The word corruption in the most general context denotes: the “perversion of anything from an original state of purity” (OED), and is defined by moralists as “to change from good to bad; to debase; to pervert” (Leys 1965: 216). Heidenheimer and Johnston (2002) provide a brief history and discussion of the term. Of nine definitions of corruption that appear in the Oxford English Dictionary, only one applies in the political context, namely – “Perversion or destruction of integrity in the discharge of public duties by bribery or favor; the use or existence of corrupt practices, especially in a state, public corporation, etc.” (2002). Lodge (1999:57) picks up on the concept of public duties, defining corruption as the “misperformance or neglect of a recognized duty, or the unwarranted exercise of power, with the motive of gaining some advantage, more or less personal.”

Cases of corruption often point to the existence of a standard of behavior according to which the action in question breaks some rule, written or unwritten, about the proper purposes to which a public office or a public institution may be put (Leys 1965:221).
Corruption occurs “when an individual illicitly puts personal interest above those of the people and ideals he or she is pledged to serve” (Klitgaard 1988).

The point must be made that corruption manifests itself in all political systems, from communist to capitalist, authoritarian to democratic. Alatas (1990:3) notes that it “affects all classes of society; all state organizations, monarchies and republics; all situations, in war and peace; all age groups; both sexes; and all times, ancient, medieval and modern”. In a democracy corruption is particularly offensive. The corrupt act is inherently undemocratic as it involves the exercise of a public duty contrary to the wishes of the electorate who have determined the duty and who employ and pay the relevant official to perform that duty properly (ICAC 1993:317).

Robert Klitgaard in Controlling Corruption (1988) notes that the boundaries of corruption are hard to define and that corruption comes in many forms, crosses over various sectors and can range from the trivial to monumental:

“Corruption can involve the misuse of policy instruments – tariffs and credit, irrigation systems and housing policies, the enforcement of laws and rules regarding public safety, the observance of contracts, and the repayment of loans – or of simple procedures. It can occur in the private sector in the public one – and often occurs in both simultaneously. It can be rare or widespread; in some developing countries, corruption has become systemic. Corruption can involve promises, threats, or both; can be initiated by a public servant or an interested client; can entail acts of omission or commission; can involve illicit or licit services; can be inside or outside the public organization.”

2.2.1 Universal or Relative

In terms of conceptualizing corruption it has been argued that one can either take a "universal" or “relative” approach. The former approach defines corruption according to certain universal common properties with the premise that a combination of these properties, or defining characteristics, will make certain behavior "corrupt" in all societies. A “relativist” approach contends that what is corrupt in one society may not be so in another and that the definition of corruption would now depend on the country and culture in question. Relativists argue that since the notion of what is
legitimate and legal varies from country to country and time to time, the definition of
corruption must vary accordingly and there cannot be one for all (Heywood 1997:7).

Some scholars argue that definitions of corruption must address its social significance
and that cultural standards or public opinions may offer more realistic definitions than
a purely legal definition (Gibbons 1988; Peters and Welch 1978).

While there is no question that people wrangle over rules, Gambetta (1999) argues
that to infer that we cannot therefore reach a clear and stable definition of corruption
conflates variations in the content of an action with variations in the type of action.
He argues to keep the defining features of corruption separate from legal, ethical and
efficiency considerations, which, whilst relevant, are not key to an analytical
understanding of the definition. The universal position he takes is informed by several
problems he identifies with the current understanding of corruption in the social
sciences: firstly, that forms of corruption with different properties are bundled
together; secondly, that the literature mixes up corruption with other social
phenomena such as organized crime; and thirdly, that it fails to specify how
corruption differs from other kinds of fraud.

While I agree with Gambetta that conceptual rigor is often lacking when it comes to
corruption, and that accusations of acts, individuals or institutions being corrupt often
use a fuzzy application of the term, most contemporary scholars agree that a working
definition of corruption that can be applied to corruption across country boundaries,
should be, and indeed is, possible.

2.2.2 A Working Definition

An oft-cited definition of corruption is “the abuse of public office for private gain”
(Gray and Kauffman 1998). This is a definition widely used by the World Bank and
modified slightly by the international NGO Transparency International (TI) who
defines corruption as “the misuse of entrusted power for private gain.” This is a
useful working definition for our purposes. TI further differentiates between
"according to rule" corruption and "against the rule" corruption: Facilitation
payments, where a bribe is paid to receive preferential treatment for something that
the bribe receiver is required to do by law, constitute the former. The latter, on the other hand, is a bribe paid to obtain services the bribe receiver is prohibited from providing.¹ A further distinction can be made between undue benefits that are paid willingly (bribery) and payments that are exacted from unwilling clients (extortion).

Public sector corruption thus involves the improper and unlawful behavior of public-service officials, both politicians and civil servants, whose positions create opportunities for the diversion of money and assets from government to themselves and their accomplices (Langseth 2000). This definition includes particular types of corruption such as bribery and extortion, which necessarily involve at least two parties, and other types of malfeasance that a public official can carry out alone, including fraud and embezzlement (Gray and Kauffman 1998). Bribery often involves a citizen or someone from the private sector interacting with a public official or politician where a bribe is “an inducement improperly influencing the performance of a public function meant to be gratuitously exercised” (Noonan 1984).

In the case of South Africa and specifically the arms deal case study, cases of alleged corruption involve improper inducements or bribes in the form of luxury motor vehicles to key decision-makers (Tony Yengeni et al) and corrupt interactions between private sector players (for example Schabir Shaik) with politicians (such as Jacob Zuma) to improperly influence public duties.

2.3 Forms of Corruption

There are many different manifestations and forms of corruption. It can be petty or grand, incidental, systematic or systemic. It can be judicial, administrative, legislative or political in nature. Corruption can include the abuse of power to manipulate, control, and diminish other people, to enrich oneself and one’s family and friends through nepotism and the misappropriation of public funds (Wilson and Ramphele 1989:271). Policies to try and curb these diverse forms of corruption should pay more attention to the various types and levels of corruption that exist (Riley 1998: 139).

¹ http://www.transparency.org/news_room/faq/corruption_faq
A useful approach to defining corruption divides it into grand and petty corruption, with an increasing recognition of the links between the two. Grand corruption is closely linked with political corruption and occurs on a large scale by a prominent official, while petty corruption occurs in smaller increments by lower-level officials, often in exchange for speeding up a legitimate process. (Doig and Theobald: 2000). While grand corruption is often motivated by greed, petty corruption is more likely to be driven by need or survival. Arguably, alleged corruption in the South African arms deal case study is of a grand nature while corruption that occurred in the homelands pre-94 and continues to manifest itself in the exchange between citizens and local government officials, is petty and routine.

Petty corruption often referred to as ‘speed’ or ‘grease’ money” (Doig and Theobald: 2000) describes facilitation or grease payments sought and obtained by junior officials who are actually or ostensibly rendering a service to the public. Here members of the public have to undertake dishonest transactions with officials in order to obtain services of one kind or another or to avoid sanctions (Lodge 1999:61). In some cases these payments are made for the provision of a service, which should be a free public good; in others they are for a largely fictitious service or relate to imaginary offences (as at many an army or police roadblock). In the case of petty corruption the motivation is more frequently that of survival in societies where individual civil servants and others receive extremely low pay (Transparency International: 2000). Closely related to petty corruption, is bureaucratic corruption that is opportunistic (rent-seeking) behavior and is related to the scope and extent of government regulation of economic activities (Mbaku: 1996).

Defined as ‘the misuse of public power by heads of state, ministers and senior official for private pecuniary gain”, grand corruption deals with highly placed individuals who exploit their position to extract large bribes from representatives of transnational corporations; arms dealers, drug barons and the like, who appropriate significant pay-offs from contract scams, or who simply transfer large sums of money from the public treasury into private (usually overseas) bank accounts” (Doig and Theobald:2000). Grand corruption has been used to describe large-scale deals involving senior public officials and companies trading or investing on an international basis. It is caused largely by the greed of those who are already well off by local, and often by
An important mechanism underlying various types of grand corruption has recently been identified as “the cabal”. According to Transparency International, in most cases of grand corruption there is a small cabal of individuals who are strategically placed in key government departments or agencies to ensure that a deal can be completed. In, say, the purchase of an armaments system where a big bribe is to be paid to the Minister of Defence, the latter will have ensured that some combination of the central bank, customs and excise, his own Ministry and perhaps a well placed individual in the Ministry of Foreign Affairs are cut in on the deal. The significance of this for an analysis of corruption is that in a cabal the individual, who may be regarded as the potential bribee, is actually part of a network with a vested interest in the project (Transparency International: 2000).

Petty and grand corruption may feed on each other as visibly demonstrated by the following example of how corruption might typically occur in a policing context:

“For example, in a police force, roadblocks and other forms of relatively minor harassment may be conducted at street level by a group of police constables. The participating constables pass a good part of their takings to their senior officer, who in turn passes a slice to his own senior, and so on up to the Chief of Police. The latter may have some arrangement with the Minister of Home Affairs who turns a blind eye to this in view of other deals in which the Chief of Police participates…In this case the link between petty and grand corruption is fairly close since middle and junior ranks of the police force may be allowed to indulge in petty corruption whilst the most senior ranks take a slice of these proceeds and are party to a major deal orchestrated by a Minister” (Transparency International: 2000).

When does corruption become systemic? Johnston (1998) has a valuable approach to this question.
According to Johnston (1998:89), systemic corruption is not a special category of corrupt practice but rather a situation in which the major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups, and in which many people have few practical alternatives to dealing with corrupt officials e.g. Mobutu’s Zaire. Systemic corruption is thus where systems depend on corruption for their survival. Now as opposed to a situation where honest behavior is the norm and corruption the exception corruption is open and routine and its workings constitute a parallel set of procedures to those of the proper operations of the bureaucracy (Lodge 1999:57).

Where unrestrained corruption pervades the civil service, statutory boards and public corporations what began as occasional acts of public misconduct spread like a cancer - the result is a pathological condition of “systemic corruption” – an administration in which “wrongdoing has become the norm”, whereas the “notion of public responsibility has become the exception, not the rule”. Corruption is then so regularized and institutionalized that organizational supports back wrong-doing and actually penalize those who live up to the old norms” (Chazan et al 1982:180).

I will argue that corruption in democratic South Africa, whilst perceived to be widespread by most citizens (see Chapter Five) is not yet systemic and that corrupt practices have not institutionalized themselves to such an extent that the democratic system has completely lost its integrity. There is however a real danger of this happening if the political will to tackle corruption when it arises, falters. The African National Congress (ANC) as an organization has recently recognized this threat and spoken out against careerism and patronage in its ranks.

2.4 Understanding Political Corruption

What is political corruption? It is not that dissimilar to the general definitions of corruption identified earlier.

Doig and Theobold (2000) identify the essence of political corruption as ‘the abuse of public authority for private profit’. They note that although such a ‘definition’ leaves much to be desired, it serves to demarcate the general phenomenon with which we are
concerned: the public official, appointed or elected, who uses his/her authority illegitimately or illegally to advance his/her own interests. Political corruption always involves at least two parties and is typically perpetrated by private interests seeking illicit public favors and finding quite willing public officials (Heidenheimer and Johnston 2002:9). Thompson (1993) notes that the distinctions between “public” and “private” when it comes to corrupt activities can be difficult to draw and that benefits may be intangible, long-term, widely dispersed or difficult to distinguish from the routine services of the political system.

Political corruption can also be defined as “the unsanctioned, unscheduled use of public political resources and/or goods for private, that is non-public ends” (LeVine 1975) Here “political” pertains to the structural and human components of the formal polity (embodied in the institutions of government such as legislatures, executives, courts, bureaucracies, and statutory bodies) and necessarily involves persons who occupy positions in this formal polity. Political corruption thus includes corrupt activities that take place either wholly within the public sphere or at the interface between the public and private spheres – such as when politicians or functionaries use their privileged access to resources illegitimately to benefit themselves or others. It can also refer to the extent to which distortions (of due legal processes) are driven or motivated or even directed by political ends as opposed to personal, private or even corporate ones” (Heywood 1997). This latter insight is pertinent to recall when analyzing the arms deal case study and the legislative and institutional responses of the ANC government to allegations of political corruption.

Diverse manifestations of corrupt transactions that fall under political corruption range from acceptance of money or other rewards for awarding contracts, violations of procedures to advance personal interests, including kickbacks from development programs or multinational corporations; pay-offs for legislative support; and the diversion of public resources for private use, to overlooking illegal activities or intervening in the justice. Forms of corruption also include nepotism, common theft, overpricing, establishing non-existent projects, payroll padding, tax collection and tax assessment frauds (Doig and Theobald 2000:3).
Transactive corruption is part of political corruption and has been defined as “the rewarding of particular groups by political parties after their accession to office in return for donations or votes and as “a mutual arrangement between a donor and a recipient actively pursued by and to the mutual advantage of both parties” (Lodge 1999:57). In considering the case study of corruption reform efforts in democratic South Africa and the particular case of alleged political corruption in the arms deal, transactive corruption involving payments from international armaments companies to political parties who could serve their interests, may have engaged in deals which were mutually beneficial, albeit not serving the public interest.

That completes our survey of the most widespread understandings of the term corruption in its diverse forms. I turn now to a consideration of an author whom I consider the most useful in his approach to unraveling the dynamics of political corruption, namely that of LeVine.

2.5 LeVine’s Model

According to LeVine (1975:2) most important in analyzing political corruption is the relationship of the activity in question to the political process, and the motivation for it. His model of understanding political corruption consists of two parts:

1. the core process - a set of related components that focus on the individual office-holder, his activities and the matters with which he is concerned and;
2. the extended process – which derives from the first, and operates on a larger system and subsystem levels.

The core process has five components: 1) Political office-holders 2) Political goods 3) Political resources 4) Transaction relationships 5) Conversion networks. The extended process has two components: 1) A culture of political corruption 2) An informal polity. Each of these components will be discussed.

With political corruption, political office-holders dispose political resources within the framework of ongoing political processes or at least use such processes as a base for the creation and maintenance of corrupt relationships. They also derive some personal material benefit i.e. self-serving behavior (LeVine 1975:3). However the
“corruption of the political process” has as its principal effect the degradation or perversion of the political process. An example here includes electoral fraud, where there is no tangible personal material gain, but the integrity of the electoral system is compromised.

2.5.1 The Core Process

Political office-holders: The key to LeVine’s model of political corruption is the individual political office-holder in the formal polity. It is people, i.e. individuals, acting alone or in concert that engage in corrupt political processes, and not the actual institutions or organizations The functions of the individual office holder occupying a given office and political position are defined not only by the formal, explicit powers and duties attached to the office, but also by a political role, determined by expectations as to how the occupant of a given office ought to behave. In the case of the arms deal case study this would apply to the role of the deputy president whose formal and informal role should be beyond repute. The office-holder is important in a number of ways: S/he represents the linkage between the formal polity and those outside it; is the agent who can convert the political resources into the goods that create, feed and maintain politically corrupt relationships; and by converting public resources into private resources, the political office-holder provides both the capital and lubricant for the machinations of the “informal polity”.

Political goods: These are defined as “those highly desirable things that governments through their agents are in a unique position to dispense” (LeVine 1975:5). They are both tangible (money, electricity, water, roads, jobs etc) and intangible (security, access to status and privilege). The nature (type, quantity, quality) of the political goods to be distributed depends largely on the nature and function of the state.

Political resources: These are defined as “the official and unofficial capital against which political goods are drawn”. Every political position confers access to certain political resources. For example, the “uniform” of office can become a political resource that enables the wearer to trade in certain kinds of political goods. Three main varieties of political goods and resources include those related directly to office
or position, to a political role attached to position or those attached directly to the person of an office-holder (example, family connections).

Transaction relationships: These are “the various means by which political resources and goods are used for purposes other than those for which they were originally intended” (LeVine 1975:6). An act of misappropriation, in which an individual, acting alone, takes or uses public property solely for his own benefit, is not seen as an act of political corruption. However, such misappropriation becomes a politically corrupt act only when there is a transaction involving at least two persons, of whom at least one is an office-holder acting in an official or quasi-official capacity and there is “an exchange in which a political good is passed at least in one direction and at least one of the parties knows that the disposition of the political good is unscheduled, illegal or unsanctioned” (LeVine 1975:6).

Conversion networks: These are the final part of the model. LeVine (1975:6) argues that all political goods undergo some degree of transformation as they are distributed and used and many lose their identities. This transformation, which begins to occur when the goods reach the hands of the first recipient, is termed conversion, and the channels through which the goods subsequently travel constitute the conversion network. For example: B pays official A a bribe (money) to do him a service. A chooses how to spend the money (for example on a car). The conversion that has taken place is from cash to car. It also works the other way: B’s service (political good) from A is an introduction to R (an influential man who can help B make a profit). The conversion here is the facilitation by A to a potentially valuable entrée.

2.5.2 The Extended Process

The other part of LeVine’s model, the extended process, has two components:

1) A culture of political corruption
2) An informal polity

A culture of political corruption is determined, in part, by operative political values, orientations, and attitudes and their related practices, as well as by the formalized behaviors and structures that go into the maintenance of a political system. Key
components include the body of orientations, attitudes and values that yield criteria for determining what is politically legitimate and what is not. When politically corrupt transactions become so pervasive in a political system that they are the expected norm in transactions involving government officials, a culture of political corruption can be said exist. Once commonplace, it is unlikely that politically corrupt transactions will only involve two people. Rather they will spread into increasingly complex networks of personal involvement through which political goods flow (LeVine 1975:8).

*An informal polity* is constituted when informal political networks become so well established within the political system that their activities and influence begins to parallel those of government structures. By the time the informal polity develops, political corruption is already so widespread that a culture of political corruption clearly exists as a prior condition. Thus the more pervasive the political culture of corruption the more highly crystallized and enduring the informal polity becomes. In the absence of a culture of political corruption, an informal polity cannot develop. However, a culture of political corruption can exist without an informal polity (LeVine 1975:8).

The informal polity is able to bypass traditional chains of command, and includes “informal political networks” i.e. relationships based on inter-personal links such as “old boy” ties, struggle comrades, friendship, family, clan, ethnic, business obligations and patronage reciprocities. It intersects the formal polity at points at which officials enter into networks of corrupt relationships and normally lies outside of the formal polity (with its continuity and predictability). It is not defined as part of the institutional network of positions and roles (with norms and limitations appropriate to positions) but quite often is established within official structures and shares individuals who function as both part of the formal polity and informal networks and who have access to political resources (LeVine 1975:9). Logically the distinctions between the formal and informal polities can become so blurred the two seem as one; when this occurs political sanction achieves near-official sanction. By definition the informal polity lies beyond the official pale and the distribution and conversion of political goods constituting its raison d’être is unsanctioned, illicit and at best morally unacceptable (LeVine 1975:10).
2.6 Conclusion

This chapter has looked at various definitions of corruption and distilled the key components of LeVine’s model for understanding the processes involved in political corruption. The case study in this thesis focuses on grand and political corruption in the public sector i.e. where individuals engaged in corrupt practices are government officials or public representatives. LeVine’s model is relevant to understanding political corruption in the South African context particularly the case study of allegations of grand corruption in the arms deal and further confirmation of this will be found in our discussions on these issues.

While the distinction between petty and grand corruption should always be kept in mind, the most useful analysis for our purposes is that of LeVine’s, in particular his analysis of the various elements in the process of political corruption - for example, access to political goods and political resources, and his argument that an alternative polity may be the end result of a particular political culture and unchecked political corruption. This is relevant to bear in mind for the South African case.

In the following chapter I will turn to a discussion of the underlying causes and conditions that give rise to corruption and outline the most evident negative economic and political consequences. This will form the basis for understanding what measures are most suitable for controlling corruption.
Chapter Three: Conditions and Consequences of Corruption

3.1 Introduction

What are the specific conditions that encourage and give rise to corruption? This chapter reviews some of the literature that addresses this issue. A particular focus is given to explaining corruption in Africa. As the potential effectiveness of anti-corruption strategies are informed by the social, cultural, economic and political environments that create conditions conducive to both the incidence and severity of corruption, it is important to consider these too. In the second part of the chapter I discuss the largely negative consequences of corruption and this underpins the importance of researching ways in which to prevent it.

3.2 General Conditions that Cause Corruption

Talking about the causes of corruption is a shorthand way of conflating the conditions, contributing factors, determinants, stimulators, opportunities, incidence and explanatory factors for corruption. Such factors are mainly rooted in the particular political and economic conditions and policies of each country although the globalization of crime through internationally organized criminal syndicates also plays a role. As such its causes are as complex as the types of corruption are varied (World Bank 1992:16).

Becoming aware of the conditions that cause corruption, suggests ways in which to control it. For example, if low salaries of bureaucrats is something that might encourage corrupt behavior, it follows that improving wage conditions is directly relevant to preventing corruption. Unless the conditions that cause corruption are clearly identified and understood, it is difficult to prioritize effective anti-corruption strategies, which ideally should address these conditions in order to prevent corruption from occurring in the future (Camerer 2001).

Social, cultural, economic, political, organisational and individual factors may also be responsible for the emergence and existence of corruption (Huberts 1996, 1999;
Alatas 1990). A review of empirical research on the causes of corruption found that corruption is caused by the following factors, all of which suggest particular interventions: absence of competition; policy distortions including government involvement in private markets, decentralization, restriction of economic freedom and public procurement procedures; the nature of political systems and public institutions, including the role of the media, degrees of openness and democracy, quality of the judiciary, recruitment procedures and salary levels; and various cultural determinants including trust, hierarchies, colonialism, religion and gender (Lambsdorff 1999). It is not possible to explore these individual factors in any detail.

There are a number of different approaches to conceptualizing the causes of corruption. The “ideological” approach to explaining the prevalence of corruption points to international system-related factors such as the spread of neo-liberalism, which in turn is related to globalization. An institutional approach tends to blame bureaucratization i.e. the various political and legal structures, institutions and practices. The cultural approach attributes corruption to psychological and cultural factors where corruption is explained primarily in terms of individuals, their characters, and specific cultural features (including religious traditions and attitudes towards the state). An economic approach to underlying corruption focuses on macro economic systems and claims that the lack of economic development and presence of restrictive government intervention, are the main structural factors for creating corruption, seen primarily as a consequence of scarcity, artificially created by a government’s desire to promote economic growth.

Models of this economic approach include that of rent-seeking and the "second economy". These are discussed more fully in Chapter Four. Here the argument is that corruption occurs where rents exist – typically as a result of government regulation – and where public officials have discretion in allocating them (Klitgaard 1988; Rose-Ackerman 1999). Since the ultimate source of rent-seeking behavior is the availability of rents, corruption is likely to occur where restriction and government intervention lead to the presence of such excessive profits. Examples of rents that lead to rent-seeking behavior include trade restrictions such as import and export tariffs or quotas and the associated licenses that civil servants give to those entrepreneurs willing to pay bribes; favoritist industrial policies, including subsidies and tax deductions; price
controls and multiple exchange rate practices. It follows that there is less corruption where there are fewer rent-seeking opportunities (Mauro 1995, 1997, 1998).

Doig and Riley (1998:45) identify a number of additional factors that stimulate corruption including self-serving political leadership; a large, inefficient and politically influenced and misdirected state framework within which individual and group private interests have priority over the collective good; public officials who have considerable discretion to accumulate private wealth through exploiting their monopolistic, low and irregularly paid positions, often in collusion with politicians and indigenous or foreign businessmen; and where there is limited accountability and transparency in governmental operations.

3.2.1 Specific Conditions: The Case of Africa

Patterns of corruption may vary from society to society and over time. Political corruption is often perceived as especially characteristic of governments in developing or third world countries (Della Porta & Meny 1997). However, that corruption occurs only in developing countries is a myth that has been debunked by high profile scandals in highly developed industrialized societies. There are however, particular socio-economic and political conditions in Africa that make the continent particularly susceptible to corruption.

Leys (1979) identify as contributory factors pervasive and chronic poverty, extremely high levels of material deprivation and severe inequalities in the distribution of resources are major determinants of corruption in Africa countries. According to Bayart (1993) in Africa the state is usually the major force within the economy and in such circumstances it has been argued that political office becomes the main route to personal wealth (Bayart 1993). It appears that the democratization of many African states has not removed corrupt forms of neo-patrimony nor significantly widened political participation as state elites have retained effective control of the political process. Corruption in Africa today is also a direct consequence of poorly developed laws, institutions and distorted incentive structures.
Corruption is therefore a governance issue and part of a set of governance problems for developing and transitional countries. Mbaku (1999:120) argues that post-independence laws and institutions enhanced the ability of the ruling elite to engage in opportunism, including corruption, to enrich themselves at the expense of the rest of the people. The transformation of the post-independence African state apparatus into an instrument for the enrichment of members of the politically dominant group is seen as a significant contributor to corruption. In our thesis we will test these ideas against the case of democratic South Africa and the specific conditions and causes of corruption that have occurred here (See Chapter Five).

To understand the immense diversity of corruption’s origins, forms and effects across developing countries, it is useful to examine the roles of both internal stakeholders in developing countries – politicians, business cliques, civil servants - as well as the external actors – such as multinational corporations and international financial institutions (Doig and Riley 1998: 45).

With regard to external actors, multinational corporations from developed countries are guilty of perpetuating patterns of corruption and bribery in developing countries where such countries, desperate to attract foreign investors, may compromise domestic, regional and international regulations. Multinational firms routinely offer bribes to officials in third world nations as a means of landing lucrative business deals. This has been shown to be the case in Lesotho with regards to the Lesotho Highlands Development Authority (LHDA) where international engineering firms such as Acres, Lahmeyer and Impreglio have been found guilty of bribery disguised as “facilitation payments” in order to secure lucrative consulting engineering contracts.

Closer to home and related to the South African arms deal, British Aerospace (BAE) is currently under investigation by the Serious Fraud Office in the UK for alleged bribes to key internal players in South Africa to secure its piece of the Strategic Defense Procurement Package (SDPP). While in the past many developed states not only legally permitted such bribery, but even permitted firms to deduct such bribes as a legitimate business expense, this is changing with the stronger enforcement of the
OECD Convention that prohibits the bribing of foreign public officials by international businesses.

It also appears that cases of extreme corruption often correlate with situations in which the state derives the majority of its revenues from external resources of easily controlled enclaves within the national economy, for example state controlled monopolies such as oil or diamonds (for example Nigeria or Angola). Each of these represents weak imperatives for fiscal accountability and facilitates elite venality (Lodge 1998).

Huntington (1968) puts forth several propositions about the conditions favoring corruption in government: According to him corruption tends to increase in a period of rapid growth and modernization, because of changing values, new sources of wealth and power, and the expansion of government; There tends to be less corruption in countries with more social stratification, more class polarisation and more feudal tendencies. These conditions provide a more articulated system of norms and sanctions, which reduces both the opportunity for and the attractions of corrupt behavior. A country’s ratio of political to economic opportunities affects the nature of corruption. If the former outweigh the latter, then people enter politics in order to make money, and this will lead to a greater extent of corruption; if foreign business is prevalent, corruption tends to be promoted; the less developed are political parties, the more prevalent is corruption.

According to Johnston (1997a), entrenched corruption features in societies with the following characteristics: low political competition; low and uneven economic growth; a weak civil society and the absence of institutional mechanisms to deal with corruption. In contrast, societies that are relatively free of corruption are premised on respect for civil liberties, accountable government, a wide range of economic opportunities, and structured political competition. These conditions he argues are mainly, but not exclusively, characteristic of developed western states.

The South African context combines factors affecting both developed countries and developing countries in periods of transition, and thus poses particular challenges to the control of corruption. For a variety of reasons particularly pertinent to South
Africa’s young democracy, corruption is likely to spread in periods of economic and political transition from authoritarian rule to democracy. These reasons include vacuums of authority left by the removal of authoritarian controls, conflicting values, a new elite trying to catch up with the old, decentralization, privatization, and the opening of the economy to international participation (Camerer 1996). South Africa’s transitional status from authoritarianism to democracy, like transitional/post-soviet countries may help explain why there are growing problems of organized crime and corruption (Reed 1994, Trang 1994, Kaufmann 1997).

If one considers in particular Huntington’s idea that greater economic opportunities can lead to a greater occurrence of corruption, clearly South Africa is a good candidate. For one, South Africa has undergone a massive transition and the transformation project is far from over. The huge economic stratification that exists is not at all of the type that would discourage corruption, but rather highly unstable, with the gap between rich and poor appearing to be widening rather than closing. While South Africa has a strong economy with the fundamentals in place it has not seen the growth required to meet the challenges of addressing poverty and unemployment, despite there being a strong presence of foreign business (another condition favoring corruption according to Huntington.) While political society in South Africa is relatively sophisticated, there is effectively low political competition and a potential threat that the ANC’s hegemony will spread over a number of sectors, further limiting strong opposition and the checks and balances required to prevent abuses of power.

On the other hand South Africa has a strong civil society and a range of institutional mechanisms in place to deal with corruption. Some of the more specific characteristics of the South African state and its historical context as well as reforms that have been undertaken to prevent corruption will be considered in Chapters Five and Six. First however, brief consideration is given to the consequences of corruption.
3.3 Consequences of Corruption

What impact does corruption have on society? It is widely recognized that corruption has profoundly damaging political, social and economic consequences, particularly when considering its broader, long term effects (Clarke 1983, Rose-Ackerman 1996, Johnston 1982).

Politically, corruption subverts good governance by undermining public trust in government (Klitgaard 1988) and may reduce political participation by adding to growing cynicism about politics and the political process amongst citizens (Johnston 1991, Rothchild and Chazan 1988). Economically, corruption raises costs, reduces government revenues and exacerbates inequality (Ward 1989). In particular corruption undermines the development capacities of states by distorting priorities (Rose-Ackerman 1978) where it may also skew decisions in favor of capital-intensive enterprise (where the pickings are greater, such as the arms industry) and away from labor-intensive activities more likely to benefit the poor (UNDP:1997b).

Some economists have argued that corruption may even have beneficial developmental effects, especially in those cases where formal bureaucratic controls obstruct entrepreneurial growth (Nye 1967 and Leff 1964). Here the argument is that acts of corruption help integrate political systems and economic growth by breaking through bureaucratic bottlenecks and creating informal markets and price systems. This functional theory of corruption argues that the buying and selling of political favors has political and economic advantages (at least for some), and that bribery “greases the wheels” by cutting through unnecessary red tape, thereby improving efficiency and speeding up the wheels of commerce.

It has also been argued that another beneficial effect of political corruption may be that it can enhance social stability where constituency based patronage systems have resulted in generous levels of public investment in rural areas (Bouissou 1997).

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1 This section draws heavily on a research paper I prepared as expert testimony for a series of high profile corruption and bribery trials in Lesotho (2002 and 2003). It was used extensively by the state’s expert witness, Hennie van Vuuren from the Institute for Security Studies in the sentencing phase of Schabir Shaik’s corruption trial.
However, other scholars give cogent arguments that far from cutting red tape, corruption increases inefficiency as bureaucrats contrive new requirements and delays in order to extract more payments (Kaufmann 1994). The enormous degree of discretion that many politicians and bureaucrats can have, particularly in corrupt societies over the creation, proliferation, and interpretation of counterproductive regulations means that instead of corruption being the “grease” for the squeaky wheels of a rigid administration, it can become the fuel for excessive and discretionary regulations. This is one mechanism where corruption feeds off itself (Kaufmann 1997). While one may think of examples in which paying a bribe or the opportunity to pay a bribe makes some firms/people better off, the overall effect of corruption on economic development is negative (Wei 1998).

While most corruption hurts most people most of the time, the “winners” tend to be the few and well-connected (Klitgaard 1988). There are exceptions to this rule, but generally corruption is used to obtain or protect valuable goods and positions of political advantage – benefits, which are almost, always in short supply. The ability to use and corrupt influence depends upon the possession of scarce and unequally distributed political resources, such as money, expertise, special access and connections, personal prestige, or a solid political following – in short, political assets which few ordinary citizens are likely to possess (Johnston 1999).

Corruption is contagious: it starts in one specific area, perhaps the area where the rules are in fact too rigid, and soon it begins to spread to other areas. In time, most activities become affected. When this happens corruption becomes like a distortionary tax levied with uneven and random rates. Then it is no longer just “oil for the mechanism” but it distorts economic decisions in ways that can be damaging to the economy. For example it may encourage unproductive public spending or economically unproductive activities, because of the bribes or the “commissions” that some public officials can get on such spending or protecting those activities (Tanzi 1997).
3.4 Economic Consequences of Corruption

There are a number of empirical studies providing overwhelming statistical evidence to show that countries with high corruption levels have poorer economic performance. There are several channels through which corruption hinders economic development and growth: briefly, it reduces investment (both domestic and foreign), distorts the size and composition of government expenditure away from education, health and the maintenance of infrastructure towards less efficient projects that have more scope for manipulation and bribe-taking opportunities, and it weakens the financial and tax system, strengthening the underground economy and encouraging links to organized crime groups. As would be expected from this, a strong connection has been demonstrated between corruption and increasing levels of poverty and income inequality. The following pages provide more detail of these empirical studies. We will take the economic effects first.

3.4.1 Effect on Investment

Corruption has been shown to have a negative and significant impact on investment. (The Asian case, which some see as an exception, is discussed later). Mauro (1995) presents the first systematic empirical cross-country analysis of the effects of corruption on economic growth by focusing on the relationship between investment and corruption. Using the Business International (BI) Index where corruption is one of the BI risk factors defined as “the degree to which business transactions involve corruption or questionable payment” – Mauro estimates the effects of corruption on the average ratio of total and private investment to gross domestic product (GDP) for the period 1960–1985 for a cross-section of 27 countries.

Mauro’s data analysis finds a significant negative association between corruption and investment, as well as a negative impact on growth. For example, Mauro finds that corruption has a negative impact on the ratio of investments to GDP – its investment rate: “if Bangladesh (with a score of 4.7) were to improve the integrity and efficiency of its bureaucracy to the level of that of Uruguay (score 6.8)…its investment rate would rise by almost five percentage points and its yearly GDP growth rate would rise by over half a percentage point”. It follows that a corrupt country is likely to
achieve aggregate investment levels of almost 5% less than one, which is relatively ‘uncorrupt’, and it will lose about half a percentage of gross domestic product growth per year (Kaufmann 1997).

Mauro also constructs a “bureaucratic efficiency index” that includes efficiency of the legal system and the judiciary, the amount of bureaucracy and red tape, and corruption. This composite index is again negatively and significantly associated with investment where a one standard deviation improvement in bureaucratic efficiency is associated with an increase in the investment rate by 4.75% of GDP (Ades and Di Tella 1996).

A further study of 67 countries covering data from 1960–85, found that corruption slows the growth rate of countries (Mauro 1997). For example, if a country such as Egypt were to heighten the efficiency of its administration and improve its corruption score of 4 out of 10 to the same level as Argentina’s 6, (again where 0 means total corruption and 10 means none at all), the rate of investment would increase by 3% and the growth rate would increase by 0.5% (Cartier-Bresson 2000). If Bangladesh reduced its level of corruption to Singapore’s, its average annual per capita GDP growth rate over the period 1960–1985 would have been 1.8 percentage points higher, a potential gain of 50% in per capita income by 1985 (assuming growth of 4% a year) (Kaufmann 2000).

Using a different corruption indicator an empirical study which includes “corruption in government” among other explanatory variables into one single index of “institutional quality” to explain economic performance, finds similar results (Keefer and Knack 1995). A further study using a corruption index developed by the World Bank and the University of Basel for a sample of 41 countries, finds that corruption significantly reduces the ratio of investment to GDP (Brunetti, Kisunko and Weder 1997). A similar conclusion is reached in a larger sample of 60 countries making use of corruption data by Political Risk Services (Brunetti and Weder 1998).

There is thus clear evidence that investment (both domestic and foreign) and economic growth are lower in more corrupt countries and that corruption in host countries discourages foreign investment. Investing in a relatively corrupt country as
compared with an uncorrupt one is shown to be equivalent to an additional 20% (“private”) tax on the investment. For example an increase in the corruption level from relatively clean Singapore to relatively corrupt Mexico is the equivalent increase in the tax rate of over 20 percentage points. If India could reduce its corruption level to the Singapore level, its effect on attracting foreign investment would be the same as reducing its marginal corporate tax rate by 22 percentage points (Wei 1997a). In terms of the effect of corruption on domestic investment, one study points out how if the Philippines could reduce its corruption level to the Singapore level, other things being equal, it would have been able to raise its investment/GDP ratio by 6.6 percentage points – quite a substantial increase in investment (Wei 1998).

Corruption therefore discourages foreign investment more than a tax because corruption, unlike tax, is not transparent, nor pre-announced. As those who pay bribes have no legal recourse, contracts through bribery cannot be enforced; this is one reason why corruption is more harmful than taxes. Corruption embeds arbitrariness and creates uncertainty. It is well established that the level of uncertainty in the business environment significantly affects investment. By increasing uncertainty, corruption raises the effective costs of investment for the firm and countries having high levels of both administrative corruption and state capture (World Bank 2000).

On the other hand Amundsen (1999) argues that the economic effects of corruption are nevertheless dependent on the type of corruption in each country, on the way in which corruption in organised or disorganised, controlled or uncontrolled, calculable or unforeseeable. In general, if businesses are able to forecast and estimate the level of corruption, to include it into their calculations as a measurable expense, and if they know that a paid bribe will have a positive effect, corruption may not be an impediment to investment and trade. If on the other hand corruption is disorganised and plentiful, unpredictable and inconsistent, a paid bribe is no guarantee that services are rendered and no more bribes expected later, corruption is economically damaging.

Despite high levels of corruption East Asian countries have grown faster than most other developing countries. Motivated by this seeming paradox, Campos et al use World Bank data in a cross-section of 69 countries to provide empirical evidence that different corruption regimes have different effects on investment (Campos et al 1999).
They find that regimes in which corruption is more “predictable” (that is, whether a corrupt service is actually delivered as agreed) have a smaller negative effect on investment than those in which it is less predictable. However, the level of corruption in societies still matters. Even given the same degree of predictability, lower levels of corruption still result in higher levels of investment. The World Bank has found that countries with more predictable corruption have higher investment rates. Thus, countries with endemic but predictable corruption, such as Thailand and Indonesia, have had strong investment growth (Cartier-Bresson 2000).

Contrary to conventional wisdom, there is no evidence that foreign investors are any less susceptible to corruption in East Asian economies than in other countries in the world. The evidence thus shows that there is no support for the Asian exceptionalism hypothesis. Instead, investors from the major source countries are just as averse to corruption in East Asia as elsewhere as foreign investors still prefer to go to less corrupt countries other things being equal. The reality is that corruption is only one of a number of factors explaining growth and development: even the few Asian countries that are considerably corrupt have developed a credible rule of law, maintained decent macroeconomic management, limited the pervasiveness of corruption, and prevented corrupt practices from encroaching on export-oriented policies (Kaufmann 1997).

Not only the type of corruption, but the way in which resources extracted through corruption are used will have repercussions on both the economy and the political system. For instance, if the use of resources is centralised and “controlled”, it might be beneficial to local businesses if reinvested in the local economy. In South Korea where huge sums had been extracted by the president and the ruling party in numerous grand-scale economic transactions, the prosecutors could not find evidence of its private use as everything had been re-invested on the South Korean stock market (Amundsen 1999). However, this may not be the case elsewhere. In the majority of African regimes, corrupt rulers and businesses may have little faith in their own national economies and tend to export their legally and illegally acquired assets as soon as possible. LeVine’s study of corruption in Ghana showed that capital derived from corruption was either invested outside the country or spent on conspicuous consumption of luxurious goods. Even when stolen money was invested
in the country there was little trickle down benefit to the public at large (LeVine 1975).

3.4.2 Effect on Revenue Collection

A further major economic effect of corruption is, then, its negative impact on revenue collection. Corruption, particularly in the form of large-scale bribery, exacerbates budgetary problems by depriving governments of significant customs and tax revenues. Higher levels of corruption are found to be associated with a large unofficial economy, the size of which can have profound fiscal implications in many transitional countries (Johnson, Kaufmann & Zoido-Lobaton 1998). Thus while corruption increases private revenues to public officials, it tends to have a negative impact on public revenues where corruption in procurement, assignment of subsidies, and outright theft leads to an exaggerated flow of funds out of public coffers.

Corruption in procurement leads to public resources being wasted on inferior quality products and services that may ultimately deter honest vendors from doing business with the state. In a survey in Georgia, the need to make unofficial payment was the most cited reason that firms said that they do not participate in state tenders (World Bank 2000). When firms produce for the unofficial economy they underreport economic activity or avoid the state entirely. This creates competitive advantages that can drive honest competitors from the market thereby generating further corruption and fiscal shrinkage. The reduction of tax revenues reduces the funds available for public services, providing firms with fewer incentives to operate officially. Once underground, such firms pay bribes to avoid detection and punishment and the fiscal implications in some countries have been staggering (World Bank 2000).

Some of the major corruption scandals internationally have been connected with public investment. The intellectual bias favoring capital spending, the controls that high level officials have on decisions concerning public projects, and the fact that in some way each investment project is unique and is subject to many kinds of designs, sizes, technology and other options, make public projects an area of public spending to be watched closely.
3.4.3 Effect on Public Expenditure

The third major effect of corruption, then, related to distortions in public expenditure. In recent years there are a number of studies that examine the negative impact of corruption on public expenditure and resource allocation. A systematic study by Tanzi and Davoodi (1997) using cross-country data and regression analysis from Business International and Political Risk Services covering the period 1980–1995 shows the extent to which corruption impacts on and changes the quality allocation of public spending. Their study shows that corruption has powerful effects on both the quantity and the quality of public investment which plays a role in the productivity of capital, and hence GDP. The increase in public spending is especially in unproductive projects because many items in public expenditure lend themselves to manipulations by high-level officials to get bribes.

In many cases resources extracted through corruption are allocated to unproductive areas. This creates a bias against soft public investments such as health and school services and a bias towards spending public money in “hard” investment areas such as equipment and construction because these are easier to corrupt. Resources tend to be either moved out of the country – money flight to foreign bank accounts and investments in foreign businesses – or spent on private consumption and the importing of luxuries. Endemic corruption generally misallocates talent to rent-seeking activities, increases insider trading, and pushes firms underground into the black market.

A study by Mauro (1998) demonstrates that highly corrupt countries are likely to under-invest in human capital and to distort public expenditures. Government expenditure on education and health is negatively and significantly associated with higher levels of corruption. He argues that this occurs because education provides less lucrative opportunities for corruption than other types of more capital-intensive public spending. Since these variables are important contributors to economic growth – the harm to development of under-investing in education is well known – corruption is therefore assumed to decrease a country’s rate of growth.
However, even where money is allocated to a particular sector such as education, a large percentage of it may be lost due to leakage because of corrupt officials and opaque budget allocation and expenditure tracking processes. Results from a Public Expenditure Tracking Survey (PETS) which collected five years of data on spending, service outputs and provider characteristics in 250 government primary schools in Uganda found that on average only 13% of the annual capitation grant (per student) from the central government reached the school in 1991-1995. 87% either disappeared for private gain or was captured by district officials for purposes unrelated to education, although there was no evidence of increased spending in other sectors (Reinikka and Svensson 2003). A relatively inexpensive policy action – namely a public information campaign on budget spending – managed to reduce such capture in primary school education from an average of 78% in 1995 to 18% in 2001.

Corruption is also found to skew the composition of public expenditure away from necessary operation and maintenance towards expenditure on new equipment so that a country’s existing infrastructure can be used at only a fraction of its potential capacity. For example, roads with potholes cannot carry as much traffic as those in good condition. Corrupt high-level officials support too much unproductive public investment and under-maintain past investments (Wei 1998, Tanzi 1997). There have even been reports of countries where expenditure for operation and maintenance was intentionally reduced so that the infrastructure would deteriorate more quickly to the point where major new investments would be required, thus providing opportunities to some officials to get “commissions” from the companies that would undertake the projects. The net effect of corruption is almost surely to increase the fiscal deficit while at the same time reducing the efficiency of public spending and of the tax system (Tanzi 1997).

Thus unproductive public investments may replace more productive investments even when the total is not affected for the following reasons: incompetent officials may move up to sensitive positions where the poorer quality of their decisions is damaging to economic activity; promotions within the civil service may not be based on merit, thus leading to discouragement and bitterness on the part of competent staff; and public projects may be completed in a sloppy way or they may never be completed (Tanzi 1997).
3.4.4 Corruption and Big Business

A further point is that the social and economic costs of corruption and bribery apply not only to the developing countries but also to multinational corporations. In the Control Risks Group survey of international business directors of 50 US and 50 European companies, 20% of the US companies polled and 34% of the Europeans said that they had decided not to do business in otherwise attractive countries where corruption was a major problem (CRG 1998). Bribery and corruption has the following impact: it increases company expenditure, eats into profits and damages a company’s reputation for integrity, which is essential in obtaining customers, high quality staff, capital and local community acceptance.

Often businesses feel they may have no choice but to bribe corrupt officials. However, the problem is that it is very hard to limit the long-term, unpredictable repercussions of bribes or other corrupt practices and once a company starts paying, it may find it hard to stop. John Bray from Control Risks, a risk consultancy that advises multinational corporations in this regard, argues that the very act of paying means that they begin to lose control for if they pay once, they will receive more demands (this applies to both “grease payments” and to “grand corruption” to secure contracts); if they do not get what they pay for, they are in no position to complain - there is no source of legal redress because they have themselves broken the law; having broken the law, they are vulnerable to various forms of blackmail; and if they enter into a corrupt relationship and then try to suspend outstanding payments, they may face a variety of different threats – including the threat of violence (Bray 1999).

3.4.5 Corruption and Development: Summary

The arguments that corruption improves efficiency are based on the assumption that the economic costs of extensive public regulations may be reduced or avoided through bribery (Andvig, Fjeldstad et al 2000). However, using data from three worldwide firm-level surveys (6000 firms in 75 countries) and examining the relationship between bribe payment, management time wasted with bureaucrats, and cost of capital, Kaufmann and Wei (1999) provide reliable evidence that levels of corruption are strongly associated with the time that managers waste with bureaucrats,
a good indicator of bureaucratic inefficiency. Firms that pay more administrative bribes end up wasting more (not less) time with bureaucrats, and with a higher cost of investment. These administrative bribes appear therefore to disadvantage many of those paying, the business community as a whole, and society (Kaufmann 2000).

Corruption thus reduces total revenues for social spending, distorts the allocation of public expenditures away from social programmes, and denies the poor equal access to public goods. Corruption also impairs the means to escape poverty by undermining property rights and raising a regressive bribery tax on small entrepreneurs. Corrupt regimes bias investment against projects that aid the poor, for example, they often prefer defence contracts over rural health clinics and schools. Further, corruption increases income inequality and poverty through lower growth, less effective social programme targeting, unequal access to education, reduced social spending, and higher investment risks for the poor (Kaufmann 2000).

As shown above, corruption is empirically associated with lower economic growth rates, thereby weakening the main factor that can pull people out of poverty. Moreover corruption has a direct (and disproportionate) impact on the living conditions of the poor increasing income inequality and poverty (Knack & Anderson 1999; Gupta, Davoodi & Alonso-Sanjuan 1998; Narayan et al 2000). While the interaction between corruption and income inequality is certainly complex, the ultimate result has been clear: income inequality has expanded most in countries with high levels of corruption and state capture (World Bank 2000).

Corruption worsens the (relative and sometimes absolute) poverty: corruption lowers economic growth, biases the tax system to favour the rich and well-connected, reduces the effectiveness of targeting of social programmes, biases government policies towards favouring inequality in asset ownership, lowers social spending, reduces access to education by the poor and increases the risk of investment by the poor (World Bank 2000). When corruption misdirects the assignment of unemployment or disability benefits, delays eligibility for pensions, weakens the provisions of basic public services such as health and education, it is usually the poor who suffer most. Such corruption undermines the social safety net and may deter the
poor from seeking basic entitlements and other public services. Corruption clearly hinders the ability of the poor to help themselves out of poverty (World Bank 2000). We have seen from empirical evidence presented above that corruption threatens economic growth by hindering investment (both domestic and foreign), distorting the allocation of public investments to areas such as defense and non-productive construction where rents are higher and more easily extracted by corrupt public officials, and how this impacts on social development to exacerbate inequality in societies and worsen the position of the poor. The research by Dani Kaufmann and his team at the World Bank Institute, Governance Matters, continues to use empirical data to persuasively argue for the importance of good governance and its impact on economic growth. The next section will highlight the political consequences of corruption, which are intimately related to the economic consequences.

3.5 Political Consequences of Corruption

Unlike many direct effects of corruption, the political costs of corruption are often intangible, widely shared, and often realized only in the long term (Bouissou 1997). As mentioned before, corruption has a major political cost in that it undermines trust in the fair functioning of the political system leading to instability as well as potential disengagement by citizens. Politically, corruption subverts good governance by undermining public trust in government and may reduce political participation by adding to growing cynicism about politics and the political process amongst citizens (Bayley 1970, Klitgaard 1988, Johnston 1991, Rothchild and Chazan 1988).

There are a number of serious political consequences of corruption that emerge as different interest groups compete for the benefits which through corrupt means can only accrue to the few. As interests other than the public interest compete in opaque and unaccountable spaces, it is in effect more difficult for governments to form and carry out coherent policies, respond to citizens’ needs and use scarce resources in effective ways. Johnston (1993, 1996, 1997,1999) argues that corruption’s mainly disintegrative features weaken a society’s ability to reform itself, and to build more open, responsive, credible and legitimate political institutions. The following section draws on his insights into the damaging political consequences of corruption.
First, however we need to consider the argument that, far from being disintegrative, corrupt practices actually serve as a means of integrating people into the political system (Andvig and Fjeldstad 2000) and that a beneficial effect of political corruption may be that it can enhance social stability where constituency based patronage systems have resulted in generous levels of public investment in rural areas (Bouissou 1997). Thus corruption allows access to public officials to groups who would otherwise be alienated and in this way can mitigate potential conflicts between politicians and bureaucrats since widespread corruption provides profits to everyone (Gould & Mukendi 1989).

The evidence here is debatable since clearly corruption does not provide profits to everyone. Although systemic corruption at the political level has helped some states to maintain a degree of political stability or the survival of the regimes it is also acknowledged that such stability has been achieved at considerable human and financial cost, for example in the case of Zimbabwe. A more compelling argument is surely that politically corruption creates situations of potential instability by destroying confidence and trust. If ordinary citizens and the poor become aware that the public interest has been compromised by particularistic interests to secure goods and services which in a democracy should be accessible to all, stability is potentially threatened resulting in unrest and general lawlessness (Camerer 1997c). The growing number of protests at local government level in South Africa linking lack of service delivery to corrupt officials, is illustrative.

In his research, Wei (1997b) finds that political stability may be negatively correlated with corruption-induced uncertainty as well as level of corruption. A politically unstable government may cause bureaucrats at all levels to try and grab rents whenever and wherever they can. Conversely, a very corrupt and uncertain government may breed public discontent and lead to political instability. Khan (1996) argues that one of the most obvious effects of corruption is an increase in the instability of all property rights when corruption exceeds a critical level. Even when the initial structure of rights is such that corruption is beneficial (if only to a few), too much corruption can lead to a loss of confidence in the institutional structure of
society with the effect that social order breaks down totally resulting in anarchy. This is clearly the case in Zimbabwe.

The impact of political corruption is particularly damaging on the economy when the chief carnivores are the highest level of leadership (Gould & Mukendi 1989). Large-scale corruption in high places in government has been cited as being responsible for socio-economic deterioration and subsequent coups d’état in much of Africa. Of the 80 coups attempted in Africa in the period 1960–1982, almost all were justified as reaction to and as efforts to improve corrupt regimes (Crawford Young 1984). Even in countries where coup attempts are not frequent but where political patronage allow regimes to forestall direct challenges, corruption remains a principal feature of political and economic underdevelopment blocking initiatives and frustrating the most ambitious change prospects (Gould & Mukendi 1989).

Johnston (1999) notes that an open, responsive and effective political process requires, at a minimum, a significant amount of citizen trust in officials, in institutions, and in each other. Open politics means not only that people are free to advocate vigorously their own interests, but also that they abide by official decisions, accepting unfavourable outcomes as fundamentally legitimate and mounting their responses through the political process. It also means people trust others to do likewise, for there is little reason to play by the rules if one’s critics and opponents are unlikely to do so.

Over and above its material costs, Johnston notes that one of the primary political costs of corruption is that it undermines and can destroy this political trust. Citizens can conclude – quite rightly – that it is futile to deal with government through official political and bureaucratic channels, or that even if such channels are still functional, others will pre-empt them through bribery and “connections”. This idea links into LeVine’s notion of the informal polity and its relationship to a culture of political corruption, discussed in the previous chapter.

Where rights and protections are no longer believable and dependable, before long, citizens come to distrust each other and the very right to express oneself politically
can become endangered (Johnston 1999). In time, basic notions of an open, understandable and accountable political process, and of a meaningful common debate over political questions and who is to be given power to deal with them, become meaningless. Politics then degenerates into a chaotic “hand-over-fist” scramble among people and groups who see themselves as having little or nothing in common. The state finds it impossible to formulate and carry out consistent policies, particularly those that might involve sacrifice on the part of private interests. Johnston (1999) paints a picture where politics then gives way to outright theft, exploitation and violence. The damage, he argues, reaches beyond the formal political arena, too, for the sort of political-free-for-all threatens a society’s cultural consensus – i.e. the basic and widely-shared conceptions of right and wrong, the beliefs about power and the nature of justice that are the foundation of legitimate politics and government. Not only can corruption destroy this cultural consensus; once it has been lost, even efforts at reform become suspect, and trust is doubly difficult to regain (Johnston 1999).

Thus if we assume that the perpetrators of corruption are out to serve their own interests, then the stakes of corruption will most often accrue to the “haves”. The cost in lost and diverted resources, unsuccessful policies, and lost political choices are then borne by the “have-nots” – precisely those who are most dependent upon the formal rules and procedures of the system in order to participate in politics at all. The unequal distribution of costs and benefits of corruption is an obvious dilemma in material terms. But it is a serious political concern too, for it may solidify the notion in many people’s minds that politics itself is a sham – that one’s rights and choices are illusory, and that the only hope of change lies in the destruction of the system. Samuel Huntington is correct in arguing that sometimes corruption can serve as an alternative to violence. However, beyond a certain point it may become the cause of violence too. There have been times in history, to be sure, when rebellion has been justified even inevitable; but corruption may also make people vulnerable to political disruption and exploitation (Johnston 1999).

From a citizen’s point of view, corruption can render official procedures unpredictable, slow, expensive and arbitrary for all who cannot (or will not) pay the price of a bribe or extortion. Widespread extortion means that bureaucrats serve themselves, and may respond to no one. On the other hand the corrupt use of
institutional procedures – hiring, evaluation, compensation and dismissal procedures or, for example, the widespread political intimidation of bureaucrats – can deprive administrative agencies of the independence they need if they are to serve society effectively. Such political problems within government mean that existing policies are unlikely to reach their intended goals, or to be well-conceived, monitored and implemented. Accurate information needed for addressing new problems will become harder to obtain. Indeed where corruption is a serious problem new problems and pressing needs may never make it onto the political and administrative agendas (Johnston 1999).

Some types of corruption do more to disrupt linkages between state and society than others. Some are more unstable and disintegrative than others, depending on the stakes involved. Some kinds of corruption will be more urgent targets of reform than others, because they are more disruptive to the political process. There is an important irony here: these kinds are the most disruptive because they involve powerful actors and the largest stakes, and thus action against them will require the most political will. On the other hand, such major cases offer opportunities to make significant and visible statement to a nation that the fight against corruption is not futile and the agents of reform mean business (Johnston 1999) and can be trusted. The South African government’s handling of allegations of corruption in the arms deal is a case in point that will be discussed in depth (Part Three and Four).

Not only does corruption affect the state, it also inhibits the growth of autonomous groups within civil society. i.e. organizations and interests loyal to the system but enjoying a healthy independence from the state. By creating dependency and/or exploitative relationships between politically powerful figures on the one hand and private citizens on the other, corruption weakens civil society and renders citizens less able to influence and balance the state (Johnston 1999). Moreover it can inhibit meaningful and structured political competition: what is the point of serving as, or remaining in a “loyal opposition” if the real political game consists of finding a well-placed patron and using corrupt influence, and if elections and other public political procedures do not produce real exchanges of power? Competitive party politics, offering meaningful choices, will be weakened or destroyed (Johnston 1999).
In these ways, corruption impacts profoundly on the effectiveness of democratic politics. For while corruption is in no way limited to democracies, it is in such systems that its effects are most disruptive for by attacking two of the fundamental principles on which democracy is based, namely equality of citizens before the law and the open nature of decision making, corruption contributes to the delegitimation of the political and institutional systems in which it takes root (Della Porta & Vannucci 1997).

3.6 Conclusion

Growing international concern about the impact and consequences of corruption have led to current international and regional anti-corruption conventions as well as citizen initiatives, all who cite the negative consequences of corruption as a main stimulus, particularly for governments to take strong action against corruption.

The compelling case made in this chapter, citing empirical evidence, of the mostly negative economic and political consequences that corruption has, support the thesis that comprehensive anti-corruption interventions are required at a variety of levels. However, if and when political leaders committed to fighting corruption arrive on the scene, in many countries they face a cynical population that has strong doubts about the credibility of the state. Where states have been captured, reformers must first overcome a deep chasm of distrust before an anti-corruption programme can be effective (World Bank 2000).

In Part Two we will test these general notions of how corruption impacts negatively on a country’s economic and political health, by looking at the particular case of South Africa. First, however, we need to conclude the theoretical framework guiding our study by considering various theories of corruption control and also the possibility of accurately measuring degrees of corruption.
Chapter Four: Theories of Corruption Control

4.1 Introduction

While Chapter Two looked at various approaches to conceptualizing and theorizing about corruption itself, in this chapter we assesses theoretical approaches to controlling and preventing corruption. First, several general assumptions about corruption control are examined. Secondly, I outline a number of theories of corruption control such as those developed by Klitgaard (on monopoly, discretion and accountability); Rose-Ackerman (on reducing incentives and creating risks); Mbaku (on institutions, incentives and the rules of the game) and Johnston (on democratic consolidation and social empowerment). Thirdly, I turn briefly to international anti-corruption efforts. Finally, I consider the possibility of accurately assessing the effectiveness and sustainability of anti-corruption efforts. In particular, the components and rationale behind the Global Integrity Index as an anti-corruption assessment tool will be briefly laid and critically analyzed.

4.2 Controlling Corruption

One of the first things to be said about the control of corruption is that it is impossible (and some would argue even undesirable) to eradicate it completely. Indeed, the “wise reformer knows that corruption can never be entirely eliminated” (Pope 1996:vii). For one, the costs of eliminating corruption completely would be prohibitive, and simply not be worthwhile in economic terms (Rose-Ackerman 1996). In addition to the financial costs, in certain instances the mechanisms needed to eradicate corruption would be incompatible with the liberal traditions that influence democracies. Also, the control of corruption may be just one of a number of policy agendas that a reform minded government is pursuing, and in certain instances may clash with other agendas.

While a “zero-tolerance” approach to corruption – such as that promoted by President Thabo Mbeki in South Africa - is to be welcomed, i.e. that a government will not tolerate corruption when and where it comes across it no matter who may be involved, this approach needs to be kept in perspective. As Rose-Ackerman warns “anti-
corruption policy should never aim to achieve complete rectitude. Those who take an absolutist position are likely to impose rigid and cumbersome constraints that increase rather than decrease, corrupt incentives.” (Rose-Ackerman 1999:68).

The way corruption is conceptualized provides insight into how one can attempt to control and manage its negative effects. Thus if corruption is largely understood to have arisen largely as a symptom of institutional failure, a focus on reforming institutions is unsurprising. The broader context of anti-corruption reforms is important to bear in mind when looking at the theory that informs it.

As discussed previously, the late 80’s and early 90s heralded a new era of both economic reform, structural adjustment and what Huntington referred to as the Third Wave of democratisation and the new development agenda of the late 90s involved an expectation of sustained efforts in developing and transitional countries towards the goals of market economies and liberal democratic political systems (Riley 1998). For a variety of reasons corruption is likely to spread in periods of economic and political transition from authoritarian rule to democracy. These include vacuums of authority by the removal of authoritarian controls, conflicts of values and a new elite attempting to catch up with the old, decentralization, privatization and the opening of the economy to international participation (Camerer 1996). An important way to strengthen the emerging democracies of Latin America, Eastern Europe, Africa and Asia has been to focus on developing strong institutions for promoting “good governance” (Oluwu and Rasheed 1993). This argument is particularly relevant to the South African context.

During the 90s industrialized countries with well-established democracies came under the corruption spotlight with revelations in Japan, Belgium, Italy, France, Spain and the United Kingdom demonstrating that pervasive political corruption can be an entrenched element of highly industrialized, democratic societies, and not simply an unfortunate dimension of underdevelopment or authoritarianism (Harris-White and White 1996:1).
This may explain some of the interest in the developed world for tackling the issue head on. Corruption is however, particularly harmful for developing countries where there are fewer resources overall so it is even worse to “waste” them or not use them in the most effective, equitable way. In developing countries there may be more opportunities for corruption and fewer resources, particularly skilled human resources with experience in audit, financial analysis and fraud investigation, immediately able to fight it. As such the consequences of corruption for developing countries are significantly worse, as described in the previous chapter.

Reform measures to fight corruption thus include a range of general and specific options. In general corruption can be addressed by democratization and decentralization, economic liberalization, reforming public institutions, public sector downsizing, legislative reforms, initiatives by civil society and public interest groups, investigative journalism as well as attempts to improve public morality by education and moral rearmament. Specific strategies might include enforcing penalties for wrongdoing, making civil service salaries competitive, creating an independent anti-corruption commission, mandating declaration of assets, establishing a code of ethics, and protecting whistle-blowers. Any and all of these reforms can be adopted as part of a comprehensive anti-corruption agenda. Transparency International notes that the policy response to combating corruption has several elements common to every society: the reform of substantive programs; changes in the structure of government and its methods of assuring accountability; changes in the moral and ethical attitudes; and perhaps most importantly the involvement and support of government, the private sector and civil society.

I identify four main approaches that characterized reform efforts in the late 90s, namely:

- **Building systems of well-performing government** i.e. a professional civil service, sound financial management including state tender procedures, effective service delivery and a balance of responsibilities amongst the executive and parliament;

- **Strengthening the legislative framework** including the rule of law, effective enforcement capacity, statutory oversight agencies such as independent anti-corruption institutions and mechanisms, and an independent judiciary;
Increasing transparency through introducing measures that strengthen the role of civil society and the media in demanding better government;

Promoting international co-operation on issues such as the criminalization of bribery and corruption, and institutional reforms and capacity building (Camerer 1997).

What is most useful, in my opinion, is framing the corruption reform agenda as one of promoting “good governance” and democratic accountability, rather than controlling corruption per se. Democratic systems of governance premised on commitments to accountability, openness and transparency are thought to create conditions that discourage corruption.

While there is no simple correlation between levels of democracy and levels of corruption, over the long run democratic regimes arguably engender more powerful antibodies against corruption than systems where political liberties are stifled. A regime that has frequent elections, political competition, active and well-organized opposition forces, an independent legislature and judiciary, free media and liberty of expression is bound to generate more limits on the scope and frequency of corruption than one that does not have them. As the balance of power between leaders and their publics continues to shift in favor of more open democratic governance with the primary driving force behind this change an “information-rich” and more transparent environment, leaders are forced to give a fuller public accounting of themselves than ever before (Glynn et al 1996).

Growing democratization hopefully means the emergence of a more active national media and stronger legislature with the power to hold leaders accountable and whilst democratic institutions do open up a long-term prospect of institutional remedies for corruption, these require a powerful political impetus to make them work effectively (Harris-White and White 1996). Political will is thus a key ingredient to ensure an effective, well-resourced anti-corruption strategy and will be discussed in some detail later in the chapter.

While democratization involves the spread of political and civil freedoms, it can also open up an era of license without responsibility to the benefit of existing and
emergent economic and political elites. Democratic systems provide incentives and opportunities for corrupt behavior, notably the enormous costs of mounting election campaigns (which can stimulate corrupt practices such as bribery of voters in order to get re-elected), the capture of political parties by economic elites, the politicization of the state apparatus by elected officials and the desire of the latter to compensate for political uncertainty by building up a capital stake through corruption. These phenomena are particularly strong in fledgling democracies where a procedural transition has not been accompanied by real or substantive democracy (Harris-White and White 1996). Thus democracy itself may open up new opportunities for corrupt behavior, for instance through corrupting influences of money on elections with excessive and unaccountable sources of funding of political parties. This will be seen to be a core deficit in South Africa’s anti-corruption armor.

4.3 General Assumptions Underpinning Corruption Control

A pluralist approach assumes that political initiatives centered on the creation of new democratic institutions – such as elected legislatures, parliamentary committees and watchdog bodies – are central to the success of efforts to control corruption. It is argued that moves towards liberal, pluralist politics, involving a freer press, competitive party politics, and the revival or creation of other independent institutions such as the judiciary or professional associations, will reduce corruption by making it more likely that it will be exposed and be politically damaging (Riley 1998:143). As such a limited, legitimate, honest and transparent state ought to be the center of the development process in both developing and transitional countries. All too often it is not and the public interest is therefore undermined and human rights infringed. In many cases the state sector is swollen, inefficient and corrupt. Individual and group private interests have priority over the collective good and public officials have considerable discretion to accumulate private wealth through exploiting their monopolistic, low and irregularly paid positions, often in collusion with indigenous or foreign businessmen.

The systems approach i.e. improving the management systems of organizations is a popular response to controlling corruption (Klitgaard 1998). Economic liberalization strategies aim at fighting corruption through reducing the scale of government.
However, this may ignore the fact that privatization and other distributive interventions such as broad-based black economic empowerment (BBEEE) bring with it new forms of corruption. Fighting corruption through civic awareness and public education is another approach, however, the involvement of civil society actors is a necessary but not a sufficient condition to reduce corruption and the role of such groups in the fight against corruption needs further research (Harsch 1993, Theobald 1994).

In general, the various theoretical approaches to controlling corruption rest on certain assumptions of both the state and the market, with corruption largely seen as a problem for, within and involving the public sector. The main assumption is that public sector corruption will be reduced if the size of the state is reduced and the economy deregulated. The argument is that there is a relationship between market structure and the incidence of corruption. Government intervention in the marketplace creates opportunities for individuals to engage in corruption. The remedy prescribed is thus less government intervention in private exchange and greater reliance on markets for the allocation of resources.

If economic and political liberalization are two theoretical approaches that inform the debate around controlling corruption, what do these approaches mean in practice? i.e. how is corruption reform related to the economy and its institutions?

The economic environment contributes to the evolution of corruption in so far as economic strategies and policy instruments, together with institutions for the implementation of economic policy, may provide different opportunities for the pursuit of corrupt practices. In particular, the process of economic reform in a transitional period provides significant new opportunities for corruption, for example risks associated with privatization projects. Whilst in the long run a deregulated economy is bound to offer less scope for corruption than a centrally planned one, the sudden deregulation of entire new arenas of economic activity can vastly expand room for misconduct, opening the door to fraud and all sorts of abuses by “businessmen” trying to take advantage of the new opportunities created by deregulation.
The reader will have noticed that I seem to be saying both that a) liberalize the economy and deregulate, lessen the role of the state to prevent corruption, and b) the introduction of liberalizations opens the scope for corruption, at least at the start of such liberalization. These are clearly contradictory. But the apparent contradiction falls away when one takes the time factor into account for the economy and polity are not static. The move towards less state control is important for reasons that are independent of the corruption issue, namely the value of individual freedom and also the expansion of the economy. In the general context of joining the global free market system, individuals in state bodies are in a position to exploit their positions. The economic role of such bodies should therefore be lessened. It could very well be that, under the previous system, before the introduction of the free market approach, there was far less corruption.

For instance when it comes to privatization, officials in charge of privatizing publicly owned assets can become instant tycoons by selling them at low prices for a bribe or possibly acquiring them through families and friends. Where seen to affect development by catering for special interests at the expense of public interests, corrupt practices may threaten the legitimacy of the privatization process. Internationally, privatization schemes have been used to legalize the ill-gotten gains or criminal organizations that build ties with elites and businesses, inevitably involving the corruption of state officials, in order to facilitate money laundering. It is well known that the ability to corrupt officials depends on how integrated the criminal organization is into legitimate structures, for the relationship between the underworld of organized crime and the upper-world of legality is characterized by its parasitical and symbiotic nature.

The new system allows for greater individual initiative and flexibility and is therefore open to greater abuse by individuals. There is a value dimension too: the new system displaces the older hierarchy of values that stressed loyalty and community, by a new emphasis on the value of individual initiative and choices. Clearly an educative program on public values and interests must be part of any sustainable anti-corruption strategy, to bridge the gap between the old and the new.
Other economic factors that potentially provide incentives for the pursuit of corrupt practices include: the prevailing nature and extent of poverty; the national distribution of income and wealth, in general; as well as the recent trends in these distributions. The presence of a significant level of absolute deprivation may also be significant. The poor may not have many alternative opportunities and are thus “forced” to commit crimes in a way that those who do have alternatives, are not. To the extent that expectations of a “better life” are frustrated, specific social groupings, and individuals could be motivated by the prospect of improving their status to undertake corrupt practices.

For its part poverty has contributed to the extension of corruption: those who cannot honestly meet their basic needs may resort to less honest means of subsistence (Frisch 1994:4). This argument is however, only relevant to those who have the opportunity to exploit possible openings for corruption. Clearly the poorest groupings, for which incentives may be the greatest in this context, will typically have almost no opportunities. Rather questions of absolute, or more likely relative deprivation in a society will be of relevance to those in, for example, lowly government positions, where the remuneration is exceptionally poor, but where the work provides possibilities for corrupt activities (Goudie and Stasavage 1997:29).

Politically, corruption is often a consequence of the monopoly power of various kinds of modern authoritarian and totalitarian regimes to be strictly distinguished from pre-modern approaches. Political structure is a critical element in the evolution of corruption, not merely in the degree of political centralization and the extent of democratic accountability, but also the manner in which the regime interacts with and exercises political control or influence through the institutional structures. Political structures where representative processes to enforce governmental accountability are weak and absent provide the greatest opportunities for corruption in view of the absence of political mechanisms through which governments that tolerate, condone or participate in rent-seeking and corrupt practices might be dismissed (Goudie and Stasavage 1997:18).

The establishment of good governance - the practice by political leadership of accountability, transparency, openness, predictability, and the rule of law - is widely
accepted as a critical element in securing stable economic development and has been shown to be a virtual prerequisite of the enabling environment for market-led economic growth (Goudie and Stasavage 1997:11). Good governance reforms rest on the economic efficiency argument: economic growth can only be achieved effectively and for the long term if decision making is soundly based with institutions in which investors and ordinary people can have confidence. Many countries lack the basic institutional foundations for markets to grow - they fail to provide law and order, protection of property and predictability of policy. High on the list of deterrents of potential (foreign) investors is the fear of dealing with countries where the rule of law is undermined, where democratic institutions are weak, where the accountability of the public service is non-existent and petty corruption is endemic (Chalker 1997).

As noted in the previous chapter, there is increasing empirical evidence to show that investors, especially foreign ones, choose to go elsewhere rather than become caught up in costly projects, which squeeze their profit margins. As such there is little investment and less economic growth. There is thus a hardheaded economic case for good governance reforms, which also serve to tackle corruption.

We can conclude that there are major problems concerning the sequencing of such reforms in Africa and elsewhere and the relationship between political and economic liberalisation is nowhere near as clear as its advocates suggest. In most African societies economic reform has preceded political reform and although down-sizing the state and political liberalisation are desirable goals in many African countries, they are necessary but not at all sufficient conditions for the reduction of public sector corruption. Extensive public sector corruption can coexist with democratic or quasi-democratic politics in Africa (Riley 1998:141).

Harris and White (1996) argue that general arguments about the inverse relationship between economic liberalisation and corruption need to be tempered by case-study evidence. The examples of China and South Korea suggest that economic liberalisation displaces, refines and may lead to more corruption. In addition “far from improving things in the short and medium term, democratisation may actually increase the source and scale of corruption without strengthening counter-veiling political or institutional capacity.” Thus it can be seen that economic liberalisation
will not always reduce corruption; nor will the arrival of democratic politics. But combined with institutional reform and political commitment they do provide the foundations upon which a successful anti-corruption campaign can be conducted (Riley 1998: 149). Corruption frequently takes place in societies where there is considerable discretion for public officials, limited accountability and little transparency in governmental operation; in such societies civil society institutions are often weak and underdeveloped.

4.4 Theories of Corruption Control

There are a number of neo-classical economic and institutional reform approaches that the literature has identified in theorizing about the control of corruption. From each of these theories flow various strategic approaches to controlling corruption. These are integrated into the discussion, before taking a more general look at current international approaches to preventing corruption and promoting accountability.

4.4.1 Monopoly, Discretion and Accountability

The first theoretical analysis of corruption I want to look at is that of development economist, Robert Klitgaard. In his well-researched study, *Controlling Corruption*, based upon a principal-agent economic analysis derived from neo-classical (or neo-liberal) economic theory, Klitgaard articulates his now famous stylized equation on the basic ingredients of corruption. His strategy is tested in a number of differing developing-country contexts (Klitgaard 1988, 1991, 1997). As he puts it, “Illicit behavior flourishes when agents have monopoly power over clients, when agents have great discretion, and when accountability of agents to the principal is weak” (Klitgaard 1988:75).

\[
\text{Corruption} = \text{(M)onopoly + (D)iscretion} - \text{(A)ccountability}
\]

There are three dimensions of institutional structures that are most critical in creating opportunities for officials to engage in corruption:

1. the monopoly power of officials
2. the degree of discretion that officials are permitted to exercise
3. the degree to which there are systems of accountability and transparency in an institution (Klitgaard 1988).

The basic causes of corruption are thus political and bureaucratic monopolies coupled with an element of discretion and weak mechanisms of accountability. Officials are likely to be most corrupt where they have wide discretion in their actions, little accountability and considerable monopoly power. As such interventions to control corruption would mean limiting monopoly (possibly through competition) as well as discretion (by introducing a more rules based approach) and increasing accountability (through the role of the media, civil society, etc.)

While corruption had classically been understood as a bribe-giver and a bribe-taker, i.e. a corrupter and one who is corrupted, Klitgaard’s contribution, according to Galtung (1998), was to depart from this notion and point out that there are not just two but always three actors involved in any corrupt transaction:

1. the Principal (P)
2. the Agent (A) and
3. the Client (C).

This distinction is demonstrated using an example of tax collection. The tax collector, who is the Agent (A) abuses the power given by the state, the Principal (P) when accepting money from a Client, the tax payer (C) to reduce the latter’s tax burden. As such the Principal (P) plays the determining role as P both selects the Agent (A) and P sets A’s rewards and penalties (Galtung 1998:110).

Using their monopoly position enables agents to charge what economists call rents. Accordingly rents in general or corrupt income in particular, can be reduced by decreasing state power, limiting the discretion of officials, and by strengthening the controls exercised over public officials (Riley 1998:135). Transparency is also an important goal. Opening up previously secret public officialdom and generating freer public discussion through a free, questioning press and an active civil society can reduce corruption.
From Klitgaard’s theoretical approach to corruption flow several general policies against corruption, for example when selecting agents, make sure to screen them for honesty and get outside guarantees of their honesty and integrity; change rewards and penalties through salaries and penalties; gather information using auditing systems and management, third parties, clients, a burden of proof; restructure the P-A-C relationship through competition, discretion of agents, rotation of agents, client groups; change attitudes against corruption through education and example, codes of ethics, and organizational cultures (Klitgaard 1988:97).

4.4.2 Reducing Incentives and Increasing Risks

Yale law professor, Susan Rose-Ackerman’s comprehensive study, *Corruption and Government: Causes, Consequences and Reform* (1999) argues that the total elimination of corruption will never be worthwhile, but certain steps can be taken to limit its reach and reduce the harms it causes. Reform measures can reduce the incentives for bribery and increase the risks of engaging in corruption and the goal is therefore not the elimination of corruption but rather an improvement in the overall efficiency, fairness and legitimacy of the state.

In her work she considers the relationship between corrupt incentives and democratic forms and discusses the relative bargaining power of public and private organization and individual actors, and how the basic structure of the public and private sectors produces or suppresses corruption. Reform at this level may well require changes in both constitutional structures and the underlying relationship between the market and the state (Rose-Ackerman 1999:5).

Corruption is a symptom that something has gone wrong with the management of the state whereby institutions designed to govern the interrelationships between the citizen and the state are used instead for personal enrichment and the provision of benefits to the corrupt. The price mechanism, so often a source of economic efficiency and contributor to growth, in the form of bribery, can undermine the legitimacy and effectiveness of government (Rose-Ackerman 1999:9). She warns that reform should not be limited to the creation of “integrity systems”. Instead, fundamental changes in the way government does business ought to be at the heart of
the reform agenda. The primary goal should be to reduce the underlying incentives to pay and receive bribes, not to tighten systems of ex post control. Enforcement and monitoring are needed, but they will have little long-term impact if the basic conditions that encourage payoffs are not reduced. If these incentives remain, the elimination of one set of “bad apples” will soon lead to the creation of a new group of corrupt officials and private bribe-payers (Rose-Ackerman 1999:6).

In South Africa it is clear that forms of corruption that manifested prominently in the apartheid state such as pension fraud continue to exist as the inequities in society, now between black middle class and very poor citizens, continues to exist. Also with preferential procurement built into the political economy in the form of black economic empowerment, such initiatives that engineer wealth transfer in the economy based on access to politicians can potentially create an elite that has benefited from undue access and influence, in a way similar to the empowerment of Afrikaners under apartheid.

4.4.3 Institutions, Incentives and the Rules of the Game

The third theory of corruption control I shall consider is Mbaku. Mbaku’s public choice approach understands corruption as opportunistic (rent-seeking) behavior related to the scope and extent of government regulation and control of private exchange and economic activities. Corruption is directly linked to state intervention in the economy and unless such power is limited, civil servants will be able to engage in opportunistic behaviors to increase their compensation packages (Mbaku 1996). From this perspective, unless the adopted rules effectively constrain the ability of the government to supply special interest legislation, rent-seeking will become pervasive as groups seek ways to enrich themselves at the expense of the rest of society.

Mbaku argues that the only way to deal effectively with corruption and other forms of political opportunism is comprehensive institutional reform of the neo-colonial state through proper constitution-making, with the end to establish and sustain participatory, accountable and transparent governance structures and economic systems that guarantee the right to engage in exchange and contract and constitutionally limit the state to intervene in private exchange. Public choice theory
views the control of corruption and other forms of opportunism as part of the problem of constitutional maintenance that requires an effective enforcement system to force cooperation and compliance.

Institutional arrangements that cannot be subverted easily by interest groups and individuals searching for ways to enrich themselves at the expense of the rest of society, rests on an understanding of institutions as devising the rules of the game in society, or more formally, the humanly devised constraints that shape human interaction. Institutions and the rules on which they are based, structure incentives in human exchange, whether political, social or economic. Institutional change shapes the way societies evolve through time and hence is the key to understanding historical change (North 1990). Mbaku draws on the work of Brennan and Buchanan (1985) who argue that rules determine the way individuals and organisations behave. Rules create the incentive structure faced by market participants – in both political and economic markets. Thus, the behaviour of civil servants and the entrepreneurs who bribe them can only be effectively examined within the context of the existing set of rules. In other words without a clear understanding of the laws and institutions of a country, an attempt to analyse corruption in that country would not yet yield policy relevant information.

Institutions determine the incentive structure for each society, helping to shape the behaviour of individuals participating in the political and economic markets. As a consequence institutions determine outcomes from markets and other forms of socio-political interaction. Thus, any attempt to affect outcomes must involve a change in the structure of incentives. Rules can be explicit (a written constitution) or implicit (custom and tradition). Within a given set of rules, corruption may be seen as opportunistic behaviour on the part of individuals or groups to generate extra-legal benefits for themselves at the expense of society. Accordingly, corruption may be regarded as part of the problem of constitutional maintenance which can be handled effectively only through the reform of the existing rules (Mbaku 1996).

Basically the rules determine the incentive system faced by market participants and consequently their behaviour and the expected outcomes. Corruption, in turn, can be seen as an outcome from a market that is defined by a given incentive structure, and
of course an existing set of rules. To affect or change the market outcome requires modifications of the incentive structure through changes in existing rules, thus the appropriate procedure for dealing effectively with rent-seeking and other opportunistic behaviours, including corruption, is to reform the rules of the game and alter the incentive structure (Mbaku 1996).

How would this apply to the particular African context? Various societal, legal, market and political strategies have traditionally been used to control corruption in Africa. Each of these strategies represents an attempt to manipulate outcomes within a given set of rules and assumes the existence of efficient and effective counteracting institutions. If existing rules provide incentive systems that encourage opportunistic behaviours, including corruption, the only effective way to control corruption is to change the rules and subsequently the incentive structure. Thus proper corruption control requires institutional reforms that result in a change in the incentive structure to guarantee the outcome desired by society. In other words to understand why individuals and groups within a society participate in corruption, it is necessary to study the rules that regulate socio-political interaction (Mbaku 1996).

Thus in understanding corruption it is important to take into account how the existing rules operate. Rules define how individuals can interact with each other, provide a means for the settlement of conflict, and generally place constraints on individual behavior, as well as that of the group and collectivity. Effective rules allow individuals to pursue their private ends in such a way that they do not infringe on the ability of others to do the same. Given an existing set of rules, corruption can be viewed as opportunistic behavior on the part of individuals or groups (Mbaku 1996). Rules do not in themselves preclude the possibility or even likelihood of serious forms of corruption, however, the absence of such regulations, as is the case in the majority of African countries, creates the ideal conditions for corruption and conflict of interest - or more importantly perceptions of corruption and conflict of interest which in turn eat away at the very fabric of public trust and confidence in democratic self-government.

As such one of the very first steps in preventing corruption in government must be to determine the legitimate scope of acceptable behavior for members of the
government. This may be problematic due to lack of consensus (ICAC 1993); however there are certain guidelines in relation to certain principles of public life which can be followed, such as those promoted by the Nolan Committee (1996) and upheld in the South African constitution. In public service occupations, professional ethics have been described as the values underpinning impartiality, objectivity, integrity, efficiency, effectiveness and discipline of public servants when acting in the public interest in general and when exercising discretionary powers in particular (Olowu 1993). The failure to observe ethical obligations by members of the public service has not only affected the efficiency levels of the service, but even more seriously has brought the public service into discredit with the public losing faith in their governments.

4.4.4 Democratic Consolidation and Social Empowerment

The final explanatory model to be considered in this chapter is that of political scientist, Michael Johnston. According to Johnston (1999) the underlying difficulties of democratic consolidation manifest themselves in varying syndromes of corruption with differing implications on how to tackle the problem, i.e. the absence or presence of degrees of corruption in a particular society reflects deeper challenges caused by imbalances between economic and political forces. As such it is important to unpack the relationships between political and economic liberalization in countries, such as South Africa, struggling to consolidate democracy. Analyzing a country’s corruption phenomena can also therefore assist in understanding its deeper democratic consolidation challenges.

For Johnston, the economic and political challenges of consolidation require careful attention to two central issues namely institutions and participation - notions which are essential in defining major syndromes of corruption. Where democracy and growth do support each other, their vitality and synergy rests on participation, in the form of open yet structured competition within the economic and political arenas, and institutionalized boundaries and paths of access between them. Thus building a lasting balance between openness and autonomy of institutions and between opportunities for political and economic participation is the key to success. Within institutions it is important to maintain the balance between openness and autonomy. Institutions must
have some degree of autonomy (for instance elected and appointed officials need to carry out their work in an authoritative way), but paths of access must also be open enough to maintain the accessibility of officials. If these paths do not exist, they will be created corruptly.

When it comes to participation there needs to be a balance between political and economic opportunities. Where institutional and participation imbalances are pronounced, there is the potential for corruption that will reflect in its stakes and patterns of influence, the particular imbalances of a given society. Huntington (1968) argues that where economic opportunities are relatively plentiful and political opportunities are scarce, corruption may occur as people try and buy their way into political power; and where political opportunities are plentiful and economic advantage more difficult, people are more likely to use their political power to enrich themselves. Thus economic and social development must take place in a rough balance, or else growing strength in either sector will foster more corruption in the other (Johnston 1997). Huntington’s injunction is a reminder that if economic growth is not accompanied by wider political access and opportunities we may simply be trading one mechanism of corruption for another.

Corruption disrupts competitive participation within, and weakens the institutional links and boundaries between the political and economic arenas. For example weak political institutions and poorly institutionalized markets enable a variety of illicit connections to flourish.

Johnston’s model is important in that it identifies several different syndromes of corruption reflecting underlying imbalances in political and economic participation and in the accessibility and autonomy of institutions. For example, corruption in the worst-off countries may be a qualitatively different problem from cases found in established market democracies and suggest the need to understand the patterns, origins and consequences to be found in high corruption societies. Anti-corruption efforts should therefore aim not just at detecting, discouraging and punishing particular kinds of corrupt practice but also at addressing the deeper imbalances that gives rise to a particular corruption syndrome.
Over and beyond a focus on the institutional reforms in both the market and the state in order to control corruption, Johnston focuses on the importance of “social empowerment” - expanding the range of political and economic resources and alternatives open to ordinary citizens – as an essential part of any attack on systemic corruption (Johnston 1998). This is particularly important in cases where the populace does not consider political institutions legitimate and corruption is systemic.

Where government is broadly legitimate, civil liberties, systems of accountability, property and contract rights, and the rule of law are credible, responses to corruption occur through institutional reform. Here, familiar and well-tested options include addressing operational problems through improved controls over discretion and resources; more transparent procedures; strengthening of internal and external accountability systems; improved recruitment, compensation, training and retraining for officials and creating channels of appeal for client. Institutional reforms to tackle corruption have a good track record in those nations where government is generally legitimate and effective and corruption is a problem with limited scope and many foes.

While institutional reforms enhancing transparency and accountability in state and economic institutions are indispensable parts of any anti-corruption strategy, they also need a long-term social foundation, particularly where corruption is systemic. This can be addressed through social empowerment – which entails strengthening civil society in order to enhance its political and economic vitality; providing more orderly paths of access and rules of interaction between state and society and balancing economic and political opportunities. Social empowerment involves the judicious co-ordination of a variety of familiar development and anti-corruption policies and will provide necessary support for institutional reforms, weaken the combinations of monopoly, discretion and lack of accountability that make for systemic corruption and help institutional reform by linking it to lasting interests contending in active political and social processes (Johnston 1998).

A number of countries have reduced corruption historically through development of civil society and enhanced political and economic competition; changes which, while not planned or coordinated as reforms per se, incorporate some of the elements of
social empowerment. Johnston’s hope is to identify a general strategy for building solid social foundations for institutional reform and for strengthening forces and processes that can sustain reductions in corruption over the long term. His conception of corruption informs his approach: “Looked at one way corruption is a problem of official ethics and public dealings; but viewed another way it is a function of the opportunities and alternatives people have in life. While institutional reforms focus – rightly – upon the opportunities and alternatives open to officials, it makes equal sense to consider those available to citizens, both as they affect their vulnerability to corruption and as they shape possible opportunities for responding to it” (Johnston 1998:88).

Johnston’s appeal to social empowerment comes from contrasting developed and developing countries struggling to address corruption. In advanced societies where economic and political vitality and a strong civil society can often be taken for granted the importance of social foundations for institutional reform can easily be overlooked, whereas in developing and transitional countries, by contrast, the indifferent record of reformed institutions (particularly those of liberal democracy and market economics) in many places give citizens little reason to trust them or to use them to defend themselves. The major institutions of the state and the economy must win broad-based legitimacy and support. As such “it will not do simply to propose democracy and market economics as solutions to systemic corruption.” Rather for serious cases of corruption, “reform from the bottom upwards, opening up political and economic alternatives and bringing excluded segments of society into an active mainstream, is an essential counterpart to increased official transparency and institutional change” (Johnston 1998:89).

Social empowerment is a complex, long-term anti-corruption strategy and is in no way a substitute for reforms at the organizational, personnel and administrative levels; indeed social empowerment and “macro-level” policies must work together as over time social empowerment can help sustain reform, both within institutions and at the level of day to day economic and political activity. Where social empowerment is effective, institutional reforms and the official rules of decision-making and administration can converge with social values and thus grow in legitimacy and effectiveness.
Johnston’s work thus highlights the important role of civil society of balancing the state in corruption reform efforts, but notes that the cultivation of civil society is not a substitute for institution building and that the two must work together. “Without a strong civil society to energize them, even a full set of formally-democratic institutions will not produce accountability…. Where civil society is weak…vital social support for limits on corruption is lost” (Johnston 1998:94).

The balance notion also applies within the economic and political sectors: a diverse economy is likely to have fewer bottlenecks that can be exploited in a monopolistic fashion, while the more competition and non-violent conflict within a political system, the better it will be able to provide political checks upon corruption in the middle to long term and the more difficult it will be to contrive and exploit political or bureaucratic monopolies over access, influence and distribution (Johnston 1998:96). He suggests the widening of political and economic opportunities within society is an important aspect of the struggle against systemic corruption and a way to institutionalize reform over the long run. The economic and political strands are intertwined: broad-based growth is likely to strengthen civil society and social interaction, which in turn is a necessary (if not sufficient) step towards greater political competition: such competition, to the extent that it weakens corrupt monopolies, is likely to aid further (and broad-based) economic development and so on.

Social empowerment is not just liberalization. Instead it is based at the level of everyday life and focuses among the range of options and resources open to ordinary citizens. Moreover it involves a substantial component of institutionalization; in civil society as interaction fosters stronger social norms and in the state-society relationship, as open paths of access between state and society bring about a balance between both while boundaries between public and private resources, processes and interests are made clearer and more legitimate. Norms and standards are prerequisites for institutional reform. Sustainable reductions in corruption are possible; but direct attacks upon it as an institutional problem, require a sound social foundation if they are to succeed, and if they are to be sustained over the long term (Johnston 1998:100).
That concludes our survey of various theoretical interpretations of corruption (and how best to control it). Each one of these theories can arguably be seen to add something of real value to our grasp of what is at stake in corrupt practices. Klitgaard’s “corruption equation” supports our findings in the first part of the chapter about the likelihood of greater corruption being coupled with a transition to a less state-directed economy. In such a transition individual discretion is greater, but the state still has various monopolies and in the absence of adequate accountability procedures, these are likely to lead to corrupt practices. This point is not far from that made by Rose-Ackerman who points to the state-market relationship as stimulating corrupt practices. Mbaku highlights the way in which incentives are largely determined by the set of rules governing institutions. Johnston’s analysis is for our purposes the most pertinent, focusing as it does on both the institutional and citizen empowerment angles.

The applicability of the above theoretical models of anti-corruption controls will feature in Chapters Five and Six that sketch the context of corruption in pre- and post Apartheid South Africa and anti-corruption reforms that have been taken by the new regime. As background to the South African case study, the rest of this chapter will briefly summarize what has happened in anti-corruption efforts in the international context.

4.5 International Anti-Corruption Reform Efforts

Corruption is an international problem that requires international solutions. Since the mid 90s, international organizations including the United Nations, the World Bank, the OECD, the Council of Europe and a number of other inter-governmental organizations and NGOs such as Transparency International have embarked on various anti-corruption initiatives, informed by a “good governance” institutional reform agenda. Two main areas around which international organizations reform efforts have been concentrated include the criminalization of bribery and corruption; and institutional reforms and capacity building. To some extent extraterritorial, international restraints can substitute for limitations on the ability of national institutions to enforce rules and international agreements are thus a mechanism for strengthening commitments not anchored by any domestic institution, serving as a
short-term substitute while these institutions are being built up. Whilst the sovereignty of national governments to initiate their own reform efforts is respected, there are certain issues where international co-operation is required and interventions should not be seen as compromising sovereignty.

Most efforts of international organizations are directed at the criminalization of corruption for only to the extent to which bribery is punishable as a crime can the full government machinery be mobilized to fight it. Making international corruption a crime requires changing laws or adopting new ones as well as mechanisms to enforce them. Key to international co-operation is mutual assistance treaties in terms of extradition as well as the exchange and sharing of information about corruption fighting techniques and legislation. The United Nations through the Crime Prevention and Criminal Justice Branch in Vienna has made efforts to co-ordinate the elaboration of materials to assist nations in developing anti-corruption reforms, including the development of a manual to combat corruption. In 2003 the United Nations Convention Against Corruption was signed in Merida, Mexico.

In 1977 the United States led way with the US Foreign Corrupt Practices Act making it a criminal offence for US companies to bribe foreign officials. The aim of the legislation was to create a level playing field and secure good governance by operating an internationally binding convention that would ensure that multinational companies such as Unilever and General Electric for example, were bound by the same rules when operating around the world. Such reforms indicate that the bulk of responsibility for corruption has gradually been shifting from the shoulders of the recipients (public officials or heads of state) onto those of the suppliers (the companies).

In 1994 the Organisation for Economic Cooperation and Development (OECD) Recommendation urged both developed and developing nations to “take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.” In the interest of attaining consistent standards of criminal legislation in this field, member states were urged to review their statutes to ensure that they effectively prohibit, in conformity with jurisdictional and other basic legal principles, all aspects of both the giving and the
taking of bribes including promises and solicitation of bribes. Each government was required to take concrete and meaningful steps to vigorously enforce legislation in this area, especially towards ending large-scale extortion and bribery involving politicians and senior officials. In November 1997 OECD member states which include twenty-nine countries covering 70% of the world’s goods and services, met in Paris to conclude an anti-corruption convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This convention was eventually ratified in 1999. There is however, much work to be done and skepticism to be overcome, before the necessary legislative frameworks and legal sanctions are fully in place.

Organizations such as the World Bank, International Monetary Fund and Millennium Challenge Corporation have in recent years been using their financial leverage to encourage anti-corruption efforts in recipient countries based on the following reasons: corruption negates development and thus the fight against corruption is the key to reducing poverty. The World Bank argues that the principal way to reduce corruption is to encourage deeper and more thorough economic liberalisation and deregulation in borrowers, although reforming and strengthening public institutions is also regarded as important (World Bank 1997).

Thus whilst in the past lending decisions were based strictly on economic criteria, now financial assistance could be suspended or delayed on account of poor governance. It has been put clearly to clients that if there is any sign of corruption the project concerned will be suspended. In 1997 the IMF cut off a $220 million loan to Kenya because of the refusal of the Kenyan authorities to clean up pervasive bribery and self-enrichment and the fact that the anti-corruption measures the government was taking “fall short of meeting the clearly expressed concerns of IMF members”. By taking such action the ire of a number of member states was invoked. For instance China accused the bank of infringing on the sovereignty of member states and warned it not to exceed its mandate. Several Fund and Bank members expressed reservations about the extent to which controlling corruption should be used as a condition for receiving aid from the multilateral financial institutions.
The Bank clearly relies on the neoclassical economic analysis of corruption articulated by Klitgaard canvassed earlier in this chapter. Accordingly, corruption principally occurs where officials are in a monopoly position (and can extract economic rents or unofficial additional income) have large discretion in their actions, and little accountability. The Bank therefore argues that an effective anti-corruption strategy should encourage the reduction of rents (by means of greater economic liberalisation and deregulation), channel and reduce discretion (through public sector reform and institutional strengthening) and increase accountability (by building up institutions such as accountancy units in government and by encouraging the growth of a more vibrant, questioning civil society) (Riley 1998:147).

Cynics argue that the corruption issue is just another means for the Bank to secure its real goal, namely greater structural adjustment programmes that have been stymied by political pressure, and that it is less enthusiastic about strengthening public institutions and increasing public education and awareness of the issue (Riley 1998:138). Structural adjustment programmes emphasise deregulation of the economy and greater reliance on the markets for the allocation of resources, reductions in the size of the public sector and the elimination of controls on international trade (Mbaku 1996:123).

One of the most comprehensive models to emerge in this recent debate on anti-corruption reforms is the National Integrity System approach developed by Transparency International, a non-profit organization with 90 autonomous chapters around the world. Set up in 1993 by former World Bank employees originally to counter corruption in international business, Transparency International encourages governments to establish and implement effective laws, policies and anti-corruption programs to enhance public transparency and accountability in international business and public procurement. In an attempt to promote a holistic anti-corruption strategy consisting of measures aimed broadly at increasing transparency and strengthening public accountability, the National Integrity Pillars approach includes assessments of political will; administrative reforms (including code of ethics; administrative practices; disclosure of gifts/assets; privatization; procurement); watchdog agencies (such as anti-corruption commission; ombudsman; auditor-general); parliament;
judiciary; public awareness and role of civil society; media and the private sector (Pope 1996).

A more recent model is the Global Integrity Index developed by the Washington DC based international NGO, Global Integrity. This builds on the National Integrity Systems approach, taking it a step further by quantifying the strength and weakness of national integrity systems.

4.5.1 The Global Integrity Index

The Global Integrity Index is an attempt to capture and quantify the array of anti-corruption institutions, policies and practices that have emerged over the last decade as being important in the fight against corruption. It draws on the work of several international bodies and is by far the most comprehensive governance assessment tool to have been developed, with a specific focus on anti-corruption reforms, taking into account the existence, effectiveness, and citizen access on these mechanisms (Camerer 2006).

What “added value” does Global Integrity bring to already existing models? Transparency International is a case in point, focusing on in-depth country studies to provide policy makers with qualitative information on the systems and practices that scholars of anti-corruption cite as key to preventing abuses of power (of which corruption is one type). These qualitative studies, while they lay useful groundwork for diagnostic and policy reform, also become quickly outdated and fail to capture the dynamics of political reform as it unfolds over time. Even more seriously, these studies do not take on the methodologically fraught but crucial task of attempting to organize and quantify information about anticorruption mechanisms and practices gathered by expert local observers on the ground in the various countries under examination. To take on that key task is the mission of Global Integrity's Index.

The Integrity Index assesses what might be called "the positive flipside" of corruption: that is, the public integrity systems that citizens can count on (and in some cases, directly employ) to help keep their public officials honest, and to hold them accountable should they go astray. The Index is therefore based on the assumption
that the greater the presence of such public integrity systems, the less likely corruption is to be prevalent.

Based on referenced, peer-reviewed expert assessments, the Index rests upon integrity indicators chosen after a comprehensive examination of the academic literature on anticorruption. (The list of 292 also includes governance indicators that are considered universally applicable and necessary if abuses of power are to be prevented in a given polity.) These indicators, in turn, capture three dimensions relevant to preventing corruption and other abuses of power:

1. The existence of public integrity mechanisms, including laws and institutions, that promote public accountability and limit corruption;
2. The effectiveness of these mechanisms;
3. The access that citizens have to the information they need in order to hold public officials accountable.

The Index does not measure corruption itself. Instead, the Index maps what might be thought of as the public integrity "topography" of a given country, revealing both its peaks and valleys when it comes to checking or preventing the abuse of power. From the table below we can see that the Global Integrity Index includes six categories and 23 sub-categories that are considered as important to include in any comprehensive attempt to put in place accountability systems that will prevent abuses of power (i.e. corruption) and promote public integrity. The Index scorecard conveys information about the particular strengths and weaknesses in the country's institutionalized public integrity "architecture."

The various dimensions making up the index represent what Diamond (2004) calls "a comprehensive system of intersecting accountability mechanisms." The rationale behind including each of these institutions, such as an access to information act, or legislature, into an index that assesses the existence and effectiveness of anticorruption mechanisms, is obvious. It should be noted that there is significant overlap with the democratic governance literature and that in many respects fighting corruption through an approach that promotes public integrity and accountability mechanisms, is a similar exercise to a good governance approach that emphasizes the quality of democratic institutions.
The Global Integrity Index: Categories and Sub-Categories

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4.6 The Effectiveness of Specialized Anti-Corruption Agencies

The Global Integrity approach is justified to the extent that anti-corruption agencies are in fact effective. What evidence is there to support the importance of these specialized prevention, investigation and prosecution techniques? There are, it is clear, numerous successful examples of such entities - Hong Kong, Singapore, Botswana, New South Wales (Australia) to name a few - however, warning signals have been sounded from some quarters. A tough independent anti-corruption agency is a potent tool and whilst it represents credible long-term commitment to combating corruption there should also be checks on its ability to be misused for political ends. In the wrong hands anti-corruption legislation can be abused. An anti-corruption commission reporting to an autocratic ruler could be used as an instrument of repression, as appears the case in some developing countries where they have been used as instruments of partisan politics.

In principle however, the creation of such bodies is essential although the effectiveness of bodies that report exclusively to a Head of State or government should be viewed with caution. The independence of any such a commission is potentially under threat and therefore needs to be headed by a person of unquestionable integrity, be fully independent of executive intervention, conferred with investigative power, and accessible to all (Chalker 1997). They should also be underpinned by an adequate system of prosecution, an open and independent judiciary and most importantly if they are to retain their credibility, the resources necessary to conduct their work in a proper fashion.

Establishing independent anti-corruption bodies is a significant and symbolic sign by governments that corruption is not tolerated and that significant steps to eradicate it will be taken. Importantly, these institutions must be independent of government but subject to the rule of law or it risks becoming a force of repression in its own right. Such bodies may also have the advantage of protecting the honest politician or public official in that they tend to discourage the making of baseless accusations of corruption since those making such allegations will be aware that there is an effective body which may well investigate the allegation and authoritatively and publicly pronounce it baseless or even malicious (ICAC 1993).
The effectiveness of specialized anti-corruption agencies very much depends on:

- committed political backing at the highest levels of government;
- political and operational independence to investigate even the highest levels of government;
- adequate powers of access to documentation and to question witnesses;
- leadership of the highest integrity
- sufficient staff and resources with specific knowledge and skills;
- special legislative powers;
- high level information sharing and co-ordination; and
- operational independence.

4.7 General Principles to Evaluate Anti-Corruption Reforms

Finally, we need to comment on general principles used to evaluate anti-corruption reforms. Any such evaluation will need to look at a range of factors, including sufficient resources and political will. Comparative experience of anti-corruption ‘clean-ups’ within previously authoritarian systems suggests that to be effective they need to rank high on the national political agenda and the political leadership must be “committed” to doing what has to be done to implement these programs. A nation that is serious about fighting corruption may need to establish new institutions or strengthen existing ones to specifically carry out some functions in the anti-corruption mandate.

However, anti-corruption institutions, regulations and laws are ineffectual without the political impetus as well as the social will to make them effective (Harris-White and White 1996). Besides acknowledging the existence of corruption, where political will is lacking, the existence of several institutions to control corruption may be of no consequence if such institutions lack independence, critical resources, public visibility and respect (Olowu 1993). For an anti-corruption campaign to be successful it also needs to be reviewed on a continual basis and the successes and failures need to be evaluated and updated in order to address any unforeseen problems that may occur. Evaluation is thus a critical part of any strategy or plan.
Transparency International (1996) argues that a serious and concerted reform effort against corruption would need to include the following elements:

- a clear commitment by political leaders to combat corruption wherever it occurs and to submit themselves to scrutiny
- primary emphasis on the prevention of future corruption and on changing systems
- the adoption of comprehensive anti-corruption legislation implemented by agencies of manifest integrity
- the identification of those government activities most prone to corruption and a review of both substantive and administrative procedures
- a program to ensure that salaries of civil servants and political leaders adequately reflect the responsibilities of their posts and are comparable to those in the private sector
- a study of legal and administrative remedies to be sure that they provide adequate deterrence
- the creation of partnerships between government and civil society
- efforts to make corruption a “high risk” and “low profit” undertaking.

Anti-corruption reform efforts can be derailed in a number of ways including limits of powers at the top (where an incoming administration may wish to tackle corruption effectively but inherits a corrupt bureaucracy that impedes efforts for change); the absence of commitment; overly ambitious promises leading to unrealizable and unachievable expectations and a loss of confidence; reforms that are piecemeal and uncoordinated so that no one “owns” them and no-one is committed to see that the reforms are implemented and kept up to date; reforms that rely too much on the law or too much on enforcement; reforms that overlook those at the top and only focus on the small fry; the failure to establish institutional mechanisms that will outlive the leaders of the reforms; and the failure of government to draw civil society and the private sector into the reform process (Transparency International 1996).

Regarding the involvement of key stakeholders, initiatives for reform can come from actors other than principals. An example would be the involvement of the judiciary in Italy, the role of social movements and for example in Bangladesh and Brazil, NGOs which have in recent years contributed to the downfall of corrupt political
establishments. The Hong Kong Independent Commission Against Corruption’s ability to involve key stakeholders, serves to increase both accountability and credibility of corruption reform efforts (Galtung 1998:112). The issue of political will to address corruption is expanded upon in Chapter Twelve.

4.8 Conclusion

This concludes our survey of theoretical approaches to corruption and also methodologies to assess the effectiveness of reform efforts. In conclusion it needs to be stressed that there is no blueprint for controlling corruption. While the context for corruption control is global, solutions are required to be local and homegrown to have legitimacy. Culture and history are both very important to bear in mind when designing strategies. Strategies need to be tailored to the local environment and the specific rules and incentive structures on the ground. Case studies are a particularly useful way to discern the interplay between formal institutional structures and informal political cultures that may operate to influence the effective functioning of institutions and the rules of the game. For this reason, the general insights gained in this summary of theories of corruption and indeed the whole of Part One of our study, should be moderated by the particular case study that occupies the remainder of the thesis.

There are no quick fixes for corruption and corruption is part of a broader politics of power and enrichment. The key issues in trying to maintain public integrity and reduce corruption are often the exceptional political and managerial commitment necessary to promote reform, as well as issues relating to the sequencing and timing of the reform efforts, its details and sustainability. The key issues in assessing anti-corruption strategies are clearly cost, impact, effectiveness and sustainability, whilst also taking into account the relative political and financial strengths of those involved in corruption (Riley 1998). Credibility and feasibility are two qualitative ingredients to lasting and serious reform efforts. Credibility presupposes sound incentives and a high degree of moral integrity (Schedler 1995). Feasibility is based on a certain degree of viability within the legal, economic, political and cultural realm (Galtung 1998:115). A law which cannot be enforced, however impressive it might first seem, will neither be credible nor for that matter feasible.
A focus on institutional mechanisms, though crucial, will not be sufficient to turn the tide on endemic corruption. Also, building national integrity systems is a longer-term objective that may raise short-term expectations but not be fulfilled and lead to public frustration. Efforts to promote good governance may prove ineffective if they are not conceived, planned and implemented in a wide, systemic and multi-dimensional perspective. Corruption cannot be effectively attacked in isolation from other problems - it is a symptom of problems at the intersection of the public and the private sectors and needs to be combated through a multi-pronged strategy. Good governance reforms to control corruption need to include preventive, administrative, investigative and legislative measures. These should be a top priority of government policies and be planned, monitored and where appropriate implemented by a specialised body. Essentially, the public determines the level of corruption it will tolerate. Public resentment towards corruption that manifests itself in a variety of ways is thus the key to the success of reform initiatives. What is ultimately needed is a change in the attitudes and behaviour of the public for unethical conduct in government is largely shaped and conditioned by such behaviour in society.

The following chapter focuses on the nature and extent of corruption in South Africa as well as the efforts at anti-corruption reforms since 1994. These efforts are then tested in Part Three and Four against a specific case study, namely that of the arms deal. In this way, theory and practice are brought together.
PART TWO: CORRUPTION AND REFORM IN SOUTH AFRICA

Chapter Five: The Nature and Extent of Corruption in South Africa

5.1 Introduction

What do we know about the nature and extent of corruption in South Africa? How much corruption is there? Is it worse now than it was under apartheid? Relative to other problems, how important is corruption as a problem to citizens? What empirical data do we have to answer these questions?

The common perception - which a number of public opinion surveys confirm – is that corruption in South Africa is neither a new nor a declining phenomenon. What is clear is that public tolerance for corruption is however, declining as local and international expectations for clean government grow. To understand the context of anti-corruption reform initiatives underway in democratic South Africa, this chapter attempts to contextualize what is known about the nature and extent of corruption in South Africa, both pre ’94 and post-apartheid.

A recent report, *Apartheid Grand Corruption*, attempts to document and describe instances of corruption that took place during apartheid, particularly during the period 1976 – 1994. The report argues that the legacy of such a corrupt system “did not disappear into the night in 1994, when the white flag was lowered, and a new South African banner hoisted”, but that it had entrenched itself to such an extent that it would inevitably serve to corrupt the new order. As such “the years before and after 1994 cannot simply be neatly compartmentalized” (Van Vuuren 2006).

In 2003 the Country Corruption Assessment Report, undertaken as part of the United Nations Global Program Against Corruption for the first time tried to establish baseline data on what is known about corruption in South Africa. The Executive Summary notes while “all actors would like to know how much corruption there is and whether it has increased or decreased relative to the past... to answer this simple and legitimate question is not easy. In fact, it is impossible to provide a comprehensive and complete answer to this simple question since it depends on a
number of factors.” The report then lists a number of these factors that any comprehensive assessment should consider, including: what is corruption (definition: legal, operational, perception); which corruption is to be looked at (type); measurement and frequency (how often); who is involved (actors); available knowledge about corruption (sources); public tolerance levels (cultural context); purpose of looking at corruption (recording, tracking, evaluation, change-inducement) etc.

The bottom line is that we do not know how much corruption there is in South Africa. Survey instruments give us some indication, mainly of citizen’s perceptions and in some cases actual experiences. Media reports of corruption also point to areas of prevalence, such as in former homelands, in particular departments, such as police or welfare, but there is no accurate or single indicator that can wholly be relied on to inform us of how much corruption there is. This has largely to do with the nature of corruption as a phenomenon and the difficulties with its measurement.

In this chapter some of the challenges inherent in measuring corruption are discussed before briefly examining the research instruments that have been developed internationally to assess and measure its nature and extent. Empirical research data that has emerged on corruption in South Africa since 1994 is integrated into the discussion that deals with manifestation of corruption domestically.

5.2 Challenges to Measuring Corruption

How does one measure corruption? This is a question that continues to vex social scientists. In a methodological essay, entitled “What cannot be analyzed in statistical terms” corruption is cited as the classic example of an observable phenomenon that is not quantifiable since “there cannot be statistics on a phenomenon which by its very nature is concealed” (Galtung 2001). Corruption does not lend itself readily to measurement as it tends to be hidden from view.

If corruption is a crime, surely one can look to criminal justice statistics to tell one how much corruption there is? Another approach has been to look at the number of public officials convicted for the abuse of public office (Goel and Nelson 1998).
However, conviction rates are often not an adequate indicator for the actual incidence of corruption but rather reflect the quality of the judiciary. If corruption is not only a crime but also manifests itself as ethical transgressions in the public sector through “conflict of interest” or “nepotism”, surely departmental data on this type of malfeasance and maladministration can give some clues as to the extent of the problem? Unfortunately data held by relevant state agencies on corruption-related cases is difficult to come by. According to the Country Corruption Assessment Report 2003:

“There are no consolidated statistics of corruption incidents or of the internal or external legal (civil, criminal and administrative) responses to such incidents. The statistics, which do exist, are ambiguous, because corruption incidents are often classified as fraud or theft in order to facilitate prosecution. Furthermore, there is also no central database of cases which would allow Government to learn from incidents in order to understand corruption better and to be able to design preventive strategies.”

Certain agencies such as the Public Service Commission have started to collect more detailed information on corruption and related offences. Designing systems to capture information on corruption has been one of the main focus areas of the public service anti-corruption strategy, discussed in the next chapter.

5.3 Types of Anti-Corruption Measures

Nevertheless, and despite the difficulties of measuring corruption, in recent years the “corruption eruption” of the last decade has produced a range of empirical attempts, comparative and contextual, mainly based on perceptions and opinion surveys, using various indicators, in an attempt to gauge the nature and extent of the phenomenon. This has been spurred in part by anti-corruption reformers believing that what you can measure, you can manage.

As Galtung (2001), one time head of research at Transparency International notes, “The question is no longer whether corruption can be measured or analysed empirically. The questions are: How? With what level of accuracy? And to what
effect?" Not all approaches are equally robust and the research challenge is to combine specific qualitative and quantitative indicators so as to assess continually the quality of public and private institutions and the effectiveness of reforms (Galtung 2001). This is an approach that has been followed by the Global Integrity Index, discussed in the previous chapter.

This next section briefly outlines the range of research tools available to assess the extent of perceived and actual corruption.

5.3.1 Composite Indices

The most well known, if not controversial international corruption measure, is the Corruption Perceptions Index (CPI) compiled annually by Transparency International (www.transparency.org), an international anti-corruption NGO with headquarters in Berlin. The CPI, as a composite index, is essentially a “poll of polls”, aggregating perception data on levels of corruption from a number of sources. Well-informed people (such as business executives, risk analysts and the public) are asked their perceptions of the extent of corruption - defined by Transparency International as “the misuse of public power for private benefit” - in particular countries. The extent of corruption reflects the frequency of corrupt payments, the value of bribes paid and the resulting obstacle imposed on business. Countries are ranked according to a ten-point scale where 10 stands for a less corrupt country and zero equals a more corrupt country. Since 1995 South Africa has been included in the CPI ranking.

A similar composite index compiled by Dani Kaufmann and his team at the World Bank Institute using mostly qualitative data generated by a range of organizations (commercial risk-rating agencies, multi-lateral organizations, think-tanks and NGOs) to measure governance, referred to in the introductory chapter as 1) the process by which governments are selected, held accountable, monitored and replaced; 2) the capacity of governments to manage resources efficiently and formulate, implement and enforce sound policies and regulations; and 3) the respect of citizens and the state for the institutions that govern economic and social interactions among them (Kaufmann, Kraay and Zoido 2001). The wide variety of cross-country indicators
shed light on the various dimensions of governance, and corruption as a particularly relevant indicator of weak governance.

Although aggregate indicators are relatively imprecise – since many countries’ likely ranges of governance overlap – these aggregate indicators can identify the group of countries facing major governance challenges, and be used to assess systematically the benefits of good governance for a large sample of countries. There have been a number of critiques of these type of composite indices (Arndt and Oman 2006). In particular, perception indices raise concerns about biases. Also, the aggregate nature of the data tells us little about the relationship between corruption and individual agents, such as firms or service providers. Conceptually macro-level determinants cannot satisfactorily explain the intra-country variations of country; firms and service providers facing similar institutions and policies may still end up paying or demanding different amounts in bribes (Reinikka & Svensson 2003). In recent years the World Bank has supported moves towards more objective and actionable indicators.

5.3.2 Surveys

Different types of surveys, for example public opinion, victimization, expert panel, service delivery, public expenditure tracking and business surveys, are additional ways to understand the nature and extent of corruption as a phenomenon.

Public opinion surveys are widely used to determine citizen’s perceptions of the levels of corruption, its seriousness as a public policy issue and its location amongst different civil servants, departments, and arenas of governance. They are useful in measuring trends if the same set of questions is asked over time. These opinion surveys are usually household surveys drawn to make up a stratified nationally representative sample. Public opinion surveys collect information by selecting respondents to answer a set of standard questions posed by trained interviewers either over the phone or on site through a face-to-face interview process.
In South Africa, since 1996 the Institute for Democracy in South Africa (IDASA), the Afrobarometer, as well the Human Sciences Research Council and Markinor have conducted a number of public opinion surveys nationally and regionally on citizens’ perceptions of corruption and governance. Some of these findings will be referred to in the following sections.

Victimization surveys have been developed as a tool to measure the “dark figure” of unreported crime, mainly in order to address the shortcomings of police statistics. Fraud and corruption as non-violent individual crimes have been included in these surveys: Fraud is defined as consumer fraud, or someone cheating another person by selling him or her something inferior, or delivering a service of inferior quality, or selling the wrong quantity and corruption involves public officials such as a traffic or police officer or customs official accepting payment for services. Responses to the questions about both fraud and corruption provide a measure of its actual incidence, rather than purely perceived levels of corruption as captured in other surveys.

Although not representative, expert panel surveys give some indications of what beliefs are held by so-called “experts” as to the nature of corruption in a particular society. Examples include the Expert Panel Survey on corruption conducted by the Institute for Security Studies in late 2000 based on a similar survey conducted by Huberts who used attendees of international anti-corruption conferences as his sample group of “experts”. In the ISS study over 150 individuals who had attended one or more of the three major anti-corruption conferences held in South Africa during November 1998 - April 1999 constituted the “experts”. Survey questions in this first ever dedicated corruption survey dealt with respondents’ perceptions of the levels of corruption in general, in different spheres of government, in a variety of government departments, in several sectors and compared to previous regimes and future levels of corruption. Personal experiences of corruption by respondents, how it occurred and the seriousness of corruption as a phenomenon were also covered as well as an evaluation of anti-corruption measures (Camerer 2001).

Public administration surveys, sometimes called service delivery surveys are a way of collecting quantitative data about the quality of public services. Using questionnaires
administered to public officials who interact with the public and service users respectively, they gather information on how well a service or department is working. Survey questions consider the following issues; organizational climate, causes and nature of corruption in the public service, prevalence and experience of corrupt practices, efficacy of departmental efforts in combating corruption including loopholes, the impact of corruption on service delivery and recording of best practices to fight corruption.

Public Expenditure Tracking Surveys (PETS) track the flow of resources through a legally defined institutional framework where funds pass through several layers of government bureaucracy on the way to service facilities which are actually charged with the responsibility of exercising the spending. On a sample survey basis, PETS can determine how much of the originally allocated resources reach each level of the institutional framework and is therefore a method for locating and quantifying political and bureaucratic capture, leakage of funds, and problems in the deployment of human and in-kind resources such as staff, textbooks and drugs. A typical PETS of frontline providers (schools and clinics and their staff) and local governments (politicians and public officials) is complemented by central government financial data (Reinikka & Svensson 2003).

Using appropriate survey methods and interview techniques business managers are often willing to discuss corruption. A number of survey instruments interview business people in firms to elicit their views on a range of issues. For example, the Transparency International Bribe Payer’s Index ranks leading exporting countries in terms of the degree to which their corporations are perceived to be paying bribes abroad. Survey questions relate mostly to perceptions about the propensity of foreign multi-national corporations and local businesses to engage in bribery and corruption.

The World Business Environment Survey (WBES) asks specific information about the share of bribes paid in businesses’ total revenue, and the percentage bribe “cut” in public procurement projects. An initiative of the World Bank Group, the WBES asks local entrepreneurs and managers about their dealings with the institutions, policies and practices of the local business environment i.e. the enabling environment for
private enterprise, in 80 countries around the world. One of the main purposes of the survey is to measure the quality of governance and public services, including the extent of corruption. Using local research companies, the data is collected through personal interviews at senior managerial level in enterprises with globally over 10 000 enterprises responding to the core questionnaire (World Bank 2001).

In South Africa, business surveys have been conducted as part of the UN Global Programme Against Corruption. These look at obstacles to doing business in South Africa, experience of criminal victimisation by businesses including fraud, bribery and corruption and perceptions about the propensity of foreign multi-national corporations and local businesses to engage in bribery and corruption.

5.3.3 Media Reports

Since the majority of citizens, including policy makers, report that they receive their information about corruption from the media, analyzing the type of information about corruption that is available within the public domain is one step towards developing a profile of corruption. These type of studies do not report on actual levels of corruption but rather present an overview of how the print media reports on corruption.

A comprehensive media study of corruption undertaken in South Africa by Landman and Associates intended to clarify what makes a case of corruption appear in the print media, why have these cases, and not others, come to light, and what makes a case of corruption newsworthy (Landman 2002). This study is being repeated in 2007, analyzing press coverage of corruption during 2006.

There are some South African peculiarities when it comes to researching corruption. Lodge points out that until 1994 it was quite difficult to undertake systematic research on corruption and that this academic neglect was primarily attributable to the major locations of corruption: those who were its main victims were poor and disenfranchised, often the subjects of homeland administrations (Lodge 2001). He notes how since 1994 much more information has become available on government, business as well as the greater role of the media and opposition parties in exposing
instances of corruption. It is possible today, he notes, given the extent of information on corruption, “to make some informed guesses about its severity.”

The next section - which draws heavily on Lodge - examines corruption in South Africa both before and after 1994 and integrates findings and analysis of corruption from some of the empirical tools described above.

5.4 Corruption in Apartheid South Africa

This section draws largely on Lodge’s analysis that explains the nature of corruption under Apartheid, and underlines the overlap in its manifestations in contemporary South Africa.

Many argue that contemporary corruption in democratic South Africa is largely a carry-over from the previous administration – part of the “legacy of apartheid” – a view for which it will be seen there is some justification. As far back as 1989, the authors of *Uprooting poverty in South Africa* predicted that corruption would loom large in a new South Africa. Noting the high degree of corruption bred by apartheid, they argued that even were a democratic government to gain power, the old clerks would not necessarily learn new habits (Wilson and Ramphele 1989). Their prediction was uncannily accurate. Since the transition, corruption has burgeoned in both the public and private sectors; besides violent crime, it is probably the factor that most preoccupies those who express concern about South Africa's future.

Corruption appeared to flourish in pre-democratic South Africa’s public administration. Of course, it was arguable that a bureaucracy which was deliberately used as an instrument to foster the social and economic fortunes of one ethnically defined group had at least a form of transactive corruption built into its functioning from the inception of National Party rule (Lodge 2002a:406). Apartheid South Africa, like many authoritarian regimes, was intrinsically corrupt. Defined as “the abuse of entrusted power for private gain”, corruption is essentially what characterized the inherently unjust apartheid state where, a minority group, purely on the basis of skin color, benefited unduly from public goods, at the expense of their fellow citizens.
From 1948 ethnic favoritism characterized all civil servant recruitment and promotions. This behavior may not have been motivated by personal enrichment among individual officials, at least not in the 50s and 60s. It has also been argued that the extent of patronage and favoritism under the previous regime where it existed was mainly geared to the strategic goals of Afrikaner nationalism and did not, at least at their inception, involve personal gain and individualized relationships (Seegers 1993). Some maintain that controls in the apartheid civil service were so stringent that bureaucrats had “little opportunity to use patronage and the conferment of financial benefits for the achievement of improper objectives” (Cloete 1978:74). It appears financial irregularities as documented in Auditor General reports during this time period, were modest (Lodge 2002b:130).

There is however, plenty of evidence that the National Party became more and more degenerate and that by the 1980s, “political corruption” - defined by Levine as ‘the unsanctioned or unscheduled use of public resources for private ends’ - was quite common in both central government and homeland administrations, especially entrenched in those domains of government activity deemed “strategic” - information, defence, homeland development - and which expended secret funds (Lodge 2002a:408).

An example of this came to light in the Information Scandal, also known as “Muldergate”, that implicated South African Prime Minister BJ Vorster and Dr Connie Mulder (Minister of Information) in plans to use government resources to fight a propaganda war for the Apartheid Government. In 1973 John Vorster had agreed to Mulder's plan to shift about R64 million from the secret defence budget to undertake a series of propaganda projects, including buying the loyalty of The Citizen, the only major English language newspaper that was favorable to the National Party. The scandal involved senior officials using public funds to pay for holidays for their families, tax free supplementary allowances, properties registered in their own names as well as R13m loaned to Mr Louis Luyt to start up a newspaper, most of which was subsequently invested in one of Luyt’s companies (Lodge 2002a:407). A commission of inquiry concluded in mid-1979 that Vorster "knew everything" about the
corruption and had tolerated it. He resigned from the presidency in disgrace and while this scandal may have forced a change in political leadership, it did not end the large-scale private appropriation of public funds (Lodge 2002b:131).

In the 1980s the Department of Defence spent four billion rand a year on secret projects, involving covert operations and arms procurement – an area that supplied ample opportunities for individuals to profit. With democracy came the ending of secret budgets to the military and a sharp reduction in defense expenditure. However, the resumption of ambitious procurement projects since 1994 opened up new lucrative prospects for dishonest officials and well-connected politicians (Lodge 2002b:133). Allegations of corruption in the Strategic Defense Procurement Package aka the “arms deal” are a case in point that will be studied in some detail.

Arguably the grand myth of so-called “independent” homelands and their associated cronies is also responsible for the malaise of maladministration and culture of impunity the new government inherited. There are some occurrences in the final years of apartheid, for example 200 officials within the Lebowa Department of Justice receiving a 100% pay increase in April 1993, that may have represented behavior motivated by the realization among officials that their powers and privileges were shortly to be curtailed. However reports suggest that graft was entrenched and routine in the highest echelons of homeland administrations through much of their history (Lodge 2002a: 409).

The system of apartheid was corrosive and corrupting, tainting both those who engaged with it as well as struggled against it. In order to survive so long, it had to be. In apartheid South Africa successive governments utilised the institution of corruption very effectively to co-opt and compromise opposition members, weaken the effects of international sanctions against the regime, derive revenue for covert operations against opponents of the regime throughout the Southern African region, and purchase support for the regime around the world (Ellis 1996).

Bribes were paid, on both sides, creating a climate of suspicion and extortion. Rule of law was absent and the power of the state was abused on a regular basis. The
apartheid era provided an environment structurally conducive to corruption where systems and habits shrouded in secrecy resulted in a lack of transparency and accountability that was advantageous to criminality. Lodge (2002a:410) has argued that in certain respects the apartheid state must have been structurally susceptible to corruption by its officials as denial of any democratic sanctions to most of its subjects substantially reduced its accountability. The more powerless people were, the more officials abused their position (Lodge 2002a:410). Increasing secrecy of its undertakings especially from the 1960s enhanced the arbitrary discretion enjoyed by bureaucrats.

The pervasive and almost obsessive secrecy that came to surround the way in which people operated in society was infectious, spreading from the public into the private sector. The breakdown of business ethics in the private sector is partly blamed on the “sanctions-busting mentality” which encouraged ingenious but often immoral means to gain access to world markets - attempts which were praised rather than repudiated - in this way encouraging a culture where unethical means for doing business were valued (Rossouw 1996).

From 1984 onwards the opposition in parliament argued that the Strategic Fuel Fund, established twenty years earlier to stockpile oil, was a vehicle for private enrichment of officials (Lodge 2002b:131). Towards the end of 2000, Mineral and Energy Affairs Minister Phumzile Mlambo-Ngcuka (later South Africa’s first female deputy president) would uncover a secret deal between the Strategic Fuel Fund (SFF), the state-owned oil company, and two private oil trading companies that had effectively sold off the country's oil trading operations without the government's knowledge. Several officials involved admitted they had accepted bribes and the following month, Mlambo-Ngcuka fired the entire SFF board and repudiated the deal (Global Integrity 2004). This incident is worth noting for two reasons: 1) it points to ongoing corruption in the oil industry in South Africa that subsequent revelations, “Oilgate”, not dealt with in my thesis, would confirm and 2) it shows the action taken by Mlambo-Ngcuka as a government minister against corruption, an action that was later recollected in the public mind when she was appointed to deputy president, following
the dismissal of her predecessor, Jacob Zuma on allegations of corruption relating to the arms deal.

Corruption and dishonesty thus became a feature of South African political and economic life. This background combined with increasing opportunities, a “get rich quick” social ethos, and along with the observation of large-scale malpractice escaping unpunished through institutions not pursuing prosecution or upholding the rule of law, undoubtedly contributed to the expansion of violent criminal and insidious corrupt activities that plague South Africa today (Camerer 1996b).

5.4.1 The Legacy of the Homelands

It has been argued that before 1994 the incidence of routine corruption probably varied in accordance with the degree of rightlessness of those seeking benefits or services from officials (Lodge 2002a:409). As such it was black people consigned to homelands who were most likely to experience and partake in corruption. For white South Africans, familiarity with corruption was probably exceptional rather than normal and most often arose from encounters from municipal rather than national state agencies (Lodge 2002b:133).

Homeland governments exhibited grand corruption undertaken by both black and white officials that was both endemic and chronic, examples being kickbacks for work never done, contracts secured by family members, projects never built, services undelivered (Lodge 2002b:132). Specific irregularities in homelands that amounted to several hundred millions in fraud and nepotism through the 1980s included fictitious tenders and contracts awarded to spouses, receipt of gifts by officials and payments to firms for imaginary works and materials (Bauer 2002; Lodge 2002a:408). In the homelands, bribery was prolific in pension departments, magistrate’s courts and the management of public housing, where thousands were evicted to make room for tenants who had paid bribes to councillors of officials (Lodge 2002b:132). Sadly, this sounds very familiar to latter day South Africa.
Routine petty corruption – where members of the public undertake dishonest transactions with public officials in order to obtain services of one kind or another, or to avoid sanction – was rife (Lodge 2002b:132). We know from Klitgaard (1988) that corruption often occurs where there is limited accountability and a monopoly over the allocation of goods accompanied by the discretion of officials. This may partly explain that the more a civil service bureaucracy interacts with the public, the more opportunity it has to be dishonest in its dealings and engage in rent-seeking behavior. It has been argued that what may appear to be an increased incidence of abuse in these departments (social welfare, safety and security and justice) is probably mainly a consequence of more stringent controls and more open disclosure and might fairly be perceived as the lingering effects of the old system (Lodge 1998).

The integration of former homeland administrations into South Africa and the difference in current experiences of corruption in different provinces (the Eastern Cape, bad, vs. Western Cape, not so bad; a case in point) points to the degrees of financial mismanagement in certain areas in the past. The transfer of homeland civil servants into regional governments may thus have helped to infect the new system with the patrimonial habits of Bantustan officialdom (Lodge 2002b:130). Corruption in the new South Africa appears to be more concentrated in provincial and local governments, rather than central government. Seven of the nine regional governments had to absorb homeland administrations into their bureaucracies, with what appears to be the least corrupt provinces, Gauteng and the Western Cape, those that have not incorporated former homelands (Lodge 2002a:412). It also appears that certain departments as well as provinces seem to be more susceptible to corruption than others, the worst culprit being the ministries of social welfare, safety and security, and justice. This is certainly a legacy that has continued.

In the case of welfare, problems are mainly attributable to the legacy of apartheid in the pre-1994 era. The department inherited 14 separate bureaucracies with no centralized record for the 2.8 million entitlements to pension payments and many of the supposed recipients were dead (Lodge 2002a:416). From 1994, newspaper reports of corruption are mostly a reflection of behavioural patterns inherited from the old regime. Pension fraud is a case in point. Between 1994 – 1998 up to R5 Billion was
paid out to “ghosts” and double claimants (Lodge 2002b:133). Cleaning up corruption in the arena of social grants has been an ongoing priority for the new government.

Media reports note how in this regard the Special Investigating Unit (SIU) has contributed to R146m in savings, R1,624b in prevention of loss and R8,9 million in recoveries of funds, where a key contributor to the achievements had been the national investigation into the illegal receipt of Social Grants and Pensions by government officials. Here the SIU removed 14262 files from the Social Grant and Pension System, 571 prosecutions were instituted and 333 convictions secured. The annual value of these irregularly obtained pensions were R50 264 000.

In two years Social Development Minister Zola Swekiya’s anti-fraud and anti-corruption strategy has led to almost 300 000 of South Africa’s now 11.5m social grants being cancelled including 12000 fraudulently claimed by government officials. More than 2000 public servants have agreed to repay grant money and 750 people have been successfully prosecuted. The antifraud crackdown has delivered a budget saving of R1,2bn in the latest fiscal year. So far nearly 22 000 public servants have been found to be drawing pensions, child support or disability grants “irregularly” with nearly 14 000 being considered for prosecution. Already 650 government employees have been convicted. Another 2000 more cases are to come to court this year. In addition to the criminal action about 3000 public servants have agreed to repay the grant money that they stole. The next step is to find private citizens who are drawing social grants fraudulently. Already the investigation has identified more than 400 000 individuals. The question can be asked: if this is the scale of corruption in just one department, what about the others? Even though much of the corruption is petty in money terms, involving officials taking R50 bribes or stealing a bit of grant money, it is widespread. And as Business Day argues, the cost is not only in money but more profoundly in the erosion of public trust in the public service.

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From a number of case studies in the literature, it does appear that some departments of the central government in the past had a history of routinized elite or grand corruption. For example, suppliers of prison food and textbooks for black school, where contracts for these were awarded in a nepotistic fashion. The Department of Development Aid that channeled development funding to homelands became a fertile fiefdom for dishonest bureaucrats (Lodge 2002b:131).

Bureaucratic inflation in which the civil service establishment tripled in size during the Apartheid era was achieved through a process of politically motivated and ethnically exclusive recruitment. As the number of unskilled and under-qualified clerical level entrants increased so did the exodus of competent managers, just as the tasks of public administration were becoming increasingly complicated. Public service pay scales deteriorated as its professionalism declined. There can be no question that the erosion of capacity caused by this expansion facilitated and encouraged rent-seeking decades before apartheid’s end appeared inevitable to its administrators (Lodge 2002a:401).

Given this heritage, it would be surprising if there were no significant political corruption in contemporary democratic South Africa. Authoritarian and secretive governments are especially susceptible to bureaucratic venality and South Africa is no exception. Given that much of the administration is still run by the same people it would be reasonable to expect the continuation of a certain amount of corruption (Lodge 2002a:411). Many people think corruption is increasing. The evidence suggests that old habits and predispositions may well sustain plenty of the existing administrative corruption for one of the consequences of a “packed” transition is that much of the ancien regime remains in place (Lodge 2002a: 421).

New policies require a new range of managerial skills and quite different control systems, presenting new challenges for financial regulation (Lodge 2002a:412). Large numbers of senior officials have been replaced and there have been fresh recruits to senior management levels of political appointments. This, together with demoralisation and fears about job insecurity amongst officials employed by the pre ‘94 administration may have helped to evade weak professional ethics (Lodge 2002a:
As an MEC in the Northern Province conceded, “We have never ruled before. We never even knew what a tender board was before we came to power” (Lodge 2002a:419).

5.4.2 New Opportunities for Corruption

It is difficult to know for certain whether present levels represent a substantial expansion of public dishonesty: Corruption was very extensive in the old regime and some of the conditions which allowed it to flourish have disappeared: homeland administrations have been incorporated and all government activities are now subject to well-publicised audits and the extension of the franchise should in theory make government more accountable (Lodge 2002a: 419). While democratization and unification closed down some opportunities for official spoilation other potential avenues for corrupt accumulation have opened up. In this regard the government’s policy towards black business empowerment surely makes it vulnerable to charges of favoritism (Lodge 2002b: 130).

Not all misbehaviour can be explained away as the prevalence of bad old habits. New kinds of government obligations have supplied fresh opportunities for corruption. For example, the building of and subsidies for low cost housing and free school meals where R143m was unaccounted for in primary school feeding schemes and in the province of Mpumalanga, and R1,3m allocated for low cost housing was used to renovate ‘state houses”. The Motheo Housing scandal where an unknown company run by a close friend of then Housing Minister, Sankie Mthembi-Mahanyele, was awarded a R198 million contract to build more than 10,000 houses. The Director General in the Ministry of Housing, Billy Cobbett blew the whistle on the deal and was fired. The commission of inquiry looking into the matter found no proof of outright corruption, but criticized the Mpumalanga government's irresponsible handling of housing funds (Global Integrity 2004).

In 2006 the Auditor General, Shauket Fakie, reported to parliament’s Scopa that provincial housing departments approved R323m of “irregular” housing subsidies between 1995 and 2004, involving more than 50 000 beneficiaries. Fakie found more
than 7000 government employees receiving housing subsidies to which they were not entitled. Large sums were also paid out to dead people, children and those who already owned houses. The AG’s report pointed to severe deficiencies in the housing subsidy system, which was able neither to detect nor control irregularities\(^4\).

Lodge notes that there are many new and disturbing sources of stimulation for corrupt behavior in democratic South Africa. These include non-meritocratic processes of recruitment and promotion inherent in certain kinds of affirmative action; tendering principles that favor small businessmen and community agencies which require more efficient administration if they are to be handled honestly; an increasing shortage of skilled manpower in the public service especially in its financial control systems which could lead to inefficiencies and delays (such as those experienced by the Home Affairs department in supplying I.D. documents and visas) that supply incentives for bribery; new sources of public finance, including foreign development aid; an ambitious expansion of citizen entitlements to public resources, such as school feeding and housing subsidy schemes; contracting out of traditional functions of government to private ventures with political connections; rapid social mobility of much of the new political leadership from situations of material hardship; and financing of political parties in a more competitive funding environment (Lodge 2002b:133).

When it comes to international development aid funding two cases are illustrative: In February 1995, struggle hero Allan Boesak was forced to withdraw from an ambassadorial posting as democratic South Africa’s first ambassador to the United Nations. Danida, the Danish Aid agency, had first raised the alarm that Boesak’s Foundation for Peace and Justice had misappropriated aid money designated for the victims of apartheid. An amount of R726,000 earmarked for the production of 12 videocassettes on voter education and democracy was instead spent on building a studio for his wife. Four year later, in 1999, the court found Boesak guilty on charges of theft of R259,000 and fraud involving R1.3m and sentenced him to six years in prison. Rather than representing South Africa in Geneva, Boesak eventually served a year of a three-year jail term in Goodwood prison before being released on parole.

President Mbeki eventually pardoned him in 2005, although has refused to apologize for any wrongdoing.

With regards to the aids play Sarafina Two, Health Minister at the time, Nkosazana Dlamini-Zuma (now the Minister of Foreign Affairs) was accused of misleading Parliament about the use of European Union funds in the awarding of a contract of R14.2m to produce an AIDS-awareness musical, Sarafina Two. An Auditor General Report found that bidding procedures were violated and an inquiry by the Office of the Public Protector found donor money was allocated through improper tender and awarding procedures with a litany of irregularities. The EU ambassador to South Africa stressed categorically there had been no prior authorization and regarded the diversion of funds as a serious misuse of EU support. While no evidence or implication of the abuse of official position for personal gain was found, this was a clear case of diversion of aid in a manner bordering on mismanagement and a lack of both transparency and public parliamentary accountability.

In terms of Black Economic Empowerment (BEE), “apparent favoritism in public tendering in certain contexts might be very difficult to avoid given the small sizes and the overlapping character of the black political and business elites as well as the frequent and rapid movement of prominent personalities between them. Government determination to use the privatisation of parastatal companies or the contracting out of government programs as opportunities for black business empowerment helps to accentuate the dangers of cronyism (Lodge 2002a: 419).

The next section looks at ways in which the government started to respond to the corruption issue, and arguably the data available on corruption started to feed into the policy agenda.

5.5 Corruption on the Policy Agenda

Policy responses to corruption are often premised on the seriousness with which it is regarded as a problem by decision makers with the power to exercise political will. This commitment manifests itself in resource allocation, but is also determined by
citizens who exercise political will by essentially deciding what levels of corruption they will tolerate in society. How seriously do citizens in South Africa regard corruption? Is it a pressing policy issue that government should address? In the greater scheme of things, how important is corruption as a national priority issue requiring focused attention and resources?

National citizens surveys in South Africa have dealt with these questions in a number of ways by 1) asking citizens what they think the most important problems are confronting South Africa that government should address 2) asking them how seriously they regard corruption as an issue and 3) whether government is paying sufficient attention to the issue of corruption.

In October 2001 Markinor’s October household survey asked citizens what their interpretation was of the seriousness of corruption in South Africa. Over 80% of respondents believe that South Africa has a lot of corruption and the majority (41.1%) believe it is one of the most serious problems facing the country. 39.1% of respondents believe that while South Africa has a lot of corruption, the country is confronted with other more serious problems. 14.5% of respondents believe South Africa does not experience a lot of corruption with 11.6% holding the view that despite this, it is one of the most serious problems the country is confronted with. 2.9% believe corruption is not among the most serious problems facing South Africa and 5.2% did not know.

The 2003 Transparency International Global Corruption Barometer, derived from a subset of 3 questions forming part of the Gallup International annual Voice of the People survey, asked a representative sample of South Africans how seriously they believed corruption affected different spheres of life, including personal and family, business environment, political life, cultures and values in society. The majority of South Africans believe corruption has a serious effect on all spheres of life as well as on the cultures and values in society. Interestingly corruption is seen to affect the business environment very significantly (68.1%) followed by political life (65.4%) and the cultures and value in society (63.3%). It is clear South Africans are not neutral on this issues but seriously believe corruption affects all spheres of life.
Since 1994 Idasa and Afrobarometer public opinion surveys have asked a representative sample of South Africans, "What are the most important problems facing this country that government ought to address?" Results from a recent January-February 2006 survey indicate that corruption does not yet rate as one of the top five priorities for government action. Rather these include unemployment (63%), housing (28%), poverty (27%), HIV/Aids (25%) and crime (23%).

Undeniably a serious issue that should be addressed by government, corruption as a problem mentioned by less than 20% of the sample (18%) is by no means the most important problem facing the country. However, since 1994 as an issue it has continued its ascent up the ladder. Referred to by less than 1 percent in the first survey following the 1994 election, almost one in five South Africans now see it as one of the most important problems in the country. Africans were less likely to mention crime (18%) or corruption (15%) than other respondents (Afrobarometer 2006).

5.5.1 Perceptions of the Extent of Corruption

How corrupt do citizens perceive the public sector in general to be? Is corruption perceived to be increasing or decreasing in South Africa? Where do citizens believe corruption occurs most within the public sector? Which types of officials are perceived as most venal, and which sectors and levels of government are most vulnerable?

Idasa has repeatedly asked national representative samples as to whether they think there is more/increase in corruption in South Africa as opposed to less/decrease under the new democratic regime, or whether in fact things have stayed the same. The 1995 survey revealed that the advent of full, inclusive, non-racial democracy did not appear to have improved people’s perceptions of government corruption. Only 24% felt that there had been any reduction in corruption from the former apartheid government. In fact 41% of the sample in 1996 felt that public corruption was increasing. An additional 25% felt there had been no change and 11% were unsure. By 1998, the position had improved very slightly if at all with 2% less, 39% saying the new
democratic government was more corrupt, but 28% still saying they saw no real difference. Thus in both surveys about two thirds could be said to see either no change, or an increase in corruption from apartheid to democracy.

The Afrobabarometer questions build on one of the most widely quoted sources of perception data on the extent of corruption in South Africa, namely surveys conducted by Idasa since 1995 where amongst a national representative sample of citizens in 1995, 46% felt that “most” or “almost all” public officials in South Africa were engaged in corruption (17% said “almost all” and 29% said “most”). An additional 38% said that “a few” officials engaged in it and only 6% believed that “almost none” were engaged in corruption. 11% did not know or were unsure. It seems that from 1995 – 1998, perceptions of public sector corruption on average when looking at public officials was getting worse with 55% in 1998 compared with 46% in 1995 believing public officials were corrupt. This improved in 2000 with 50% holding this opinion.

Thus when viewed over time, between 1995 and 2000 around half of South Africans felt that “all” or “most” officials in national or local government, were involved in corruption. But these negative views dived precipitously in 2002 and remained at far lower levels in 2004 following highly visible prosecutions of top ANC officials such as Winnie Mandela-Madikezela and Tony Yengeni.

Cynicism and perceptions of corruption in certain spheres of government appear to have increased sharply in 2006 from 2004. When asked: “How many of the following people do you think are involved in corruption, or haven’t you heard enough about them to say?” just under half of all South Africans say that “all” or “most” of their elected local councillors and council officials are involved in corruption (45%). This is over a 20 point increase from 2004 and explained by the myriad of allegations about irregularities in tenders and hiring in local councils across the country that appear to have wakened citizens’ cynicism about their local government. According to the 2006 Afrobabarometer conducted in January and February 2006 almost half of South Africans (45%) believe that all or most of their elected local councilors and officials are involved in some form of corruption. Recent disclosures about suspected
tender scandals and contract irregularities had renewed cynicism and led to the sharp spike in perceptions that local government was corrupt. About one third think the same about national government officials (36%) and one quarter from MPs (26%). Afrobarometer analysts argue that the recent reading for MPs is statistically unchanged since 2004 and suggests that Parliament’s “Travelgate” scandal – where one quarter of MPs were at one stage under investigation for having allegedly abused their travel vouchers – has not yet achieved much traction in the public consciousness. One in five now say “all” or “most” officials in the President’s office (22%) are corrupt, up four percentage points from the 18 percent measured in 2004, and nine points from the 13 percent recorded in 2000.

In explaining a resurgent perception of corruption in South Africa, both as a policy issue on the national agenda and in terms of prevalence, Mattes (2007) drawing on the Afrobarometer notes that in the late 1990s and early 2002, South Africa’s elite corruption busting units such as the Heath Commission and the National Directorate of Public Prosecutions investigated and successfully prosecuted a range of top level figures in the ruling ANC. Public perceptions of corruption as measured in the 2002 and 2004 Afrobarometer surveys then fell rapidly from the high levels measured between 1995 and 2000. However, according to the Afrobarometer’s analysis the combined effect of the revelations from the trial of ANC confidante Schabir Shaik, the impending corruption trial of the former deputy president Jacob Zuma, and a myriad of allegations about irregularities in tenders and hiring in local councils appear to have reawakened South Africans’ cynicism about government corruption.

It is important to place these perceptions of current day public sector corruption in the context of citizens’ perceptions of relative regime comparisons. The Afrobarometer (1999-2000) provides a measure of citizens’ perceptions on present day government corruptibility as compared to the previous regime. In Zimbabwe, Malawi, South Africa and Zambia more people tend to think that the current regime is more vulnerable to corruption while in Namibia and Lesotho it is the opposite. 44% of

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South African respondents in 2000 felt the government was more corrupt with 25% saying it was the same i.e. almost 70% of citizens believe that democratic South Africa is the same or more corrupt than the Apartheid regime. Compared to regional perceptions of perceptions of how citizens view those in public office, South Africa fares on average better than Zimbabwe, marginally worse off than Zambia and Malawi, and much worse that Botswana, Lesotho and Namibia. Interestingly the advent of democracy and regime changes in many of these countries, including South Africa, has not positively impacted on perception of government corruption.

In 2003 Transparency International’s Global Corruption Barometer asked citizens in 47 countries, including South Africa, the following question: Do you expect the level of corruption to change in the next three years? South Africans are amongst the most pessimistic of the countries polled. A clear majority of Cameroonians, Georgians, Indians, Israelis, Dutch, Norwegians, South Africans and Turks expected corruption to increase in their countries. In South Africa almost 50% (49.8%) believed corruption would increase in the next three years, 13.5% that it would stay the same, 30.1% that it would decrease either a little or a lot and 5.6% polled did not know. Having looked at findings from perception polls of corruption, what were citizens’ actual experiences of corruption in South Africa?

5.5.2 The Actual Experience of Corruption

It seems as if perceptions of crime and corruption are only tenuously linked to actual experience. While perceptions of corruption are quite high, actual experience is often much lower. We know that perceptions are worse than actual experience, and yet in order to tackle corruption comprehensively, we need to address perception too.

How many people in South Africa have had a direct experience of bribery/corruption over the past few years? One way of finding out the extent of the corruption problem is to ask respondents whether they personally, someone in their family or someone whom they know, have been forced to pay a bribe, give a gift or perform some favour in order to get government welfare over a certain time period.
In 2001, as part of the UN country assessment, this question was asked to a representative sample of 3500 South Africans. Over 10% of respondents in the Markinor October 2001 survey, reported that in the past 12 months they had experienced corruption of one kind or another. However, more than 90% respondents had not in the past year experienced any type of bribery for a particular service of social good such as a job, pension, electricity or water. The area in which respondents did however experience official attempts at extracting rents were in the context of jobs (4.4%) followed by electricity and water (3.2%), ID document, passport, birth or death certificates etc. (3.2%) and then housing or land (2.6%), pension or welfare payment (2.3%), schooling (1.7%) and medical care (1%).

The Afrobarometer, conducted in several SADC countries found that on average 4% of South African respondents had experienced corruption in a question phrased: Have you or someone you know been forced to pay a bribe, give a gift, or perform some favour in order to get various forms of government welfare in the past year? This was less than citizens in Namibia (6%) and Zimbabwe (12%). 7% of the South Africans said that they had to pay a bribe, or do a favour in order to get electricity or water. In terms of housing or land, 4% of respondents had personally encountered government corruption. 2% of the South African respondents said that they had experienced corruption whilst trying to find employment. A similar proportion (2%) had encountered corruption while trying to get a government maintenance payment, pension payment, or loan.

In 1998, the national victimisation survey conducted by Statistics South Africa amongst 4000 households found that whilst approximately 29% of individuals experienced at least one crime in the five-year period 1993—1997, of these, 6% of citizens reported an experience of fraud and 4% of corruption. When looked at over a one-year period, 1997 a similar pattern emerges: 15% of people experienced at least one individual crime over the year. Of all crimes, 3% experienced fraud and only 2% were victims of corruption by a public figure. Personal experience of corruption amongst South Africans, defined mainly as having to bribe a public official to perform a public duty, thus range between 2 – 10% of the population. However, a 2004 Institute for Security Studies survey found corruption
was the second most common crime after housebreaking in South Africa. The strains of corruption include money, favours and gifts. It was most evident in encounters with traffic officials where 100% of people questioned said they had paid bribes.

Similar to the perceptions of the likelihood that certain levels of government, departments or types of public officials are more or less prone to corrupt practices, there are certain areas such as basic service provision of water and electricity, pensions and jobs where citizens are more vulnerable to unscrupulous public officials and likely to experience corruption. If corruption occurs where there is a monopoly over the allocation of goods (in this case limited social goods such as jobs) the data points to areas of intervention which in the case of basic services such as water and electricity may be administered by local government.

5.5.3 Corruption in the Criminal Justice System

Police corruption may have worsened since 1994 as a consequence perhaps of democratization and disloyalty to the new government. In 1998, 10 000 (out of 140 000 police officers) were under investigation for charges of bribery, theft, fraud and involvement in crime syndicates. For instance the sale of cars from official depots of recovered stolen vehicles and licensing rackets remained two particularly profitable fields of policy activity (Lodge 2002b:133).

A total of 2300 cases of police corruption were reported in 1996. This figure almost tripled to an annual total of more than 6400 cases by 2000. The Anti-corruption unit was closed in 2002 and the official number of reported cases decreased drastically. By 2003 an annual average of about 1200 case were being investigated. The SAPS annual report for 2004 said 347 police members were suspended as a result of “corrupt activities”.

Surveys in 2000, 2001, 2002 and 2003 by a range of different organizations (ICVS, UNECA, Markinor) consistently indicate the police as being the main institution of state citizens perceive as being corrupt. In 2006 the Afrobarometer survey, found that the highest levels of cynicism about corruption were directed at the South African
Police Services with one half (48%) of all South Africans think that most police are corrupt, up from 36% in 2004. Other corrupt public officials deemed to be corrupt were health workers (25%), tax officials (23%), judges and magistrates (22%), and teachers and school administrators (19%). The 2003 TI Global Corruption Barometer also asked respondents where they would focus their attention if they could eliminate corruption from a particular institution. South Africans see the police (23.8%) followed by political parties (21.1%) as the main areas for reform. Other important areas, which over 10% of respondents thought needed reform, included the education system (14.4%) and health/medical services (11.3%).

While not a new problem, the Department of Justice has seen an increase throughout the 1990s in incidences of docket losses and subsequent dismissal of charges against suspected criminals (Lodge 2002b:133). A 2005 Court Integrity project by the UNODC that interviewed 400 magistrates, prosecutors, lawyers and users of the court showed that 68% of magistrates experience problems of lost or misplaced court records; many felt that caused “serious problems in the criminal justice system”. 52% of all those interviewed said corruption existed in the justice system – one of their reasons for lack of confidence in the justice system. 7% of prosecutors and 11.7% of court personnel said they knew of bribes being paid to expedite cases and according to 60% of court personnel most of these bribes were paid during investigations. 15% said the bribes were paid before trial and another 15% knew of bribes being paid after trial6.

Corruption in the criminal justice system has been a consistent focus of government’s anti-corruption efforts, reforms that are described in the following chapter.

Since the establishment of the National Anti-Corruption Hotline in September 2004, a total of 1390 alleged corruption cases and 1024 service delivery complaints relating to the Public Service have been referred to government departments for further investigations7. These and other anti-corruption initiatives will be discussed in the next chapter.

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5.6 Conclusion

What is the nature of the apartheid inheritance when it comes to corruption? Did the new South Africa inherit a public administration that was endemically corrupt? Was corruption a parallel system or was it localized and isolated and confined to certain spheres? Was it primarily routine venality or something more grandiose?

From the existing data we can draw some tentative conclusions about the perceived nature and extent of corruption in apartheid South Africa and today, even though investing in a dedicated monitoring tool - such as an annual survey of both experiences and perceptions - would be useful in being able to measure trends.

From what we do know, from surveys and media analysis, corruption in democratic South Africa as in the past, is mainly petty and opportunistic, rather than systemic and grand. The arms deal case study however, reveals corruption of a grand sort, not picked up by survey data.

Opportunities for corrupt practices appear to be situated in specific areas (such as welfare, criminal justice and housing) and at local government and municipal level where unethical and dishonest agents of the state with more opportunities for misconduct, and fewer safeguards may be more likely to abuse their office and powers and there is limited oversight. In the introduction to the HSRC’s State of the Nation: South Africa 2007 Southall points out that allegations of corruption often arise when there is incompetent management. This may be the case at local government level where capacity is stretched thin. The growing number of service delivery strikes blaming corrupt officials for conditions of poverty that exist thirteen years after democracy, is an important indicator of growing dissatisfaction with conspicuous consumption of councilors a trigger for public discontent.

Whereas in the past under the apartheid state there was job reservation for whites, today the short-term middle class replacement and on the job affirmative action rather than investing in the human capacity over in the long term, has led to the “apparent systemization of corruption” within the public service (HSRC 2007). According to
Southall indicators that corruption is systemic is linked to the drive for representivity and the accompanying culture of entitlement that is linked in turn to the legacy of apartheid in terms of lack of formal education and skills training.

With varying emphasis, South Africans believe the main causes of corruption in society and in government to be: a decline in morals and values; greed and a desire for self-enrichment; socio-economic conditions such as poverty and unemployment; institutional weaknesses, manifested in weak checks and balances and mismanagement within government and; the legacy of apartheid including challenges of transformation (Camerer 2001).

These underlying causes suggest differentiated responses to intervening to control corruption. Improving accountability systems and controls in public sector management as a strategy differs from influencing individual or societal morality to address a decline in moral values. It would appear that efforts aimed at moral regeneration, are a parallel strategy to “hard” interventions such as tightening up the legislative framework and improving the criminal justice system. In the following chapter (Chapter Six) we will discuss recent policy, legislative and institutional responses to creating a system of democratic accountability to effectively prevent abuses of power and promote public integrity.
Chapter Six: Anti-Corruption Reforms in Democratic South Africa

6.1 Introduction

This chapter traces specific reforms put in place by the South African government since 1994 to address corruption and promote public sector accountability. This is mostly done chronologically although the debate around the rationalization of anti-corruption agencies, crosses time periods. The chapter addresses the politics of anti-corruption reforms, identifying factors that need to be taken into account if reforms are to be regarded as both credible and feasible. Key insights into and conclusions from the implications of these reforms and what they signify, are highlighted.

6.2 The Politics of Anti-Corruption Reforms

Anti-corruption reforms tend to receive enthusiastic support from both the public and the media. By taking this stance a government receives credit for its principled approach and also tends to receive credit when corruption is exposed, rather than being blamed for the corruption that existed there in the first place (ICAC 1993). In many countries, new leaders have ridden to office on anti-corruption platforms, only to be later exposed as thoroughly corrupt in turn. As such it is vital that a citizenry, through the media and other civic bodies, demands a high ethical performance from its officials and that the political will is sustained to enforce policy measures designed to tackle the problem of corruption (Olowu 1993).

Mbaku (1996) argues that in many African countries, incumbents do not seem to be genuinely interested in effective cleanup programmes because corruption represents an important source of revenue and a means through which incumbents can channel resources to supporters and to elites who use the threat of violence to extract rents. Some analysts have noted cynically that anti-corruption rhetoric has "... been a routine feature of politics, invariably less as a means to longer term reform than as a means to diffuse opposition to the incoming regime, placate external agencies and secure tenure on office" (Gillespie & Okruhlik 1991).

Particular examples where political rhetoric around corruption control has replaced the real issue include countries like Nigeria where "... the preoccupation with panic..."
measures and the creation of ad hoc panels and tribunals to replace non-functioning legal institutions for ensuring public accountability have not been particularly helpful" (Oluwa 1987). Making an example of senior political figures in fighting corruption may set a good precedent, although the political difficulties in this cannot be overestimated. In addition, some African governments have resorted to scapegoats or have been overtly partisan in their official inquiries (Riley 1998). This is one of the critiques that has been leveled at the National Prosecuting Authority in South Africa in relation to its handling of the criminal investigation into the arms deal, in particular with regard to former deputy president Jacob Zuma.

It is thus clear that efforts to fight corruption can be motivated primarily by political exigency rather than by genuine interest in the efficient functioning of the nation’s political and economic institutions. Examples include post-coup commissions of inquiry to discredit the ousted government and help incoming elites gain recognition and legitimacy; clean up programs to stay in power and continue to monopolize the supply of legislation and allocation of resources; and campaigns to direct attention away from existing problems and the government’s inability or unwillingness to provide effective solutions. According to Mbaku (1996), whether this is the case or not is determined by three factors: 1) the personal values of the head of state 2) challenges from a counter elite 3) popular discontent arising from socio-economic conditions.

Political cunning and real determination is required to deal with the difficult challenge that entrenched corruption presents (Johnston 1997). Political choices have to be made both by leaderships and civil society organizations interested in public integrity. Efforts need to be made to identify the types of corruption and the structural conditions that may have produced the corruption (for example type of bureaucracy, formal rules, civil service salary levels) (Riley 1998).

Riley (1998) argues that public integrity reforms must also be sustainable as well as politically feasible. Politicians have to recognise that they can take action without seriously damaging their own political prospects. In many African societies, they must be able to take the credit and avoid the blame if they themselves are not involved. Political determination is a crucial aspect of any public integrity strategy.
Without a strong commitment to reform and personal examples and commitments from political leadership, governmental statements of intent, attempted reforms and strategies remain cosmetic devices. African politicians could demonstrate their commitment to public integrity by dismissing corrupt ministers and announcing the reason for their dismissal, by restructuring law enforcement agencies to fight corruption, and by holding chief enforcement officers accountable for public integrity. It is possible to challenge vested interests. And scandal, as well as clearly illegal cases of corruption, can be used to initiate action (Levi & Nelken 1996).

Should a government be serious in its reform efforts, choosing the type of anti-corruption strategy to embark on includes a range of practical considerations over and beyond the political, such as where action should be taken and by whom. In the short-term, the goal for developing countries ought to be finding the means to pursue the most effective and economical measures to control corruption. How this is arrived at depends on a number of factors, including the legacy of previous anti-corruption campaigns; the reaction of the population to anti-corruption inquiries; and the perceived impartiality of such inquiries (Findlay and Swart 1992). The approach to effective anti-corruption strategies thus requires planning, through assessment, a strategy that focuses on corrupt systems and not just corrupt individuals and effective implementation (Klitgaard 1997). If states are serious about fighting corruption they will require a detailed country-specific assessment of the costs of corruption. This must include an assessment of where corruption is likely to impose the greatest costs, including tax and customs revenues, business regulation, state sponsorship of infrastructure projects, institutional reform, political commitment and public involvement (Rose-Ackerman 1997).

Short-term, sustainable and cost-effective measures that have impact need to consider the following: Is the focus of the reform effort on the office or officeholder? Is the focus on protecting state revenue (income) or on investigating evidence of criminal activity such as contract corruption (expenditure)? Should the focus of reforms be on visible punishment of wrongdoers (retribution) or on protecting state funds (restitution); and what should the vehicle of reform be, for instance an all-purpose anti-corruption agency, or a risk assessment of a department and the procedures most
vulnerable to corruption? African reformers in particular, need to think more about the politics and practicalities of reform efforts rather than relying upon the unpredictable, longer-term effects of economic and political change. Although downsizing the state and political liberalization are desirable goals in many African countries they are necessary rather than sufficient conditions for the reduction of corruption. For short-term anti-corruption strategies to be more effective in African societies, more attention needs to be devoted to questions of timing and sequencing, the technical details of the proposed public integrity initiatives and their sustainability in very poor societies, and the exceptional political and managerial commitment, determination and courage necessary to promote, maintain and carry through such reforms (Riley 1998).

Controlling or reducing corruption thus requires a long-term strategy. Greater thought needs to be given to the timing and sequencing of reform measures. As is well known reform efforts may actually generate new forms of corruption. What is required is real indigenous political commitment over time, as well as considerable ingenuity if such efforts are to make a significant impact on reducing corruption (Riley 1998:154).

6.3 Anti-Corruption Reforms in Democratic South Africa

Parallel to and indeed largely informed by the public discourse both internationally and nationally on corruption, the South African government has taken various initiatives to formulate policies and strategies to tackle corruption within the public realm. Not only have substantial policy papers, strategies and new laws and regulations been enacted to promote good governance but also a number of dedicated institutional bodies with the capacity to fight corruption have been established within the criminal justice system. An example would be the Special Investigating Unit and the Directorate of Special Operations. Resolutions taken at two national anti-corruption summits (April 1999 and March 2005) that have fed into the Public Service Anti-corruption Strategy, are considered part of the state’s dedicated efforts to actively confront corruption.

1 See Appendix 1: Chronology of Anti-Corruption Reforms
Since 1997 when the corruption issue was placed firmly on the table - not least because of a number of high-profile scandals that dominated the local media (for example Sarafina, Motheo Housing) but also the impetus of the international community in this regard, culminating in the UN Convention Against Corruption - numerous policy statements, laws and institutions have been introduced in democratic South Africa to control corruption. Over several years a comprehensive national anti-corruption strategy has been developed through a conscious partnership approach involving all sectors of society.

In many respects the anti-corruption reform policy process in democratic South Africa has been both systematic and sequenced and benefited from the global context that since the mid 90s strongly promoted good governance as the key to sustaining democratic reforms. Specific programs and policies have largely realized the three key policy objectives identified at the First National Anti-Corruption Summit in April 1999\(^2\). These objectives were:

1: **Combating Corruption**: This included a review of anti-corruption legislation; establishing a whistleblower mechanism; enacting an access to information law; establishing special courts to adjudicate on corruption cases; establishing sectoral coordinating structures and a national coordinating structure (the National Anti-Corruption Forum) to coordinate, monitor and manage the national anti-corruption program.

2: **Preventing Corruption**: This included efforts to blacklist individual businesses and organizations involved in corruption; establishing an anti-corruption hotline; establishing sectoral hotlines; taking disciplinary action against corrupt persons; putting in place systems to ensure consistent monitoring and reporting on corruption; and promotion and implementation of sound ethical, financial and related management practices.

3: **Building Integrity and Raising Awareness**: This included the promotion and pursuance of social research, analysis and advocacy to analyze the causes,

\(^2\) See Appendix 2 Benchmarking Anti-Corruption Reforms
effects and growth of corruption; enforcement of a code of conduct and
disciplinary codes; inspiring youth, workers and employers towards
intolerance for corruption; promotion of training and education in ethics;
sustained media campaign to highlight aspects of the strategy.

In 2006 the African Peer Review Mechanism’s (APRM) Country Self Assessment
Report for South Africa noted the culmination of the government’s anti-corruption
efforts in the 2002 adoption of a comprehensive Public Service Anti-Corruption
Strategy, as a strategy that “has served as a blueprint for consolidating and reinforcing
the anti-corruption legislative and regulatory framework as well as strengthening the
institutions mandated to monitor, investigate and prosecute corruption.” A further
“corner stone” of South Africa’s anti-corruption effort, noted by the APRM report, is
the development of key partnerships between the government, civil society and the
private sector in fighting corruption. Examples of this partnership include the two
National Anti-Corruption Summits (held in 1999 and 2005 and a third summit
planned for November 2007) and the launch of the tri-partite National Anti-

Additionally the APRM report (2006) regards anti-corruption legislative and
regulatory measures adopted since 1994, as “strong and in keeping with international
practices”. The range of anti-corruption laws include the Public Service Code of
Conduct 1997; The Parliamentary Code of Ethics 1997; The Executive Members
Ethics Act no 83 of 1998 and Codes of Ethics 2000; The Public Finance Management
Act and Municipal Finance Management Act; The Promotion of Access to
Information Act; The Protected Disclosures Act no 26 of 2000; The Financial
Intelligence Center Act no 38 of 2001 and finally The Prevention and Combating of
Corrupt Activities Act (No 12 of 2004).

This “state of the art” Act focused on preventing and combating corruption came into
force on 27th April 2004 – significantly on the 10th anniversary of South Africa’s
transition to democracy – and is a particularly comprehensive law that spells out over
twenty specific corruption offenses. It was crafted against the backdrop of the
finalization of the United Nations Convention Against Corruption and takes into
account other regional anti-corruption protocols such as those developed by the OECD, SADC and the African Union.

In addition to the above specific laws South Africa’s range of specialized anti-corruption agencies include the National Prosecuting Authority; Directorate of Special Operations; South African Police Services; The Special Investigating Unit; the Independent Complaints Directorate; the Public Protector; the Auditor General; the Public Service Commission and various Parliamentary Committees (APRM Report 2006).

Indeed, South Africa’s anti-corruption arsenal, developed systematically since 1994, is impressive and the country appears to have in place, at least at the national level, many of the key institutions and laws cited in the good governance and anti-corruption literature as being important to expose and prevent abuses of power.


The report also lists South Africa’s range of specialized anti-corruption agencies including the National Prosecuting Authority; Directorate of Special Operations; South African Police Services; The Special Investigating Unit; the Independent Complaints Directorate; the Public Protector; the Auditor General; the Public Service Commission and various Parliamentary Committees.

6.4 Establishing New “Rules of the Game”

Emerging from its authoritarian past characterized by policies and systems that served a particular ethnic group and encouraged corrupt behavior, the new democratic state
effectively had to craft a whole new set of rules for governing including regulating the
behavior of public servants and citizens according to a new set of norms.

In May 1996 Parliament adopted The Constitution of the Republic of South Africa Act
No 108 of 1996 that came into effect in February 1997. With this Act, the new rules
underpinning a democratic South Africa were firmly entrenched. As the most
important law framing the new state’s commitment to both promote public integrity
and government accountability, certain parts of the Constitution are worth expanding
upon.

Chapter 1, Section 1 notes that the Republic of South Africa is one, sovereign,
democratic state founded on the following values:

a. Human dignity, the achievement of equality and the advancement of human
   rights and freedoms.
b. Non-racialism and non-sexism.
c. Supremacy of the constitution and the rule of law.
d. Universal adult suffrage, a national common voter’s roll, regular elections and
   a multi-party system of democratic government, to ensure accountability,
   responsiveness and openness.

The Constitution includes a Bill of Rights (Chapter Two) that binds the legislature,
the executive, the judiciary and all organs of state. Guaranteeing a broad range of
political, civil, economic, and cultural rights to all South Africans, including
provisions on the administration of justice (chapter 8) the Constitution also establishes
a number of key institutions to protect the public interest. In particular it establishes
the constitutionally mandated role of the legislature in providing oversight over the
executive. In this regard Section 55(2) of the Constitution provides as follows:

The National Assembly must provide for mechanisms -
(a) to ensure that all executive organs of state in the national sphere of
government are accountable to it; and
(b) to maintain oversight of-
(i) the exercise of national executive authority, including the implementation
of legislation; and
(ii) any organ of state.’

This requires the National Assembly to do two things: hold organs of state in the national sphere accountable, and exercise general oversight over national executive authority and organs of state (Corder, Jagwanth and Soltau 1999). In this regard specific parliamentary committees such as the Standing Committee on Public Accounts (Scopa) and the Committee on Members Interests, also known as the Ethics Committee, play an important oversight role.

In addition the Constitution establishes so called "Chapter 9 institutions" that support constitutional democracy. These include among others the Public Protector and the Auditor-General. Both of these institutions play a crucial role in the arms deal investigation that will be discussed in detail in parts three and four.

"Chapter 9 institutions" - are established under the following governing principles:

S 181(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favor or prejudice.

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

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

With its significant majority in parliament following both the 1994 and 1999 election, ANC members in parliament would be challenged to play an effective oversight role over their own executive, as tasked by the Constitution. Allegations of corruption in the arms deal would highlight this tension between parliamentary oversight of the
executive branch. Was it indeed possible to be a loyal ANC member of parliament and also protect the public interest by fulfilling the oversight role of the public purse and the executive, as required by the constitution? This is something two reports to parliament would address in some detail.

When it comes to the basic values and principles governing public administration in the new South Africa, Chapter 10 of the Constitution sets these out. These principles apply to administration in every sphere of government; organs of state; and public enterprises.

195. (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

a. A high standard of professional ethics must be promoted and maintained.

b. Efficient, economic and effective use of resources must be promoted. Public administration must be development-oriented.

c. Services must be provided impartially, fairly, equitably and without bias. People's needs must be responded to, and the public must be encouraged to participate in policy-making.

d. Public administration must be accountable.

e. Transparency must be fostered by providing the public with timely, accessible and accurate information.

f. Good human-resource management and career-development practices, to maximize human potential, must be cultivated.

g. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation. The specific anti-corruption interventions introduced by the government, led by the Minister for Public Service and Administration, would be framed by these ground rules and values in place for administering public service and administration in democratic South Africa.
On 17 June 1997 the Code of Conduct for the Public Service became part of the regulations for every public servant and was the subject of an ethics promotional campaign by the Public Service Commission (Balia and Sangweni 1999). Outlined in Chapter M of the Public Service Regulations, it covers five particular areas of concern to public servants, namely their relationship with the legislature and executive; the public; fellow employees; performance of duty; personal conduct and private interests.

6.5 A Parliamentary Code of Conduct and Ethics Committee

Shortly after coming to power in April 1994, on 25th October a subcommittee of the Rules Committee of the National Assembly resolved to focus on ethics and in particular to “investigate and make recommendations on a code of conduct for members, including a register of gifts and register of members interests.” Chaired by Professor Kader Asmal the committee would produce a report that included a Code of Conduct with regard to financial interests of a limited group, namely persons entitled to be present and participate in the proceedings of parliament. Only much later would this code extend to the executive branch.

On 21 May 1996, the “Code of Conduct in Regard to Financial Interests” was published and the introduction is noteworthy: “In order to achieve a political order in South Africa that is truly open, transparent and accountable, as is envisaged in the Constitution, it is essential that its elected leaders maintain the highest standards of propriety to ensure that their integrity and that of the political institutions in which they serve are beyond question.” It further notes that “In general, no person bound by this Code must place himself or herself in a position which conflicts with his or her responsibilities as a public representative in Parliament nor may he or she take any improper benefit or advantage from the office Member.”

The code also makes provision for setting up the Committee on Members Interests as well as the Register of Members’ Interests (Section 3.2) where acting upon its own, or on a complaint by any member through the office of the Registrar, the Committee must investigate with due expedition any alleged irregularity with regard to the disclosure of financial interests of Members registrable in terms of this Code (Section
5.1), setting out the procedures for conducting investigations and reporting (Section 5.2 and 5.3) and the penalties where it has found that a Member has contravened the code (Section 5.4). Details of interests to be disclosed include under “Gifts and hospitality”: a description and the value and source of a gift with a value in excess of R350; a description and the value of gifts from a single source which cumulatively exceed the value of R350 in any calendar year; and hospitality intended as a gift in kind. Penalties may include a) a fine not exceeding the value of 30 days salary; b) a reduction of salary or allowance for a period not exceeding 15 days; or c) the suspension of privileges or a member’s right to a seat in Parliamentary debates or committees for a period not exceeding 15 days.

In July 2000 the Executive Ethics Code covering members of the executive was proclaimed. The Code covers various aspects of conduct including specific instructions regarding conflict of interest, gifts, disclosure of financial interests (these include shares, sponsorships, gifts and hospitality, benefits, foreign travel, land and property, pensions); and instructions relating to the Register of Financial Interests. The Public Protector investigates breaches of the executive code and in the coming years, a number of complaints would be laid at his door.

As the scandal around the arms deal unfolded, implicating members of parliament such as the ANC chief whip Tony Yengeni in allegations of corruption, it is important to recall this early commitment to create checks and balances among MPs in order to uphold the integrity and reputation of this key institution. How Yengeni’s case was dealt with by parliament’s ethics committee will be looked at in detail in Chapter 12 where for essentially a breach of the parliamentary code – not disclosing as a gift the 47% discount he had received from an arms company with an interest in the arms deal when he was chair of the Defence Committee – Yengeni would be tried and convicted and be sent to jail, even if only for a brief period. The code regarding financial disclosure regulations for political office bearers, both Members of Parliament and Members of the Executive, will be seen to play an important role in the discussion of the arms deal case study that follows. In the coming years, parliamentary accountability and oversight of both the executive as well as the relationship with Chapter 9 institutions such as the Public Service Commission, Auditor General and Public Protector, that are obliged to report to parliament, would be thoroughly tested.
6.6 Independent Institutions

In August 2007 the Report on the ad hoc *Committee on the Review of Chapter 9 and Associated institutions*, was released. Embarked on by parliament, even though it was initiated by the executive, does as the ANC chair argued, “itself demonstrate that we collectively care about our constitutional democracy…” Based on the terms of reference the Asmal Committee looked at: (1) the effectiveness and efficiency of the institutions; (2) whether the National Assembly played a sufficiently robust oversight role over the institutions; and (3) whether the institutions were fulfilling their Constitutional and legal mandates.

The report argued that as the apartheid state had displayed a profound disrespect for the human rights of its citizens and failed to honor even the most basic tenets of the rule of law, it was necessary to create a set of credibly independent institutions whose task would be to strengthen constitutional democracy by assisting to: (1) restore the credibility of the state and its institutions in the eyes of the majority of its citizens; (2) ensure that democracy and the values associated with human rights and democracy flourished in the new dispensation; (3) ensure the successful establishment of and continued respect for the rule of law; and (4) guarantee that the state became more open and responsive to the needs of its citizens and more respectful of their rights.

Without going into the detailed findings of the report its recommendations are important to mention as they “can be seen as an attempt to enhance the oversight role of the National Assembly in recognition of its important Constitutional role in relation to these institutions.” And in what the chair of the committee, Kader Asmal termed a “surprising but delightful development” almost all of the institutions under review expressed the view that the National Assembly should play a more active role in holding these institutions to account, and that there should be more engagement between these institutions and the National Assembly. In his remarks marking the release of the report Asmal notes the following:

“Independent institutions established across the world to deepen democracy and to promote and protect human rights are not always, to put it mildly, universally celebrated and enthusiastically supported by those in positions of power. They are, however, an essential countervailing force in any
Endorsing and promoting the need for such institutions does not imply distrust of the other branches of government – just like the adoption of a justifiable Bill of Rights does not imply distrust in the Legislature or the Executive. These institutions should be part of the democratic firmament of any vibrant and self-confident society and when they act with wisdom and passion, within the confines of their mandates, but always aware of the need to deepen democracy and promote and protect human rights, they are in effect supporting the other branches of government in upholding the Constitution and fulfilling their other tasks.”

Clearly the relationship between different branches of government in the new South Africa as well as various independent institutions is being worked out and high profile scandals such as the arms deal, which involved almost all of these institutions, are important in that they play a role in defining the landscape of our new constitutional democracy and in testing the mandate and powers of these institutional safeguards.

6.7 Parliamentary Oversight and Accountability

In July 1999, a report prepared by the University of Cape Town’s public law department and submitted to the speaker of parliament, would point to the concerns of parliamentary oversight and propose certain ways in which parliament, and the independent chapter nine bodies supporting constitutional bodies, might be strengthened (Corder, Jagwanth and Soltau 1999). Specifically the UCT report addressed the constitutional and theoretical values underpinning the concepts of oversight and accountability and the purposes they serve in a democracy particularly in relation to the constitutional roles of the National Assembly and the National Council of Provinces. It made recommendations dealing with both legislation and structures that need to be put in place to give effect to Parliament’s obligations under the Constitution giving an analysis of the ways in which Parliament can ensure accountability of constitutional institutions while at the same time respecting their independence. It would take eight years before the Asmal Committee would report comprehensively on its findings, as noted above.

Remarks by Professor Kader Asmal, MP, Chairperson of the ad hoc Committee at the launch of the Report of the ad hoc Committee on the Review of Chapter 9 and Associated institutions at the Good Hope Building, Parliament, Tuesday 21 August 2007.

3 Remarks by Professor Kader Asmal, MP, Chairperson of the ad hoc Committee at the launch of the Report of the ad hoc Committee on the Review of Chapter 9 and Associated institutions at the Good Hope Building, Parliament, Tuesday 21 August 2007.
While it is not possibly to go into a full discussion of the UCT report, there is an important section capturing the “difficult” oversight role of parliament in relation to the executive, something that the arms deal investigation, particularly the role of the main oversight committee, namely the Standing Committee on Public Accounts (Scopa), would confront. The researchers note:

“The executive in carrying out its tasks, whether by implementing legislation or policy, acquires considerable power (the ability to influence or determine a person’s conduct). A condition of the exercise of that power in a constitutional democracy is that the administration or executive is checked by being held accountable to an organ of government distinct from it. This notion is inherent in the concept of the separation of powers, which simultaneously provides for checks and balances on the exercise of executive power, making the executive more accountable to an elected legislature…While our Constitution gives expression to the principle of separation of powers by recognizing the functional independence of the three branches of government (see Re: Certification of the Constitution of South Africa 1996 (10) BCLR 1253 (CC)), our parliamentary system of government does not give full expression to the notion of separation of powers because of the close links between the legislature and the executive….Our executive is not only chosen from the legislature but also primarily from the leadership of the majority party. In addition like many other parts of the world a strong party-based system exists in South Africa. This can hamper effective oversight as members of the legislature may be reluctant to call to account a government that is made up of leaders of their party. This is further exacerbated by the electoral system of proportional representation because members of parliament presently retain their seats through their membership of political parties. Members of the majority party in particular may be unwilling to subject the government to rigorous scrutiny for fear of being perceived as disloyal or even expulsion from the party and a consequent loss of their parliamentary positions (my italics).”

As will be shown in Chapter Ten, the few individuals within the ruling party who did take their oversight role as MPs seriously, such as ANC MP Andrew Feinstein, would
find themselves in an untenable position as the arms deal investigation proceeded, and in Feinstein’s case, resulting in resignation.

6.8 A National Campaign to Prevent Crime and Corruption

In response to the wave of crime threatening to destabilize the country, in May 1996 the National Crime Prevention Strategy (NCPS) was released. A National Program on Corruption and Commercial Crime was one of seven priorities identified. It noted that while corruption in all of its forms seriously undermines public confidence in democratic governance itself, this is particularly damaging in respect of such corruption and criminal complicity within the criminal justice system. By March 1997, government ministers responsible for the NCPS had established a program committee to work on corruption in the criminal justice system. Led by the ministry of Safety and Security the intention was to develop a comprehensive strategy that would take into account best international practice and existing oversight structures, identify cross-cutting factors contributing to corruption in the system, focus on preventive as well as investigative strategies and identify possible solutions to the problem.

Early on it was recognized that the relationship between the underworld of organized crime and the upper-world of legality is characterized by its parasitic and symbiotic nature and that the ability to corrupt officials depends on how integrated criminal organizations are within official structures. A less isolated post-apartheid South Africa had started to attract new threats such as international organized crime and money laundering syndicates and during 1996 several bills were drafted by parliament to increase the capacity of South Africa’s law enforcement agencies to address these new threats (Camerer 1996, 1999). These included the International Co-operation in Criminal Matters Act 75 of 1996, the Proceeds of Crime Act No 76 of 1996, the Extradition Amendment Act no 77 of 1996 and the Money Laundering Control Bill.

Responding to the need to address the growing crime issue and its negative impact on business, Business Against Crime (BAC) was established in 1996 initially for three years, to partner with the government on its commitment to prevent crime. Eleven years later it is still going strong. The group of business leaders established a number
of programs whereby private sector skills could assist the new democratic state. One of these programs was the Working Group on Commercial Crime, a task team that met once a month with key representatives from the criminal justice agencies, as well as business and policy actors. Its purpose was to propose solutions to make the criminal justice system more effective when it came to investigating and prosecuting so-called “white collar crimes”. Efforts of the BAC Working Group yielded much needed research and eventually a concrete proposal for government to establish a specialized commercial crime court (Camerer 1996, 1998). A court was established in Pretoria in August 1999 and a second one in Johannesburg in January 2003. Both courts have been enormously successful in prosecuting complex cases of fraud, corruption, money laundering and organized crime.

6.8.1 Committing to the Fight Against Corruption

In June 1997 the official opposition in the national assembly, initiated a debate entitled “Measures to Combat Corruption”. The Order Paper’s draft resolution read:

“That, in the light of numerous incidents of corruption within the State set-up recently, the House calls on the Minister for Public Service and Administration to urgently take steps to curb such incidents, to set in motion all possible measures for the prevention of such corruption, and to have all cases, irrespective of who is involved, investigated forthwith.”

In the heated debate National Party (NP) leader FW De Klerk while conceding, “many of today’s problems may be related to former policies,” argued that crime and corruption were worse since the ANC took power. According to him the ANC-led governments – central and provincial – “must accept full responsibility for their new policies and their management, or lack of management”. “At the heart of the problem” he said, “lies unbalanced and over hasty affirmative action as well as questionable management of tender procedures and the like. For that the ANC must accept responsibility. It cannot hide its blunders and its failure to deliver, behind the past.”

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FW De Klerk, “Crime and Corruption are worse since the ANC took power, and it cannot be denied.” The Star, 2 July 1997.
This debate provided an important opportunity for the ANC government to unequivocally state its clear commitment to addressing corruption with ANC Minister Pallo Jordan saying “I think this debate has served one purpose only, and this is to offer us the opportunity to reiterate this Government's commitment to rooting out corruption and combating corruption anywhere.” Another ANC MP put things in perspective: “We are having this debate today because the ANC is committed to a lean and clean administration. We inherited a bloated, ineffective public service, with an almost total lack of checks and balances. But we're not hiding behind this as an excuse for corruption to continue…We don't hesitate to act harshly and openly against people who are appointed to the highest positions… We live in a society that is corrupt. We live in a society that is overburdened with high levels of crime. What on earth made us believe that the public sector would be spared? Corruption is a reality we have to manage. One of the first actions taken by the ANC when it took power was to put in place mechanisms designed, not only to expose corruption, but also to wipe it out.”

The release of the NP’s Corruption Barometer later that year calling for urgent ANC action against corruption and President Mandela to declare the prevention of corruption a national priority, provided the NP with yet another opportunity to accuse the ANC of being soft on corruption. Although some individuals in the ANC government were concerned about spiralling corruption, it noted the absence of a general commitment by government to combat the problem. Reacting, the ANC noted it was “ironic that the ANC led government, which has put into place its institutions and oversight mechanisms to expose and root out the legacy of corruption, is itself blamed for corruption. The ANC has put these institutions in place on the basis of the realization that corruption spawned and nurtured under National Party rule not attended to expeditiously will in the long run undermine the moral and social fibre of our democratic society. We remain convinced that institutions the government has put into place are not only equal to the challenges but have begun making serious inroads into all forms of corruption.”

6.8.2 Confronting the Moral Crisis

Alongside legal, institutional and public administration reforms to fight corruption, a concurrent moral debate was occurring in the country to bolster the “moral and social fibre of our democratic society”. This was precipitated both by the scourge of violent crime and public sector corruption that the government felt great urgency to address, lest it become an entrenched feature of South African life. ANC leaders from Mandela down would, from 1995, recognize the “moral crisis” facing South Africa and the need for an “RDP of the soul”. This was a reference not only to the dehumanizing levels of violent and often domestic crimes, seemingly unleashed by the vacuum in social authority left by the demise of the apartheid state and its damning legacy, but also to crimes of fraud and corruption such as ghost workers, i.e. non-existent state employees drawing salaries to which they were not entitled, mainly in previous homeland administrations.

In June 1997 President Mandela and key South African religious leaders met to discuss the role of religion in nation-building and social transformation. Mandela described the ‘spiritual malaise’ underpinning the crime problem:

“Our hopes and dreams, at times, seem to be overcome by cynicism, self-centeredness and fear. This spiritual malaise sows itself as a lack of good spirit, as pessimism, or lack of hope and faith. And from it emerge the problems of greed and cruelty, of laziness and egotism, of personal and family failure. It both helps fuel the problems of crime and corruption and hinders our efforts to deal with them (Mandela 1997).”

Six months later, in December 1997, when addressing the African National Conference, and stepping down as president of the ANC Mandela further described manifestations of moral failure and decay in the new South Africa:”… the corruption of public servants by the private sector; the low level of tax morality, white collar crime and the subversion of business ethics; venality, theft and fraud within the public sector; corruption in the public justice system; the unbridled self-gratification of rape and child abuse; disrespect for human life; the easy resort to the use of force; the acceptance of theft as a means of personal enrichment; mendacity in the conduct of public affairs; contempt for the law; and the virtual collapse of a system of social
behavior informed by the precepts of humanism which, historically, have informed African culture."

At the December 1997 conference Thabo Mbeki was nominated to be Mandela’s successor as president of the ANC and eighteen months later, in June 1999, would become president of South Africa. Linking fighting corruption to his vision of an African Renaissance – finding embodiment in the New Partnership for Africa’s Development (NEPAD) that seeks to promote and strengthen systems to enhance better governance on the continent – Mbeki would make fighting corruption a hallmark of his presidency.

Further policy responses to the “moral crisis” would include the “Moral Regeneration Movement” (led by the deputy president, Jacob Zuma who in later years would ironically be accused of both rape and corruption). The source of the MRM within the ANC came from the commission for religious affairs. A so-called “Moral Summit” was held in October 1998 to which President Mandela invited leaders of all political parties and religious communities. At the summit a humanitarian ethics pledge and Code of Conduct for people in leadership positions was signed with leaders committing themselves to the following principles: Integrity; Incorruptibility; Good faith; Impartiality; Openness; Accountability; Justice; Generosity; Leadership (Balia and Sangweni 1999).

6.9 Corruption on the Policy Agenda

At the 8th International Anti-Corruption Conference (IACC) in Lima, Peru, South Africa agreed to host the next IACC two years later in Durban in October 1999. The pressure was on to be in a position to showcase South Africa’s anti-corruption reform agenda to the international community. In 1997 an inter-departmental Committee on Corruption consisting of the Ministers of Justice, Public Service and Administration, Safety and Security, and Provincial Affairs and Constitutional Development, was appointed with the mandate to consider proposals for implementing an anti-corruption campaign at both national and provincial level. After much research and consultation the Committee recommended that Cabinet approve a number of proposals, including establishing a project team to carry out a feasibility study for an anti-corruption
agency and the rationalization of existing bodies, a review of the existing legislation in order to draft new corruption legislation, and the holding of a National Summit on Corruption (Balia and Sangweni 1999). In July 1998 the committee submitted its final report for a National Campaign Against Corruption to Cabinet. This Report and Cabinet's subsequent approval on 23 September 1998 would become the foundation of anti-corruption initiatives in South Africa, in particular within the public sector.

Despite professed commitments to confront corruption, the public remained somewhat skeptical. Public opinion surveys conducted by IDASA/Markinor and the SABC in October/November 1998 on government effectiveness at controlling corruption painted a sobering picture with 60% of respondents saying government was performing its job of controlling official corruption not very well/not at all well (Camerer 1999c). Clearly it was time to show some sort of persuasive commitment.

6.9.1 The Public Sector Anti-Corruption Conference (November 1998)

During November 1998 the Public Sector Anti-Corruption Conference was held in parliament, Cape Town and attended by over 200 delegates including the deputy president Thabo Mbeki, ministers, heads of agencies and parastatals, senior government officials including delegates from parliament, the public service, local government and organized labor in the public sector. The aim of the summit was to develop a concrete plan of action to combat and help prevent corruption in the public sector in particular. The media, donors and civil society were allowed to attend as observers.

The initial outputs for the November summit were identified as follows:

- To develop a clearly articulated national strategy to fight corruption in all sectors of society
- To create a common understanding of corruption in all its facets
- To obtain a commitment from all stakeholders to deal with corruption
- To affirm key principles necessary for the establishment of effective and coordinated anti-corruption structures
- To provide guidelines for a program of anti-corruption actions
• To recommend legislative measures to give muscle to anti-corruption structures
• To send a clear message that corruption will not be tolerated by government or any other role-players in our new democracy

Opening the conference, Mbeki noted how “the threatening state of moral degradation in our society is reflected in the high levels of crime, disrespect for authority and the rule of law, and the erosion of key institutions such as the family. The culture of entitlement, so prevalent in our community, has contributed to the “name it, claim it” syndrome where individuals seek an elusive moral justification for engaging in criminal activity. The deepening of the crisis in public value is largely visible in the lack of professional conduct from so many wearing the badge of public honor in the civil service.” He further noted that “zero tolerance” would be offered to the “parasites of our land who have scorned the public interest and that sought their own self enrichment at state expense.” Also that it was “incumbent on government unequivocally to affirm its seriousness and desire to stamp out corruption wherever it occurs.”

The November 1998 Conference Statement committed itself to developing a comprehensive strategy that would combine prevention with “ruthless action against transgressions”. It recognized that corruption has “deep roots in our society” and that “while some short term measures can have a significant effect, ending corruption forms part of the long-terms and laborious process of transformation of government and society as a whole.” The adopted conference resolutions called to restore a public service ethos, for civil society to play a role as an “equal partner”, to strengthen financial management and controls and for government to review the scope and jurisdiction of anti-corruption agencies, and would form the basis of comprehensive anti-corruption reforms in the coming years (Balia and Sangweni 1999).

At the November 1998 conference it was resolved that a working group representing the various stakeholders would oversee the implementation of the resolution and

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declaration and work together to ensure the success of the February Summit in developing an effective program for combating corruption. The summit eventually took place in April, some believing this may have been a way for the ANC to keep anti-corruption top of its agenda pre the June 1999 election. The efforts seem to have paid off with public opinion research indicating that government was doing enough to fight corruption. A survey conducted by the Human Sciences Research Council in March 1999 indicates that when asked about corruption in the public sector, 34% of respondents believe the government is giving sufficient priority to fighting corruption. In total 20% said that government was giving the issue of corruption too high a priority, whilst ANC supporters were most likely (27%) to think this was the case. Numerous pre-election statements by president-elect Thabo Mbeki identifying fighting corruption as one of his government’s key priorities for the next five years, effectively persuaded citizens that fighting corruption was something the government was dealing with satisfactorily.

6.9.2 The First National Anti-Corruption Summit (April 1999)

During 14-15 April 1999 the National Anti-corruption summit, held in Cape Town, brought together government leaders, political parties, business, organised religious bodies, the NGO sector, donors, the media, organised labour unions, academics, professional bodies and the public sector. Interestingly political parties were not invited to participate in the Summit. The Country Corruption Assessment Report (2003) notes the following in this regard: “This averted the possibility of political parties using the occasion to score political points. The down side, however, is that political parties were not a party to the Summit's outcomes. The non-participation of political parties also impoverished debate. Issues such as electoral fraud and corruption related to political funding were not dealt with.”

The First National Anti-Corruption Summit created a powerful platform for the National Campaign Against Corruption in that it recognized the societal nature of corruption, and that the fight against it required a national consensus and coordination of activities. The resolutions adopted at this conference would form the main basis for the government’s national anti-corruption strategy and subsequent
developments and relate to it’s three-pronged approach, namely 1) combating corruption, 2) preventing corruption, and 3) building integrity and raising awareness.

A key resolution emerging from the National Anti-Corruption Summit in Cape Town under the theme of “Combating Corruption” was to “develop and implement whistle blowing mechanisms, which include measures to protect persons from victimization where they expose corrupt and unethical practices”. Indeed, ‘Blow the Whistle on Corruption’ was the conference slogan used to launch the National Anti-corruption Initiative. Civil society would play an important role in this regard, making submissions to the Justice Committee in October 1999.8

The proposed whistle-blowing legislation initially fell under the Open Democracy Bill which made provision for the transparency of government actions and access to government records. In March 2000 the Promotion of Access to Information Act (PAIA) came into force, giving effect to the public's broad right to access information as set out in Section 32 of the 1996 Constitution. It required private as well as governmental bodies to disclose information. Later in 2000 hearings would be held by parliament’s Justice Committee on a separate law to protect whistleblowers, namely the Protected Disclosures Act. Under this legislation bona fide whistleblowers reporting on government wrongdoing would be protected from workplace reprisals. These might include dismissal, demotions, unfavorable transfer, informal discrimination or harassment by managers or co-workers. Because of the need for fairness to officials accused of wrongdoing — who will have a right to know of the accusations and an opportunity to defend themselves — anonymity for the whistleblower will often be impossible. In this instance, the proposed legislation notes other protections for whistleblowers such as relocating them without prejudice to their career and granting indemnity against prosecutions or workplace disciplinary sanction for a whistle-blower’s own complicity in governmental wrongdoing (Camerer 1999d).

The government recognized that there would be an urgent need to promote awareness of both the laws and the way in its intended operation. During 2001 a Cape Town based NGO, the Open Democracy Advice Centre would set up a free legal advice service on how to utilize the act, produce a brochure on whistle-blowing for the

Public Service Commission and conduct training of senior public service managers in all nine provinces.

6.9.3 The National Anti-Corruption Forum

In August 1999 the Cross Sectoral Task Team on corruption convened consisting of representatives from government, business and civil society. This body tasked with taking forward the resolutions from the National Summit and engaging all sectors on the fight against corruption produced a memorandum of understanding for what became known as the National Anti-Corruption Forum. Launched in mid June 2001 in Langa outside Cape Town the body comprised 30 leaders representing key sectors. Launching the forum, the Minister for Public Service and Administration, Geraldine Fraser-Moloketi said:

“Notwithstanding the knowledge of the nature of the corruption problem and how challenging the road is ahead of us, I think as South Africans we are showing that we are committed to deal with this issue as best as possible. We have embarked on a strategy of co-operation and supportive partnerships, on international, regional and domestic levels. Through comprehensive and multi-sectoral approaches, such as this National Anti-Corruption Forum, we are increasing our chances exponentially to deal with the problem at hand in a decisive manner.”

The founding charter of the National Anti-Corruption Forum requires members from all sectors of society to:

- Establish a national consensus through the coordination of sectoral anti-corruption strategies
- Advise government on the implementation of strategies to fight corruption
- Share information on best practices on sectoral anti-corruption work
- Advise all sectors on the improvement on sectoral anti-corruption strategies

6.9.4 The Second National Anti-Corruption Summit (March 2005)

In March 2005 the second National Anti-Corruption Summit hosted by the National Anti-Corruption Forum (NACF) took place in Tshwane. The purpose of the summit,
the first since 1999, was to identify a common campaign for all South Africans to
fighting corruption as it was felt the government’s approach up until this point was
seen as too “inward-looking”. Sponsored by the UNODCP, DFID and GTZ, it was
attended by 390 delegates from the public, private and civil society sector.

Deliberations focused on three main areas: Ethics, Awareness and Prevention;
Combating; and Oversight, Transparency and Accountability. It also focused on the
role of the National Anti-Corruption Forum, an entity that was launched in June 2001
and that would now take on a more formal role. The summit confirmed the NACF as
the vehicle for building a national consensus on the fight against corruption and
adopted resolutions that direct the meetings, composition and structures of the NACF.
Twenty Seven resolutions were drafted and adopted by the Resolutions Committee
comprising of sectoral representatives, to be translated into programs of action.
Clusters of resolutions covered whistle-blowing; co-ordination; implementation of
anti-corruption legislation; post-public sector employment; research; financial
disclosures; awareness; the National Anti-Corruption Forum, and apartheid
corruption.

Following the summit, an Implementation Committee, consisting of program co-
coordinators from the public sector (Director-General of DPSA), the business sector
(CEO of Business Against Crime) and the civil society sector (Convener of the Civil
Society Network Against Corruption) and accountable to the Executive Committee of
the NACF was appointed to establish and implement joint National Anti-Corruption
Program (NAP) projects. The implementation of these resolutions and the activities of
the National Anti-Corruption Forum will be important to monitor in the coming years.
In 2008 the Third National Anti-Corruption Summit will convene to consider progress
made. Clearly corruption is still on the policy agenda.
As of 2007 the National Anti-Corruption Forum has continued to meet and finally has
dedicated resources to assist its public information role, with a recently established
website (www.nacf.org.za).
6.10 Specialized Corruption Fighting Bodies

Following the First National Anti-Corruption Summit in April 1999 came the June elections, fought largely on a zero-tolerance anti-corruption ticket. Mbeki’s new cabinet formally endorsed the Summit resolutions. While highlighting corruption in government was a key election issue raised by opposition parties such as the United Democratic Movement, New National Party and Democratic Party hoping to win votes from an electorate disillusioned by widespread public sector abuses of power, it appeared that the ANC, through a number of high profile conferences and public statements on anti-corruption had effectively undercut this tactic.

In his opening address to Parliament, President Mbeki announced the establishment of a special criminal investigation unit to tackle high-profile crimes, including public corruption. This unit - the Directorate of Special Operations (DSO) - more popularly known as the “Scorpions” fell under the National Prosecuting Authority (NPA). The NPA was headed from August 1998 until his resignation in July 2004, by former ANC chief whip and MP, Bulelani Ngcuka. Based on the troika principle of intelligence, investigation and prosecution, the DSO would take on crimes determined by the following criteria: High level of seriousness/impact of a national nature; High level of violence; High level of organization (enterprise related crime); Requiring an integrated multi-disciplinary approach; Very high profile.9 From the beginning one of the main challenges facing the Scorpions would be to avoid duplication and fragmentation with existing crime-fighting bodies and to increase co-ordination. Although 90% of crimes would still be dealt with by the South African Police Services (SAPS), from the beginning the tension between the SAPS and DSO in terms of operational mandates would prevail, eventually resulting in the Khempepe Commission of Inquiry set up in 2005 to investigate the relationship between the two agencies.

The DSO was formally launched on 1 September 1999, not a moment too soon. Later that month allegations of wide-spread corruption in the Strategic Defence Procurement Package would officially surface. The DSO would play a crucial role in

9 Comments by Pete Richer, Head of Operational Support, DSO, UNODC/NPA Expert Roundtable, Pretoria May 2000
the criminal investigations that followed. Down the line its head, Bulelani Ngcuka, would be accused of being a spy for the apartheid regime, and for failing to prosecute Jacob Zuma, although announcing a prima facie case of corruption against him, of abusing the powers of his agency. This would lead to a Judicial Commission of Inquiry (Hefer Commission) and an investigation by the Office of the Public Protector, events not covered by this thesis. For now, the Scorpion’s ambition, captured in its motto, “Loved by the people, feared by the criminals” was seen as a bright light in government’s commitment to effectively address serious crime and corruption.

6.10.1 Coordinating Efforts

At a conference in May 2000 organized by the UN on anti-corruption agencies, the National Director of Public Prosecutions, Bulelani Ngcuka noted that the criminal justice system alone did not function as a deterrent factor against crime or corruption and that there were far too few cases that led to prosecution and conviction. While the government had created many agencies for fighting corruption Ngcuka stated that the overall impact had not been as effective as was hoped for and there was still a lot to be done. The “burning problem” of co-ordination and cooperation among different agencies was highlighted by Dr Ugi Zvekic, a Senior Crime Prevention and Criminal Justice expert with the UN, arguing that the fight against corruption needed to be approached at all levels: through prevention, education, regulation, investigation, prosecution and adjudication. Zvekic would play a key role in facilitating a multi-year agreement with the South African government as part of the United Nations Global Program Against Corruption to conduct baseline country assessments.

In his opening address to the November 1998 conference, President Mbeki had noted that “a laudable feature of our new democracy (is) that no less than ten structures exist to counteract corruption in line with their constitutional mandates. Some might share the view that these bodies are not effective enough, whilst others might feel that they need to be replaced by a single anti-corruption agency." This remark needs to be understood in the context of a debate that had been raging on co-ordination or rationalization of existing anti-corruption agencies, such as the Heath Special Investigating Unit. This debate is important as it provides important context to the
controversial decision to exclude the SIU from the final arms deal investigation in January 2001, discussed in Chapter Nine.

6.11 The Debate Around the Special Investigating Unit

First some background: In 1996, then Minister of Justice, Dullah Omar, indicated that the government was investigating the establishment of a permanent Anti-Corruption Commission to investigate allegations of serious corruption (De Lange 2001). Widespread corruption relating to ghost workers and social security grants were already being investigated by various Commissions of Inquiry such as the Eastern Cape based Heath Commission into alleged malpractices in the Ciskei, the White Commission to investigate irregular appointments and promotion, and the Semenya Commission and Skweyiya Commission dealing with allegations of widespread corruption in former homelands. The Eastern Cape-based Heath Commission’s apparent success in recovering state assets through civil proceedings had caught the attention of President Nelson Mandela.

According to the long time ANC chair of the Justice Committee Advocate Johnny De Lange (later deputy Minister of Justice) already at this time it was acknowledged that there was a need to create new and innovative mechanism to strengthen the fight against corruption: “The view was held that the Public Protector’s Office was not ideally suited to the task of investigating allegations of corruption, which were of a sufficiently serious or substantial nature, to justify the appointment of a Judicial Commission of Inquiry. On the other hand, a conventional commission of inquiry was felt to be too limited in scope, as such as commission would have to rely on the Executive to implement its recommendations and any remedial action could only be taken through conventional civil litigation in the ordinary courts of law” (De Lange 2001).

In 1996, Parliament had passed a bill that broadened the commission’s responsibilities to cover corruption countrywide and deal with the whole spectrum of ‘clean’ administration and the protection of the interests of the public regarding public money and public property. The Special Investigating Units and Special Tribunals Act (74 of 1996) thus established a new and innovative mechanism “for the purpose of
investigating serious malpractices or maladministration in connection with the administration of state institutions, state assets and public money as well any conduct that may seriously harm the interests of the public, and for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from such investigations by Special Investigating Units.”

The Unit would thus investigate matters from a civil perspective and institute civil action in the Special Tribunal with all matters of a criminal nature that come to the Unit’s attention referred to the relevant prosecutorial authorities in order to proceed with criminal prosecutions. In performing its functions, the Unit would liaise closely with other bodies such as the Auditor-General, the Public Protector, the Attorney-General and the South African Police Service (SAPS), in order to co-ordinate investigations into matters which fall within the jurisdiction of the Unit.10 Ironically, this powerful new anti-corruption agency headed by Judge Willem Heath would not be used in the multi-agency investigation into allegations of widespread corruption surrounding the largest scandal in South Africa’s democratic history, namely the arms deal. The exclusion of the SIU, the reasons given, the impact this had on public trust in the corruption investigation, is documented in detail in the case study that follows.

Despite not having criminal jurisdiction, the Heath Unit had nurtured an impressive public profile as the face of effective anti-corruption efforts in the country. Heath’s own belief was that the recovery of money and assets should be the primary objective of any fight against corruption: "Criminal action should be secondary. The recovery of money proves that economic crime does not pay and this is essentially the message to convey. Recovery will not only act as a deterrent but will replace what has been removed from the coffers and thus strengthen the economic climate."11 The Unit’s investigative armory included legal representatives specialized in anti-corruption, mal-administration and related investigations and civil litigation emanating from such investigations. Multidisciplinary teams of experienced investigators, internal auditors and accountants, supported by an information technology team to access relevant information, had delivered impressive results. At the time 71 people were employed

by the Unit and Heath’s belief was that this number was far below what was required for the unit’s work to be effectively optimized and had expressed the need to appoint additional members to effectively deal with the expected increased workload of the Unit. Issues of budgetary constraints, however, were currently limiting these appointments and suggestions made by the Unit to supplement its budget through the appropriation of a percentage of the recovered proceeds of corruption, had effectively been dismissed.

The SIU’s broad powers enabled it to act quickly against official corruption: With the authority of a magistrate or judge, unit members could enter and search premises and remove documentation on the basis of a reasonable suspicion that it would assist an investigation. The unit could also summon anyone to appear before it and compel them to answer questions. It has powers to make an order for the return of money or property and to issue an interdict to stop the potential loss of such money or property. Some critics believed that the special powers invested in the head of the Special Investigating Unit were too wide and the question had been raised whether Heath’s concept of an independently funded body, combined with its vast legal powers, could lead to the Unit becoming untouchable.¹² Heath’s response had been: "... we are very careful in our approach and apply the principles of the constitution meticulously. Although we are independent from government departments we still have to comply with the terms of the Act. The Unit can never become more than what the Act provides for."¹³

However, Heath had expressed his frustration over the current terms of the Act. It required that allegations first be referred to the necessary authorities, whereafter a (usually) lengthy process was followed before the Department of Justice submitted a draft Proclamation to the office of the President. This finally culminated in a Proclamation referring the matter to the Unit for investigation. This lapse of time served to delay and hamper the effectiveness of investigations and Heath had thus proposed specific amendments to the Act, notably the scrapping of the requirement that the Unit had to wait for a proclamation before investigating cases. These

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proposed amendments were viewed as the already powerful unit asking for additional powers and were effectively ignored by the Justice ministry.

Thus while the proposed amendments were received with sympathy in some quarters, others believed the Unit already had too much power. Objections had been raised over what was seen as an increasing tendency of the SIU to bypass the courts. The point was made that if fast track procedures were needed to deal with corruption, these should be implemented within the legal system.\textsuperscript{14} Heath had strongly denied that the special powers given to his Unit were unfair to the people against whom it acted and that the fast track procedures of the Unit and the related tribunal could infringe on the civil rights of those it investigated, as was suggested. He indicated that the shortened procedure related only to documents, and that defendants had the right to access everything pertaining to their cases: "There is no hampering of rights. We are completely transparent and we play open cards."

On the eve of the November anti-corruption conference, Heath’s request for more powers was met with a stinging attack from the President’s office. In a letter leaked to the press, complaints were made that the Unit was guilty of sloppy work which was causing the President’s office legal headaches: "Our office has had to assist in dealing with litigation or threatened litigation which arose there from, or from the alleged failure of your unit to operate within its legal limits." Some commentators believed this was clearly a campaign aimed at clipping Heath’s wings.\textsuperscript{15} In the same week, Justice Minister Dullah Omar, in a written reply to a parliamentary question on the fate of Heath’s amendments, appeared to express concern that the Heath Unit’s powers, once extended, might set precedents for other investigative bodies. He questioned whether it was appropriate to have a judge as head of the unit, and whether the Unit should indeed continue existing as an independent body, given the existence of the Public Protector and the Attorneys-General. His suggestion that the Unit could possibly be rationalized to form part of a single anti-corruption centre under a "special cabinet committee" was met with outrage by Judge Heath who said that such a step

\textsuperscript{14} M Acott, “Critics question effective anti-corruption unit’s key powers”, Business Day, 2 March 1998
\textsuperscript{15} P Bell, Courage and Conviction, Leadership, 17(4), 1998.
"... would raise the question of whether or not such a body was apolitical."\textsuperscript{16}

In response to Heath’s public call not to compromise on the independence of his Unit, both Omar and President Mandela’s office subsequently denied that the proposed rationalization amounted to political interference. Instead, in an apparent turnabout, Omar claimed that the media had misrepresented his position, and pledged additional funds to the Unit and to the Public Protector. He stated that government would protect the Unit from political pressure and "... would like to see the two bodies become even more independent and strengthened."\textsuperscript{17}

In the heat of the debate which followed the suggestion to rationalize anti-corruption existing structures and establish a single anti-corruption agency, presidential spokesperson, Parks Mankahlana, made the following statement: "Inevitably all structures of government have to be reviewed not only for the purposes of maximum efficiency but also to ensure that the general cost of administration is kept at a minimum. The reality of the situation is now you have the Heath Special Investigating Unit, the police and the Public Protector. Sometimes we even appoint commissions of inquiry and you have parliament. The duplication that is taking place is unbelievable. Furthermore they all rely on resources from the same coffers. We are not saying that the Heath Commission or the Public Protector must die – all we want is to maximize efficiency and rationalize out structures."\textsuperscript{18}

The highly contentious debate around establishing a single dedicated anti-corruption agency, was temporarily resolved at the November 1998 public sector summit by urging existing anti-corruption agencies to publish clear guidelines on the nature of corruption they deal with as well as how they deal with these reports. However, on the eve of the November 1998 conference, the “possible rationalization” of existing anti-corruption agencies such as the Special Investigating Unit headed by Judge Heath, to possibly be replaced by a single anti-corruption center reporting to a special cabinet committee, evoked a political storm. Heath was quoted as saying that “such a step would raise the question of whether or not such a body was apolitical” with led to

\textsuperscript{17} A Koopman, “Conference is no talk-shop – Omar,” Cape Times, 12 November 1998.
\textsuperscript{18} “Govt will “strengthen not abolish Heath unit”, Cape Times, 8 October 1998.
both Justice Minister Dullah Omar and President Mandela’s offices subsequently denying that the proposed rationalization amounted to political interference.

The debate on Heath’s calls for more powers and more resources continued into 1999 and was starting to polarize public opinion. In mid 2000 the SIU issued a press release that it was restricting its interaction with the media. Tensions with the government over the SIU’s power were running high and limiting media interaction was seeing as one way to calm the situation. The statement read:

“…The SIU has, however, now identified that the Unit’s open approach to towards the media in the past, has created fertile ground for media reports that position the Unit in an adversarial relationship with the Government. These media reports have resulted in a perception that the Unit is the “enemy” of the Government, whiles in truth the Unit is one of the weapons in the armoury of the Government and its fight against corruption and maladministration. This perception that the Unit investigates the Government instead of protecting and recovering the assets of State Institutions, now appears to have created a rift between the Unit and at least some figures in the political arena and this is perceived to be a major stumbling block both for the workings of the Unit and the morale of members of the Unit. In order to address the problem…and to show that the Unit is committed to its real purpose and is opposed to being portrayed as operating in the political arena, the Unit has decided to place a moratorium on all communication with the media until such time as a workman like media policy, which fully addresses the problems set out above, has been accepted by the Unit. It is hoped that this policy would be in place by July 2000 and until such time any approaches by the media would be responded to with a “no comment”. This drastic approach has been forced on the Unit by the circumstances it finds itself in, and the Unit apologizes for any inconvenience this may cause to any other person or party.”

Clearly to stay with the popular metaphor, Judge Heath’s wings were in the process of being clipped. In November 2000, the Constitutional Court judgment that was used as the basis to exclude his Unit from the arms deal investigation rendered him a lame

19 1st August 2000 email from Guy Rich: Press Release: Media Contact with the Special Investigating Unit
duck and by July 2001 he had resigned as head of the unit. In August 2001 the Public Service Commission would release a comprehensive audit report reviewing the roles the various anti-corruption agencies. It would conclude forcefully that South Africa did not need a new and separate anti-corruption body, but rather that the existing criminal justice capacity and other agencies with an anti-corruption mandate should be bolstered (PSC 2001): “This report shows that there is no integrated, holistic approach to fighting and preventing corruption amongst existing agencies. Only once the anticorruption capacities of the existing agencies are optimally utilized in a holistic and strategic approach to fighting corruption in the public sector in South Africa can the next step - a single independent anti-corruption agency which deals with all aspects of corruption - be seriously considered.”

As the lead consultant on this report for the Public Service Commission and having interviewed all of the agencies in South Africa with an anti-corruption mandate, it was my informed opinion at the time that strengthening existing institutional capacity was the way to proceed and was a way to ensure that checks and balances in the institutional framework would be prevail, and not be subsumed under an all powerful central anti-corruption agency reporting to a defensive executive.

6.12 Conclusion

Against the backdrop of allegations of high level corruption in the arms deal – PAC MP Patricia de Lille had blown the whistle in parliament in mid September 1999 – in October 1999 the South African government co-hosted the 9th International Anti-corruption Conference in Durban, a meeting attended by over 1600 delegates from over 135 countries. This was an opportunity, one of many to come, to show the international community the country’s commitment to fighting corruption.

In opening the conference President Mbeki hoped that the conference would “give an added impetus to all of us as Africans further to intensify our own offensive against the scourge of corruption.” Referring to the writings of international financier, George Soros on the flaws of the market system, Mbeki called for an end to “the unhampered pursuit of self interest” in societies saying South Africa’s past political and social
system of apartheid had led people to set their own norms of social behaviour and that these conditions underpinned the levels of crime and corruption present in South Africa now:

“I am also convinced that, in this country, another important factor that led to the spread and entrenchment of corruption, was the existence for a long period of time of a political and social system that was clearly morally and politically illegitimate and considered so by the overwhelming majority of the people…The consequence of this was that both the legal system and the institutions of governance lost all possibility to provide for society the set of norms that would simultaneously be legally enforceable and morally justifiable…Of course the first thing that we had to do was to end the illegitimate system of apartheid and replace it with a genuinely democratic and inclusive political system. Hopefully this system will succeed to evolve the social norms that will generally be accepted as legally enforceable and morally justifiable. Clearly, this would have a major impact on ensuring that we reduce the negative tendency towards the setting of norms by individuals informed by the concept of ‘the unhampered pursuit of self-interest’ (Mbeki 1999).

With Apartheid gone and the new rules of a democratic game in place, it appeared that apart from some institutional turf wars amongst various anti-corruption agencies fighting for resources and powers - not in and of itself unhealthy - the government was serious about fighting corruption. A clear national strategy to fight corruption was in place, based on consultation and partnership with all stakeholders, and the ANC had won a landslide victory on a “zero tolerance” platform, still largely blaming the legacy of apartheid for the country’s corruption woes. The government’s handling of the arms deal would however, cast shadow over these lofty commitments. This will be the topic of the next but one chapter. First however, it is important to take account of further specific anti-corruption measures taken by the South African government.
Chapter Seven: Designing a National Anti-Corruption Strategy and Law

7.1 Introduction

In the previous chapter we summarized the constitutional and institutional framework that set the stage for anti-corruption debates and initiatives that took place after 1994. The further strategic measures (both policy and legislative) that were implemented during President Mbeki’s term in office will now be canvassed.

This chapter takes a more detailed look at the national anti-corruption strategy, including legislation emerging in South Africa. It is clear that some of the institutional reforms undertaken with regard to tightening accountability mechanisms were informed by the experience of the arms deal, documented in the next few chapters, for instance with regard to tightening conflict of interest and post public sector employment provisions (namely the case of the former minister of Defense, Joe Modise). This chapter also looks at the Idasa submission and subsequent court case on access to information regarding the funding of political parties – arguably the most gaping lacuna in South Africa’s otherwise impressive anti-corruption regulatory framework.

7.2 Designing a National Anti-Corruption Strategy

By early 2000, three important streams were emerging to inform the South African strategic approach to fighting corruption, namely the need 1) to address the moral malaise; 2) to bolster criminal justice capacity, and 3) to reform public administration. Within policy circles confusion reigned around cabinet leadership of the anti-corruption initiative. It was unclear whether corruption was an issue being dealt with primarily by the Governance and Administration cluster or by Criminal Justice. Particularly confusing was trying to figure out who was responsible for what and how to make sense of certain initiatives in the criminal justice as well as public administration arms of government and how these tied together.

Clearly a range of actors and approaches need to be involved in anti-corruption efforts, something recognized in resolutions that emerged from the two anti-corruption summits in November 98 and April 99. During the course of 2000 it would become clear that the Public Service Commission, which at the April 1999 summit
had been tasked to drive the anti-corruption initiative forward, was not appropriate. In a major error of judgment that resulted in a serious delay in the implementation of the resolutions and a definitive anti-corruptions strategy for the public service, the Public Service Commission (PSC), tasked by the Constitution to conduct oversight of the public service, was mandated as the ‘flag carrier’ of the anti-corruption initiative. This was clearly based on a confusion of roles that had characterized the whole debate. As flag-bearer, the PSC was placed in a role that would necessitate driving policy reforms, thus conflicting with its oversight mandate. Only through delicate political maneuvering would the right locus for anti-corruption policy eventually be found. In future the Department of Public Service and Administration (DPSA) would drive policy and by June 2000 a draft “First Discussion Document: An assessment of anti-corruption strategies in the South African Public Service” existed wherein short, medium and long-term strategies were proposed that flowed from the summit resolutions. For the first time it appeared that a dedicated task team with some type of budget was in place to tackle anti-corruption reforms.

Baseline information and a review of the current situation were recognized as an essential element in designing the national anti-corruption strategy. In March 2001, following a prolonged period of negotiation, the South African government joined the United Nations Global Program Against Corruption. This was an international program that prioritized the development of certain common strategies and the exchange of information, experience and good practices, when it came to addressing corruption. In a multi-year agreement signed by Minister of Public Service and Administration, Geraldine Fraser-Moloketi, South Africa committed itself to conducting a Country Corruption Assessment Report (CCAR). A report would be released two years later in April 2003 and the assessment exercise repeated in 2007. The comprehensive country assessment would entail inter alia perception and experience surveys among households, public service delivery institutions and businesses; analyses of legislation and code of conduct; and data collection on criminal and disciplinary cases related to corruption, providing for the first time baseline data on the scourge of corruption that would “enable one to monitor progress in the governance environment and in the effectiveness of strategies to combat and prevent corruption” (CCAR 2003).
When it was released to parliament in April 2003, the CCAR would barely touch on the arms dealer scandal that had played out over the two years while the assessment was being conducted. The foreword notes that five years into the process (since 1997 when anti-corruption efforts had started) government’s assessment was that good progress was being made to implement the resolutions of the Summits and many departments and agencies were believed to have put in place solid systems to fight corruption. It noted however, that “at the operational level, problems were emerging, more notably the absence of clear anti-corruption legislation, insufficient co-ordination of anti-corruption work within the public sector and among the various sectors of society, and poor information about corruption and the impact of anti-corruption measures (CCAR 2003).”

In April 2001 a three-day strategic planning workshop of the Public Service Task Team was convened by the Department of Public Service and Administration to design a national strategy for the public sector to fight corruption. In opening the workshop, Minister of Public Service and Administration Geraldine Fraser-Moloketi explicitly called for a “practical, effective and coherent strategy” which would be “workable and implementable” and “have immediate results”. Noting that much of the groundwork had already been done at the summits (hosted in 1998 and 1999), these resolutions needed to be taken forward and translated into action. There was no need to start from scratch, but rather to cement existing initiatives such as laws around public finance, whistle-blowing and access to information into a coherent strategy for wider use. As a follow up in June 2001 a consultative workshop was convened in Pretoria to discuss the draft Public Service Anti-corruption strategy. The working definition of corruption used in the strategy referred to corruption as: “any conduct or behavior in relation to persons entrusted with responsibilities in the public sector which violates their duties as public officials and which is aimed at obtaining unfair advantages of any kind for themselves or for others.”

7.3 Mbeki Announces Reforms

At a three-day cabinet lekgotla the Public Service Commission’s draft report on the role of various anti-corruption agencies and the draft Public Service Anti-corruption
Strategy was discussed. Addressing the media President Thabo Mbeki noted that corruption posed one of the major challenges confronting his government and announced a number of measures. Mbeki singled out Correctional Services as the hardest hit area - a senior prison official had recently been assassinated - and announced the establishment of the Jali Commission of Inquiry into corruption in correctional services.

At the briefing Mbeki announced that former ANC MP, Willie Hofmeyr would be the new head of the Special Investigating Unit, replacing Judge Heath, something that had been widely speculated along with the fact that the unit would now be incorporated into the National Directorate of Public Prosecutions. A report regarding the workload of the Special Investigating Unit had been tabled in Parliament in May 2001 and had stressed the “urgent need” for the unit to get its house in order and deal with the backlog of cases and had expressed concern at the cumbersome process of obtaining proclamations before any investigation could be conducted. Hofmeyr, despite his struggle credentials, was widely regarded as being independent minded, sparing “neither friend nor foe in the fight against corruption” and had already proven himself as operationally independent and adept at using the media to show the use in practice of the laws against money laundering and organized crime.

Mbeki also noted that the government was working on new regulations to clarify the role of officials involved in the negotiation of big contracts in order to limit corruption. As an example, he cited how currently any cabinet minister could leave the government to join a field in the private sector that operated in an area covered by the minister during his term. Such a move he noted could be viewed as corruption since the minister would have participated in the award of tenders to a firm that he later joined. Regulations were therefore being proposed that would prevent former cabinet ministers from taking up private sector posts in their fields, making it impossible for instance, for a former defence minister to join the arms industry after leaving government. This was a clear reference to former Defence Minister, Joe Modise. Asked if the new regulations were being drafted in the light of the

4 “Corruption is public enemy No 1, says Mbeki” The Star, 27 July 2001.
controversies emanating from the arms deal probe Mbeki replied “Yes...even if all of
the allegations are not proven to be true, the issues are relevant and we need to attend
to them.” This admission from Mbeki clearly proves the responsiveness of the
government to address corruption loopholes that the arms deal procurement process
had brought to light.

7.4 The Case of Joe Modise

A week before the media briefing, on 20th July 2001, the Mail and Guardian had
reported that former Minister of Defence, Joe Modise’s six bedroom mansion had
been constructed partly at the expense of taxpayers money. The National Directorate
of Public Prosecutions noted it would not be prosecuting Modise in this regard as he
had agreed to repay the money spent by Denel to help build his home (apparently only
once he realised the matter was being proposed). At no time had Modise recorded his
interest in the residence in the parliamentary register of interests. After leaving
Parliament in June 1999, Modise had become chairman of Conlog holdings, a
company with an indirect stake in the arms deal. In July 2001 it was reported that
Conlog had been contracted to work on the Coega industrial development zone in
Eastern Cape, strongly tied to the R4,5billion submarine purchase that is part of the
arms deal. Executive Director of the Eastern Cape based Public Service
Accountability Monitor, Colm Allen commented: “…After his intense involvement in
the policymaking process Modise ends up as chairperson of a company which has
been awarded contracts to implement the Coega project. For Modise to benefit
financially as a businessman from decisions that he made whilst he was a cabinet
minister is an astounding conflict of interests. You don’t need a degree in ethics to
recognise that.”

In October 2001 Modise would be questioned by the Scorpions for his role in the
arms deal, but would carry any secrets he might have had to the grave, dying of
cancer on 27th November 2001 in his home. This was not before being conferred the
highest civilian honor, the Grand Cross (Gold) of the Order of the Star of South

7 John Matisonn, “Modise heads company that benefits from Coega deal.”, Sunday Independent, 22
Africa, on his deathbed by President Mbeki. Terry Crawford-Browne alleges in his book (2007:156) that “the spooks” came to see him about six weeks before Modise’s death: “Modise was, they told me, being slowly but deliberately poisoned because his cancer was not as advanced as would be politically convenient. Members of the government wanted him dead when the arms deal report came out because ‘a dead man could tell no tales’!”

In June 2003 The Guardian newspaper would allege that Modise had received a 500 000 Pound bribe and that cash also went to the 1999 election fund of the ANC. BAe Systems plc would confirm funding of the Umkhonto we Sizwe Veteran’s Association (MKMVA) and that this was all above board and part of BAE’s social responsibility program:

“We wanted to support the effort to provide training for (ex) fighters of the liberation (struggle). To assist in incorporating them into civilian society. The money was deposited into the First National Bank in Pretoria and is administered by a group of trustees called the Airborne Trust. The funds are audited by KPMG. BAe did it to be a good corporate citizen, to become involved in a project that was going to work towards the benefit of the country. And to demonstrate that we wish to be good corporate citizens doing business in South Africa.”

In November 2003 former ANC MP Andrew Feinstein alleged in interviews on Swedish radio and television stations that the partly-Swedish consortium BAe/Saab had bribed government and ANC officials, giving the ANC $35million to secure the contract to sell JAS Gripen fighter jets to South Africa. Swedish Christian groups and the opposition Green Party called for an inquiry into allegations of bribery in South Africa’s multi-billion rand arms deal. BAe and Saab strongly denied the allegations saying these had been fully investigated by the Joint Investigating Team. The Serious Fraud Office in Britain is currently investigating BAe’s suspected bribery activities around the world, including South Africa.

8 Guardian Newspapers Limited, 14 June 2003
Mbeki’s anti-corruption measures were widely praised. Later in the week Minister of Public Service and Administration, Geraldine Fraser-Moleketi told the Pretoria Press Club that the issue of disclosure of public servants financial interests would in future not be limited to only Director Generals and their deputies and that the whole question of disclosure would be re-evaluated. The matter of consultants and conflicts of interests would also to be revisited with possible timeframes limiting contract work for the government after the termination of employment. There would be also be a review of the role of elected representatives such as Ministers “who may have served in particular portfolios and then also go into areas of work that could arguably be captured as conflict of interest. This would be dealt with in terms of the ethics framework in place for parliamentarians as well as guidelines set for public servants. We feel that our commitment should go beyond out merely speaking about it but through practical actions that are taken.”

Clearly the various strands of the anti-corruption policy debate with both public administration and criminal justice reforms. The focus on corruption stimulated by the arms deal would provide an impetus for tightening anti-corruption legislation and reform, putting pressure on public officials to conduct themselves in a way that would best serve the public interest.

7.5 The Public Service Anti-Corruption Strategy

The government’s anti-corruption reform agenda was underpinned by research and from June to December 2001 the Public Service Commission undertook research into the functioning of hotlines, risk management, blacklisting of businesses and financial disclosure requirements for senior public servants. These findings and recommendations fed into the Public Service Anti-Corruption Strategy presented to parliament in May 2002. The new corruption legislation tabled for discussion in parliament in April 2002 would also try to address loopholes. But civil society in its submission on the bill (discussed later in this chapter) failed to persuade government to expand its commitment to addressing potential conflicts of interest and financial

disclosure to the critical issue of the funding of the political process. Instead the 
“conspiracy of silence” between contributors and recipients would continue to hold.

Following the release of the JIT report on the arms deal to parliament in mid 
November 2001 Minister of Public Service and Administration, Geraldine Fraser- 
Moloketii commented that government response to the arms deal report would include 
an anti-corruption strategy with tighter laws to back it up and that this was being 
worked out between the security cluster of Ministers and herself, and due to be 
finalized by the end of the year.12 She referred to the fact that one of the lessons learnt 
from the arms procurement package was to look at employees lower than senior 
management – for example, deputy directors involved in negotiating large contracts: 
“We need to ensure we also have appropriate mechanisms to protect the employee as 
well as the government in terms of those deals to avoid abuse.”13

In January 2002, Cabinet approved the public service anti-corruption strategy that not 
only built on preceding anti-corruption summit resolutions but also directly responds 
to issues raised by the arms deal, for example issues of post-public sector 
employment, conflict of interest provisions, procurement and financial disclosures by 
senior public servants. In his State of the Nation Address to the Joint Sitting of the 
Houses of Parliament in February 2002, President Mbeki noted: “In accordance with 
the government's comprehensive Public Service anti-corruption strategy, we have 
introduced measures to ensure that the code of conduct is upheld and that all public 
service managers are subject to conflict of interest disclosures. To complement this, 
legislation to fight corruption will be brought before parliament during this session 
(Mbeki 2002).”

The Public Service Anti-Corruption Strategy document (2002) includes a summary of 
the proposals, a status report of the summit resolutions, a discussion on various 
dimensions of corruption, including impact, cost and definition and is designed to 
take a “holistic and integrated approach to fighting corruption…that requires a 
strategic mix of preventative and combative activities and a consolidation of the 
institutional and legislative capabilities of Government.” The strategy includes a

systematic implementation plan that considers time frames/target dates as well as cost implication. The nine inter-related and mutually supportive strategic considerations that comprise the Public Service Anti-Corruption Strategy are:

Firstly, **review and consolidation of the legislative framework**: this requires that the existing Corruption Act be replaced with an effective and modern anti-corruption law. Other related legislation needs to be refined where necessary.

Second, **increased institutional capacity**: this requires an increase in three areas; the courts' anti-corruption capacity, as well as increased institutional capacity for existing national institutions which have anti-corruption mandates and departmental anti-corruption capabilities.

Third, **improved access to report wrongdoing and protection of whistle blowers and witnesses**: this focuses on improving application of the protected disclosures legislation, witness protection and hotlines.

Fourth, **prohibition of corrupt individuals and businesses**: this proposes the establishment of mechanisms to prohibit corrupt employees from employment within the public sector. It also prohibits corrupt businesses from doing business with the Public Service.

The fifth consideration is for **improved management policies and practices**: practices pertaining to procurement systems, employment arrangements, the management of discipline, risk management, management information and financial management are to be improved. Proposals include the extension of the system of disclosure of financial interests, screening of personnel, establishing mechanisms to regulate post-public service employment and strengthening the capacity to manage discipline.

The sixth area that has been identified is the need to **manage professional ethics**: this requires a renewed emphasis on managing ethics, including the establishment of a generic ethics statement for the Public Service that is
supported by extensive and practical explanatory manuals, training and education.

A seventh consideration is the need for partnerships with stakeholders: partnering is envisaged as a major cornerstone of the establishment of a national anti-corruption strategy.

The eighth consideration, is the need for social analysis, research and policy advocacy: This consideration proposes that all sectors be encouraged to undertake ongoing analysis of the trends, causes and impact of corruption: All the sectors are required to advocate preventive measures.

Lastly, a need has been identified for awareness, training and education to support the above developments and launch of a targeted public communication campaign: It is proposed that the campaign be aimed at the promotion of South Africa's anti-corruption and good governance successes both domestically and internationally. Domestically, the campaign will be hinged on the promotion of Batho Pele initiatives and the development of a sense of pride amongst employees.

Not all the strategic considerations will be dealt with. Clearly the references under strategic consideration two regarding procurement, conflicts of interest and mechanisms to regulate post-Public service employment (a "cooling off period") stem from lessons learned from the arms deal investigation, in particular relating to the chief of procurement, Chippy Shaik, and the financial activities of the former minister of defence, Joe Modise. These were areas that the arms deal scandal had highlighted as weaknesses in the government’s anti-corruption program. The remainder of this chapter will look at the development of strategic consideration one, namely the new corruption law.

7.6 A New Corruption Act

The first step of the national anti-corruptions strategy was to support the legislative process underway to enact a new law that would comprehensively deal with corruption in all its forms. Making corruption a prosecutable offence in democratic
South Africa would be the main objective of the Prevention and Combating of Corrupt Activities Act. The adoption of the new law would see South Africa comply favorably with every international and regional obligation to fight corruption, and the South African legal framework when it came into effect would both comply with and exceed the requirements of the United Nations Convention Against Corruption (signed by South Africa in December 2003 and ratified on the 22 November 2004).

The United Nations Convention Against Corruption with its 71 articles and 8 chapters paves the way for a more unified and international multi-sectoral response to corruption. For one, it requires Party States to criminalize bribery and embezzlement in both the private and public sectors. It also makes provision for the participation of civil society in the fight against corruption. The provisions on asset recovery make it mandatory for Party States to return the proceeds of these offences to the countries of origin. The agreement includes norms of conduct for public officials, greater transparency based on public access to information of government business, as well as stricter procurement regulations and measures against money laundering. The Convention requires State Parties to promote integrity, honesty and responsibility among its public officials and to adopt measures to facilitate the reporting by officials of acts of corruption to appropriate authorities. The provisions also make reference to declarations of outside activities, investments, assets and substantial gifts or benefits that may result in conflicts of interest as regards the functions of a public official.

7.6.1 Background to the Legislative Process

A review of the corruption act had been called for from 1997 and in both the anti-corruption conference resolutions of 1998 and 1999. The Corruption Act 94 of 1992 was widely regarded as ineffective, not least as it had repealed the common law crime of bribery and had also failed to keep pace with technological, jurisdictional and legal developments around the world. In October 1999, in response to the perceived delay on implementing the national summit resolution on reviewing the existing corruption legislation, Raenette Taljaard, an MP from the Democratic Party, tabled a private member’s bill. Taljaard would serve as an outspoken member on Scopa as it grappled with its oversight role relative to the arms deal investigation.
Taljaard called for an amendment to the existing Corruption Act 94 of 1992 to provide for the “criminalization of the misuse of public office” arguing in the accompanying memorandum that “the new offence created by this Bill will assist the Heath Investigative Unit with its stated intention to blacklist public officials found guilty of corrupt behavior. The synergies between such a system of blacklisting and tracking and the new offence created by this bill will contribute greatly to the fight against corruption and ridding our civil service from the scourge that plagues it at present”. Taljaard’s action, pursuing legislative reform using the private member’s Bill was described by the Financial Mail as standing as good a chance as “the proverbial snowball in hell of getting though the ANC-dominated parliament.” The Chair of the Justice Committee, Johnny De Lange, dismissed the proposal in favor of a comprehensive rather than what was termed a “piecemeal approach” towards the anti-corruption legal framework. This comprehensive approach would take almost five years, from October 1999 to April 2004, to deliver the new law.

In reviewing and consolidating the legislative framework, the national anti-corruption strategy in January 2002 had ambitiously argued that such a review would need to a) establish a workable legal definition of corruption; b) extend the scope of legislation to all officials in public bodies, corruptors and their agents; c) reinstate the common law offence of bribery d) create presumption of prima facie proof to facilitate prosecution of an offence under the revised legislation; e) establish extra-territorial application and jurisdiction, and compliance with international conventions to which South Africa is a signatory; f) improve the civil and recovery elements of the legislative framework, for example recovery of losses in terms of the Public Finance Management Act, prevention of organized crime, recovery from pension provisions, freezing of assets and return of assets to institutions that incurred losses; g) enable the State and individuals to claim for damages; h) prohibit corrupt individuals from further employment in the Public Sector as well as prohibit corrupt Businesses (including principals and directors of such Businesses) from gaining contracts funded from State revenue; i) regulate post-Public Service employment; j) establish responsibility for maintaining the witness protection system; and finally k) make the legislation easy to understand and apply.

In February 2002, Justice Committee members were finally presented with a first copy of what was termed the Prevention of Corruption Bill, “to provide anew for the prevention of corruption and related offences; and to provide for matters connected therewith. The Bill had been drafted by the Department of Justice with inputs from stakeholders and was accompanied by a comprehensive memorandum, including legal opinions on the reverse onus provisions in the Bill. Following a brief overview of current international initiatives against corruption, the accompanying Memorandum stated “it becomes clear that South Africa lacks an overall anti-corruption strategy and the South African legislation relating to corruption and bribery, although only enacted in 1992, is far behind the legislation of the major international countries.”

The trend of modern international legislation is the “unbundling” of corruption, in terms of which various specific corruption actions and corrupt practices are defined and prohibited. The South African act drew largely on the Nigerian Corruption Practices and Other Related Offences Act that in turn had relied on legislation enacted in Malaysia, Singapore, Hong Kong, India, Lesotho and Kenya.

The adoption of the new Bill would see an unbundling of corruption in which corrupt practices and related offences are specified across a wide spectrum. At the time the head of the National Prosecuting Authority, Bulelani Ngcuka, commented:

“Commendably, the new Act will also address the fraudulent acquisition of private interest, the problem of unexplained income (assets) of those living beyond their means, abuse of public office for gratification, the failure to report corrupt transactions and the corruption by South African citizens or public officials in connection with business or foreign states or international organizations. The developments if accepted and implemented represent a milestone in our efforts to place a regulatory straightjacket on corrupt activities. I hope that ultimately the legislative regime will provide clarity in respect of future corruption, several cases of malfeasance and some untenable forms of conflict of interest” (Ngcuka 2002).

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7.6.2 Civil Society Responds

On 18th April 2002 an explanatory summary of the new Corruption Bill was published for comment. The public interest NGO, Idasa convened a number of meetings with civil society stakeholders to discuss the draft Bill and potential submissions to the Committee. Idasa’s substantive submission tackled the crucial question of the regulation of private funding to political parties, even proposing a draft chapter for the Bill on this issue. Endorsed by NGOs such as the Institute for Security Studies, the Black Sash, The South African Catholic Bishops’ Conference, Social Law project at the University of the Western Cape, Human Rights Committee, and the Open Democracy Advice Center, Idasa’s argument for regulation was to minimize the undue influence of money on politics, while at the same time recognizing that money is an important feature of the modern political landscape. The argument was based on an argument of equality and the right of freedom of expression:

“To this end, various social and political practices and functions may require regulations to make sure that the average citizens right to expression is not constrained or drowned out: As a democratic right, freedom of expression assumes the equal opportunity to speak and be heard in order to contribute to political debate by providing information and opinion that will persuade. In an unregulated system only the wealthy are able to do this in a non transparent manner, and in a rights based culture like ours, this derogates from the principle of political equality and provides an unfair advantage to those who are able to donate.”

Responding to Idasa’s submission the Justice Committee chair, Johnny De Lange, argued that the criminal offence of corruption as envisioned by the Act would incorporate all forms of corruption, including those involving political parties and elected public representatives, particularly MPs. He pointed out that the general clauses of the bill as it stands would apply as much to political parties as it would to public servants or private sector companies. Thus any official of a political party, involved in say, bribery, as defined in the bill, will be guilty of an offence. De Lange conceded that the Bill did not deal with the reporting of donations to political parties
and related offences and suggested it would be difficult to incorporate a code on political party funding, as suggested by Idasa, as this would require the agreement of all the parties and the introduction of a new chapter. He did not think it was practical to include political party funding in the Bill simply because there was nothing to hang offences on, i.e. because there was no system governing party political funding, it would not be possible to simply create a series of offences. Idasa’s Richard Calland said that he accepted the point made, but "we are hoping that the justice committee will recognise the importance of this issue and chart a way forward perhaps with a recommendation that it be considered in terms of other legislation".16

Concern about corruption in political parties was of growing concern. In July 2003, Transparency International’s first Global Corruption Barometer survey polling 30 000 people in 44 countries (including South Africa) found that in three countries out of four, political parties were singled out as the institution from which citizens would most like to eliminate corruption. 21.1% of South African respondents mentioned political parties, with only the police as an institution targeted for reform trumping this number at 23.8% (TI 2003). In late 2003 Idasa and two South African citizens, Judith February and Brett Davidson would take four South African political parties (ANC, DA, IFP and NNP) to court. In Heads of Argument Idasa sought to establish the principle that political parties were obliged to give details of their substantial private donations to those asking for that information and that disclosure of donations (over a certain threshold of R50 000 – substantial enough to influence a political party, its office bearers and its members) is required for the proper functioning of a multiparty system of government and to ensure accountability, responsiveness and openness.17

In November 2003 I prepared an expert affidavit for Idasa’s court case and argued, based on the emerging international anti-corruption debate, the centrality of the regulation of the funding of political parties to the corruption issue. Flowing from research conducted as part of the 2004 Global Integrity study, the affidavit noted that:

“...the most glaring omission in South Africa in relation to electoral processes and accountability provisions in general is the fact that there are no specific

rules around the disclosure of private funding which political parties receive. Indeed there appears to be a conspiracy of silence between corporations and political parties as well as foreign governments who fund various parties. In this sense accountability is eroded between political parties and citizens who want to know who is funding their political bosses and which policy issues foreign or corporate interests may determine. There seems to be an unspoken understanding that providing funding to a political party, particularly one in power, may positively influence one’s chances of securing a particular contract. Whilst no-one denies that political parties need funds to run an election, there appears no will to disclose who funds whom to the public and in this way open up scrutiny for potential conflicts of interests” (Camerer 2003).

The affidavit concluded with a plea for accountability based on citizen’s access to information: “If knowledge is power, and corruption can be defined as the abuse of public power for personal gain, it is crucial that citizens re-access the power that is being exercised in their name by politicians, in order to hold their government’s accountable. This they can do through information. A refusal by political parties to disclose information about their private funding creates the potential for abuse when money and power coincide. This puts into question the credible commitment of political players to openness and transparency. The consequent opaqueness of the political process favours special interests that can buy access as well influence the political process in inequitable, unjust and potentially criminal ways that harm the public interest and adversely limit the ability of citizens and the public to participate in democratic process” (Camerer 2003).

On 20th April 2005 judgment was delivered in the Cape High Court. Idasa’s application to access the records of private donations made to the four biggest political parties in South Africa under the Promotion of Access to Information Act 2000, was dismissed. Recognizing however that the litigation was brought in the public interest and the importance of the principles of transparency and openness at stake, Judge Griesel made no order as to costs (Idasa 2005). While not granting the relief sought by Idasa and dismissing the application, Judge Griesel nevertheless found that the applicants had made out a “compelling case – with reference to both
principle and to comparative law – that private donations to political parties ought to be regulated by way of specific legislation in the interest of greater openness and transparency.” Because of the complexity of the issues involved and the myriad of ways in which they can be dealt with by legislation, the Judge noted that it is “precisely because of these complexities that the court is, in my view, ill equipped – compared with the legislature – to perform the task that the applicants are seeking to impose on it.”

At a press briefing on the case, Idasa stated that having carefully considered the judgment of Justice Griesel, the organization had decided not to appeal. “We do not abandon our assertion that the public have a constitutional right to know who privately funds political parties – far from it – but accept that for the time being at least, political parties should be given a further opportunity to fill the lacuna that exists in the anti-corruption policy and legal apparatus by processing appropriate legislation through parliament.” The statement went on to note how the ANC’s position in court had been to either dismiss the case or alternatively call for a stay of the proceedings “so as to allow for the political and legislative process to follow the proper course necessary for the adoption of a national policy through legislation regulating the funding of political parties within the Republic of South Africa” stating in its Heads of Argument that “the question of regulation and control of private donor funding of political parties should be addressed and implement through a legislative process which will embody national policy perspectives and the balancing of the rights interests of all persons, including the electorate, political parties and their donors.” The ANC had essentially committed itself to take the issue back to the legislature something Idasa noted, “We see no good reason not to accept the good faith of its stated position to the Court…Like the judge, we too take seriously the assertions made by the ANC on oath…and look forward to the parliamentary process.”

Idasa recalled a speech made in the National Assembly in 1997 when the ANC introduced the bill that subsequently became the Public Funding of Represented

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18 Case No 9828/03 in the High Court of South Africa (Cape of Good Hope Provincial Division) Judgment Delivered 20 April 2005.
Political Parties Act 1997. Then Minister for Constitutional Development Valli Moosa had said:

“For political parties to perform in terms of the Constitution, that is to be democratic, to be accountable, to be responsive to the people of this country, we need to ensure that parties do not act merely as fronts for some or other powerful financial backer. That is the danger that our democracy could face, as other democracies have in other parts of the world. Therefore, this Bill attempts to ensure that we reduce the dependency of political parties on one or two powerful financial backers, and thereby reduce the possibility of the subversion of political parties and also the subversion of Parliament itself and of our democracy.”

Idasa noted that in the corruption trial of ANC financier Schabir Shaik, evidence was given that Shaik had made substantial donations to the ANC during the late 90s and early 90s, and that these “show the on-going danger of secret, unregulated private funding of political parties. In both instances, the public received this information too late for it to be able to evaluate the impact it may have had on policy – such as the golf estate development or the notorious arms deal – and only know because of the criminal trials.” As of April 2008 the ANC dominated legislature has yet to have a serious discussion on the regulation of private contributions to political parties, and for now the conspiracy of silence continues. In comprehensively reviewing the corruption related legislation in South Africa, it appears the opportunity was missed to tackle reform in this key area.

7.7 Conclusion

Having followed deliberations around the Bill closely in parliament it is clear that this was one of the most conceptually challenging laws for legislators to grapple with. Committee chair, Adv Johnny De Lange, was clearly not going to rush the law through until each section had been thoroughly interrogated, clearly defined and teased out so as not to create a potential loophole in the law. The deliberations in the committee make for fascinating reading and are persuasive of the seriousness with which members of parliament, across the political spectrum, applied their mind taking into account domestic and international considerations.
Finally, following two years of deliberations and ten drafts, the new Prevention and Combating of Corrupt Activities Act was finally completed in December 2003 and came into force on 27th April 2004, on the 10th anniversary of South Africa’s transition to democracy. The purpose of the Act is:

To provide for the strengthening of measures to prevent and combat corruption and corrupt activities; to provide for the offence of corruption and offences related to corrupt activities; to provide for investigative measures in respect of corruption and related corrupt activities; to provide for the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts; to place a duty on certain persons holding a position of authority to report certain corrupt transactions; to provide for extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities; and to provide for matters connected therewith.

The significance of new law eventually being signed on the tenth anniversary of South Africa’s successful transition to democracy should not be underestimated as a statement of political will on behalf of the executive to fight corruption. This comprehensive law was crafted against the backdrop of the finalization of the United Nations Convention Against Corruption and takes into account other regional anti-corruption protocols such as those developed by the OECD, SADC and the African Union. It would be used by the National Directorate of Public Prosecutions to charge former deputy president Jacob Zuma on three counts of corruption (following his dismissal by President Thabo Mbeki on 14th June 2005). The ongoing criminal investigation into Jacob Zuma is not dealt with in any detail in this thesis.

While the national anti-corruption strategy was released six months later than originally intended, to the extent that the findings and recommendations from the JIT Report into the Strategic Defence Procurement Packages were integrated into the final strategy document, this delay may have been beneficial. South Africa, for the first time, had a comprehensive law to tackle corruption and related offences, wherever they might appear. Whilst the law and the threat of its impending sanctions may have come into effect too late to prevent any corruption and related offences relative to the
arms deal, it is clear that the its drafting was influenced by the backdrop of the criminal investigations and cases that emanated from the Joint Investigation Team and its report.

While the new law is comprehensive, it fails to include specific provisions relating to the regulation of the private contributions and sources that fund political parties (although this was argued by civil society in its submissions to parliament on the legislation). Some would argue that this lacuna in the anti-corruption architecture seriously questions the political will address the corrupting influence of money in politics, a thread which weaves itself through the arms deal allegations. When it comes to knowing who funds the political process in South Africa, the corrupting nexus between power and money, thirteen years on, this remains a shocking lacuna in an otherwise impressive array of anti-corruption mechanisms. And it is something that the ruling party (as well as other parties in parliament) seemingly has no real interest in remedying. The area of political party contributions would come to dominate civil society activism around the issue of corruption as this gap would continue to be exploited by the corrupt across political parties. Allegations of corruption in the arms deal have continually harped on whether kickbacks from arms companies to secure lucrative contracts were possibly funneled into ANC party coffers, rather than purely individuals within the process who might have benefited from the deal. At this point there is no way of knowing.

This concludes our survey of recent anti-corruption reforms in South Africa. Having addressed both the theory of corruption and its control (Part One) and the policy landscape with regards to anti-corruption measures in South Africa (Part Two), the stage is set to explore the practice. This will be done in Parts Three and Four that look at the arms deal as a case study of the effectiveness of corruption and accountability measures in South Africa.
PART THREE: THE ARMS DEAL

Chapter Eight: Anatomy of the Arms Deal

8.1 Introduction

The primary purpose for undertaking a comprehensive case study of the Strategic Defence Procurement Package (SDPP) or “arms deal” is to document the workings in practice of the institutions and mechanisms that comprise the anti-corruption architecture in South Africa. In particular, the following chapters of the thesis examine the challenging role of parliament and its committees in exercising oversight over the executive branch of government. This is an aspect that has not been particularly highlighted by any of the theories of corruption and our close attention to it, gives a new emphasis to the debate. The South African experience in this regard has implications beyond our borders.

Why focus on the arms deal, admittedly an unusual case of grand corruption?

As an illustration of this aspect of the corruption equation, the arms deal chose itself. Since allegations of corruption in the arms deal first surfaced in 1999 involving senior cabinet figures, no other issue has so dominated the political landscape nor so acutely tested the legislative, policy and institutional mechanisms in place in democratic South Africa to prevent abuses of power, nor the political will of the government to confront corruption within its ranks.

While a number of other politically significant cases of corruption emerged during the first decade or so of South Africa’s democratic transition, it is the arms deal that has tested several tenets of South Africa’s constitutional democracy, and continues to. From challenges to the independence of the criminal justice system and the so-called Chapter Nine institutions such as the Public Protector and Auditor General, to freedom of the media, even the future presidency of South Africa has been thrown wide open by the ongoing criminal investigation into the deputy president of the ANC and former deputy president of South Africa, Jacob Zuma.

1 For ease of reference, Appendix 3 gives the names of individual role-players and institutions that appear in the case study.
The arms deal case starkly demonstrates the limits of the institutions, laws and practices that are in place to prevent abuses of power in South Africa and points to the importance of taking other factors into account such as political will, political rivalries, political culture and context, all factors that may play a role in influencing the effectiveness of anti-corruption agencies.

8.2 Focus of the Case Study

The case study covers the time period from the initiation of the Defence Review process in 1996, allegations of and investigation into alleged corruption by the Joint Investigation Team (JIT), through to the firing by President Mbeki in June 2005 of his deputy president, Jacob Zuma. It does not cover in any detail the criminal trials of Tony Yengeni and Schabir Shaik that resulted from the JIT investigation, nor the Hefer Commission of Inquiry that took place during this period. Rather the focus is on events that took place in parliament as the key institution constitutionally tasked with upholding democratic accountability, and a body meant to represent and protect the public interest specifically by overseeing executive powers.

The case study is relayed from the perspective of an ordinary member of the public who may have followed the public debate and coverage of the arms deal both in the media and in parliament. It does not go into any technical detail of the arms industry, procurement processes, nor arguments around offset agreements. Rather, the activities of the legislative branch of government (namely the Speaker, the ruling party, opposition political parties and parliamentary committees, in particular the Standing Committee on Public Accounts and the Ethics Committee) are examined telling a revealing story of how the South African government, with its oft-stated commitments to good governance, chose to respond to an actual case of alleged corruption. With the institutional mechanisms at its disposal, this would lay bare the extent to which, behind those mechanisms, there exists the political will to confront corruption.

Lessons learned from the arms deal case study may inform the theoretical development of South African as well as international approaches to fighting corruption. The case study highlights how fiercely the political culture within the
ruling party, namely that of loyalty to the party, impacts on the functioning and integrity of various democratic institutions. This notion is alluded to in LeVine’s explication of political corruption, dealt with in Chapter Two. The arms deal has been chosen as it touches on and tests both the existence and effective functions of the systems that promote democratic accountability, described in previous chapters.

8.3 A Test for Democratic Accountability

Would the ANC led government pass the toughest test it had faced yet in terms of its political will and commitment to fighting corruption wherever it might appear? The stakes were high.

The “litmus test” for democratic accountability in South Africa is how the good governance NGO, Idasa, described the way in which the government would deal with the allegations of high level corruption, implicating leading ANC politicians including the deputy President and a former minister of Defence. Others noted that the investigation into the arms deal was “set to test the country’s anti-corruption and oversight institutions to their limits.”

The political will of the ruling ANC, the government and particularly President Thabo Mbeki faced “a decisive test of their integrity and will to combat corruption in the attitude they adopt to the investigation into the R43.8 billion arms deal.”

Aside from upholding the country’s reputation for honoring contracts and preventing corruption, a proper investigation was argued to be a “defining moment in the current state of our democracy.” The credibility of the investigation was said to “substantially determine the extent to which South Africa can, and does, in future years advance good governance in the region as a whole.” Whatever other scandals South Africa may have been implicated in since the dawn of its democracy “none could have been as damaging to the country’s image abroad as these allegations involving the arms procurement.” Indeed, a senior source in the investigation

2 Mail and Guardian, 4-9 November 2000.
suggested that if the scale of corruption was as widespread as some of the evidence suggested the scandal “could even bring down the government”.

8.4 Arms under Review

In April 1998, the Defence Review process that originated from the 1996 White Paper on Defence, came before parliament. Two years of widespread, transparent and public consultation had characterized the Defence Review whose objective had been three-fold: to review the current defence force capabilities, determine the force size and equipment for a democratic South Africa and both make recommendations as well as provide for a vision on optimal force size and equipment.

The end of apartheid had brought with it a vision of peace and stability in the region. Nationally, the focus was on the Reconstruction and Development Programme (RDP) that would produce internal stability and growth. For this reason both the White Paper and the Defence Review argued that South Africa could significantly reduce defence spending and rather concentrate on the establishment of a small (core) conventional regular force and a large part-time force, which could be mobilized when required (Le Roux 2004). It was anticipated that the SANDF would progressively withdraw from the internal policing function and that a force of about 1,000 soldiers – with air, maritime and medical support units – would be sufficient for the country’s international and regional peace support obligations. These planning assumptions, combined with budgetary restrictions, thus led to the approved establishment of a defence force of some 55,000 uniformed regular soldiers focused on the maintenance of a core conventional capability (Le Roux 2004).

While the White Paper and Defence Review process had presented a coherent defence policy framework, by 2004 it was clear that the vision presented in both documents had not been fully realized. This was for a variety of reasons that will not be discussed here save to say that many of the force design assumptions had been wrong and that as peacekeeping on the African continent became an important focus for the SANDF, the final Strategic Defence Procurement Package that was agreed to in 1999 had been largely inappropriate.

During the Defence Review NGOs such as the Coalition for Defence Alternatives (CDA) had argued persuasively that there was no conceivable foreign military threat to South Africa. Rather the real threat to security and the transition to democracy was poverty. It would be CDA who in June 1999 received a memo via ANC intelligence operatives from Concerned ANC MPs of allegations of corruption in the arms deal (Crawford-Browne 2007).

8.4.1 Parliament’s “Approval” of the Deal

One of the myths of the arms deal saga is the oft-quoted notion that “parliament approved the arms deal when it approved the force design contained in the Defence Review”, a mantra used repeatedly by those wishing to defend the deal. This argument does not hold water. In April 1998 while Parliament approved the force design contained in the Defence Review, it did not however approve the final procurement package. Rather parliament approved a “vision” which would change over time, be subject to parliamentary oversight, and which the Department of Defence itself accepted was not affordable because of budgetary constraints (Idasa 2001). In May 1998 Shamin “Chippy” Shaik, the recently appointed Chief of Acquisitions at the Department of Defence told parliament’s joint standing committee on Defence that South Africa could not afford the “core force” acquisitions proposed in the Defence Review.

While Parliament’s “approval” was used to add credibility and legitimacy to the deal, it was not necessarily so clear-cut. The Defence Review did not motivate for an increase in defence spending. On the contrary, the Review stated that the Department of Defence expected its budget to remain constant over several years at R9.7 billion in 1998 Rand value. Leading defence experts such as Dr Jakkie Cilliers of the Institute for Security Studies were surprised at the eventual size of the deal. In March 1998 Cilliers wrote “realistically there is little, if any, chance that South Africa could afford the approximately R28 billion packages that are being discussed…the country can probably only afford to procure foreign equipment to the tune of R8-9 billion” (Cilliers 1998).
Thus, when parliament approved the Defence Review, it did not approve an increase in defence spending and as such parliament was never asked to approve the current arms package (Idasa 2001). Decisions on the final procurement package would be taken outside of parliament, namely by the executive ministerial committee (MINCOM). On the largest public expenditure in democratic South Africa, parliament would be precluded from the start from exercising effective oversight.

8.5 The Procurement Process

Once recommendations for the SDPP had been “approved” by parliament, the framework for procurement, in particular the evaluations systems for defence contracts, was established. An elaborate tender process was followed:

- The evaluation of tenders was first considered by four committees, the first assessing the tender in terms of its technical merits, the second considering its financial details, the third considering its Defence Industrial Participation (DIP) benefits, and the fourth its National Industrial Participation (NIP) benefits.

- These results were forwarded to the Strategic Offers Committee (SOC), which operated as a coordinating committee.

- The results of SOC were forwarded to the Armament Acquisition Steering Board (AASB), which in turn submitted its recommendations to the Armaments Acquisition Council (AAC).

- The AAC’s recommendation was forwarded to the Ministers’ Committee (MINCOM), which in turn reported to the Cabinet.

In early July 1998 different evaluation teams met to consolidate offers with the highest score, according to various criteria, and recommend the preferred suppliers. Specific criteria for the tenders related to Industrial Participation (IP) programs, notorious as a negotiating strategy in the defence trade to “offset” the costs of unusually large arms purchases by requiring that a percentage of the contract value be invested in the economy of the purchasing country. This investment can include participation of local companies as subcontractors in the main project, export of
related or other industrial goods, or investment in plant, facilities, or people, thereby stimulating economic activity. All substantial arms purchases were subject to both Defence Industrial Participation (DIP) and National Industrial Participation (NIP) obligations (Botha 2003). The stated tender requirements for offsets set by the South African government were that DIP and NIP should at least equal the value of the purchase contract. As the interest among tenderers was so high, IP became a key differentiating issue, and the agreements that were eventually signed were for DIP of $2.4 billion (60% of the contract value) and NIP of $14 billion (350% of the contract value), totaling more than four times the value of the signed contracts (Botha 2003).

At the end of August 1998 a Cabinet subcommittee accepted recommendations relating to the preferred bids. On 21 October 1998 a presentation of the Strategic Defence Packages was made to Cabinet where it was resolved that the committee dealing with procurement must have further discussions with the Finance ministry regarding the recommended packages and report back to cabinet. On 18 November 1998 Cabinet approved the program costs and the preferred suppliers of defense equipment were announced.

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<tr>
<th>Supplier</th>
<th>Product</th>
<th>Cost (Rbns)</th>
<th>Investment (Rbns)</th>
<th>Exports (Rbns)</th>
<th>Local Sales</th>
<th>Jobs</th>
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<tr>
<td>Germany</td>
<td>4 frigates</td>
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<td>2.1</td>
<td>11.8</td>
<td>10 153</td>
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<tr>
<td>Germany</td>
<td>3 submarines</td>
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<td>6.3</td>
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<td>Italy</td>
<td>40 helicopters</td>
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<td>Britain</td>
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<td>24 Hawks</td>
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<tr>
<td>Sweden</td>
<td>24 Gripens</td>
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Source: Business Day 19 November 1998

There was no indication of any additional costs being brought to Cabinet’s attention. The International Offers Negotiating Team (IONT) established by cabinet to negotiate achievable funding arrangements to finalize the contracts, sprang into action. Minutes from a MINCOM meeting held on 20 January 1999 note that initial discussions by the IONT with the project team indicate a possible increase in the overall procurement cost from that presented to the cabinet on 18 November 1998. The Department of Defence proposed that all program management costs be addressed outside the
approved procurement cost and undertook to ensure that all technical program related costs would be accommodated within the project cost.

In March 1999 an Affordability Team was established within the Finance Department to consider and report upon the cost implications of the proposed transactions and in particular what negative consequences entering into the transactions might have for the South African economy. This report was presented to MINCOM five months later on 31 August 1999. The report noted the cost of the deal as being “substantially higher than originally presented to Cabinet” but that affordability was ultimately a question of political choice. This echoes a sentiment raised by a defence analyst from the Institute for Security Studies: “In the case of major procurement decisions, the final decision is taken within Cabinet and is essentially a political and economic, rather than a technical decision” (Cilliers 1998).

8.6 The Final Strategic Defence Procurement Package

On 15 September 1999 cabinet announced its decision and reasons (such as age) to procure the following military equipment:

• **Nine dual-seater Gripen and 12 Hawk aircraft** from British Aerospace/SAAB to replace the current Cheetah and Impala aircraft. A further option has been taken on the balance of the 12 Hawks and 19 single-seater Gripens;

• **Four patrol corvettes** from the German Frigate Consortium to replace the present ageing strike crafts, which are more than 30 years old;

• **Thirty light utility helicopters** from the Italian helicopter manufacturer Augusta, which will replace the Allouette helicopters which have been in service of the air force for more than 30 years;

• **Three submarines** from the German Submarine Consortium, which will replace the ageing Daphne submarines, which have been in service in the navy for more than 30 years.

The choice of the equipment was framed by reference to the Defence Review process which had concluded that the specific force design required for South Africa should be a high technology core force, sized for peace time but which could be expanded in
the face of any emerging threat. In addition various critical factors such as technical capability, the value of the equipment, the industrial and economic development offers made, as well as examining the affordability of the package given the socio-economic imperatives of the country, were apparently taken into account in selecting the preferred suppliers.  

8.6.1 The Cost of the Deal

Regarding the cost of the deal, the 15 September 1999 statement read:

“The cost of the equipment package is R21.3 billion over the next 8 years. If the option to procure additional equipment is exercised, the total equipment cost will rise by R8.5 billion to R29.9 billion over 12 years.”

These costs included “statutory cost like VAT, custom duties, freight, export credit guarantees and program management”, but not the actual financing of the deal. These additional and substantial costs would only come to light over a year later in October 2000 when parliament’s Standing Committee on Public Accounts (SCOPA) quizzed DoD officials and the true cost of the deal would be revealed to the public. With regard to the full cost implications, although the nominal initial capital commitment was R29.992 billion, taking into account likely adverse exchange rate movements, the impact of escalation clauses in the contracts, and interest obligations, the ultimate outflow of currency from South Africa was likely to be well in excess of R50 billion (IDASA 2001).

The deal had been sold to the public as generating investment worth R104bn through offset agreements and Industrial Participation (IP) that would create 65 000 jobs. In terms of affordability of the package, given the socio-economic imperatives of the country, the statement announcing the deal noted “Cabinet is fully satisfied regarding the offset arrangements attached to this package, which will benefit the economy and advance socio-economic interests of the country.” The press release did not state that the transactions were subject to any risks. However, the affordability report presented to MINCOM in August 1999 had foretold that the transactions would result in payment obligations well into the future and emphasized three important risks.

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8 GCIS press statement 15 September 1999: Cabinet decision on strategic defence procurement.
namely: possible adverse foreign exchange movements; the non-materialization of national and defence industrial participation benefits and the impact of interest obligations. The report had stressed that the transactions held adverse financial implications for the country under the best-case scenario and in relation to the latter two risks noted:

“… The materialisation of either one of the two risks analysed - larger than expected interest rate shock in relation to the announcement, or the failure of the vendors to meet a significant proportion of their NIP commitments - is likely to lead to the macro-economic impact of the program being significantly negative in comparison with the baseline scenario.”

The report concluded with two further warnings:

“The sums involved are extremely large; they involve fixed contractual commitments extending over long periods with high breakage costs; they are heavily import-based; and their costs are off-set by a set of associated activities (the NIPs) which cannot be guaranteed.”

“These characteristics create a set of important and unique risks for Government … ultimately the decision about expenditure levels really constitutes a decision about Government’s appetite for risk.”

In short, MINCOM was pertinently warned about the negative impact that the transactions would have on the economy (IDASA 2001). However, the South African public, it appears, were not told of these risks.

8.6.2 Off-Sets and Undisclosed Risks

The expression “off-sets” is used to refer to benefits intended to accrue to a country as a consequence of arms transactions. Thus the main contractors were required to indicate in their tenders what economic benefits they would commit themselves to providing to South Africa, which would effectively off-set the enormous costs of arms procurement. Off-sets in industrial participation commitments for the arms deal were estimated at about R110 billion (later reduced to R104 billion) and would apparently create more than 65 000 jobs. The off-sets formed a major (if not the major) basis for
persuading Parliament and the South African public that the transactions were desirable (Idasa 2001).

In the September 1999 press statement the “affordability” of the transactions were touted on the basis that: “Over the medium term, benefits of NIP and DIP fully off-set economic and fiscal costs of the procurement” and “Government will be able to cover expenditures required without altering its existing deficit target.” Although the briefing document saw implementing National Industrial Participation (NIP) and Defence Industrial Participation (DIP) as a critical area for attention, it gave no idea as to the tenuous nature of those supposed benefits. Rather Cabinet noted that it was “fully satisfied regarding the offset arrangements attached to this package, which will benefit the country and advance the socio-economic interests of the country.”

Idasa would describe the media briefing of September 1999 as a relatively significant “misdescription of the true position.” The Affordability Team’s report gave a generally negative opinion on the implications which the transactions would have on the economy while the media briefing, on the other hand, suggested that the expenditure was fully justified by reference to the benefit of the off-sets (Idasa 2001).

**8.6.3 The Problem with Off-Sets**

Idasa’s report had raised the legitimate question: If it is indeed possible, by spending R29.992 billion, to achieve economic benefits of R104 billion, why does every developing country in the world not spend its entire budget on arms?

The answer seems to lie in the fact that off-sets are an internationally discredited manner of promoting arms transactions. Offsets are notorious as a scam used by the armaments industry, with connivance of politicians, to fleece the taxpayers of both supplier and recipient countries. They are apparently prohibited in civil trade agreements between European Union and North America because they are impossible to monitor, distort markets and are notorious for corruption.

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9 GCIS press statement 15 September 1999: Cabinet decision on strategic defence procurement.
10 Terry Crawford-Browne, The Cape Times, 2 February.
Could the government have been taken for a ride by the international armaments industry? And would the South African public be footing the bill for arms that would never be off-set by NIPs or DIPs?

Four major concerns with regard to NIPs and DIPs would be neatly summarized in SCOPA’s 14th report on the arms deal, and are listed below:

The first relates to their enforceability. While it is so that the contractors were required to commit themselves in writing to the NIPs, it is doubtful whether these commitments could ever be enforced in any Court.

Second, whilst penalty provisions in the contracts should ensure that the successful tenderers complied with their obligations to provide the promised NIPs, the penalties were small by comparison to the costs of the transactions. In most instances the penalties were 10% of the value of the tender. It is additionally possible that many tenderers may have inflated their tender prices so as to cater for the risk of their having to pay the 10% penalties. If so, any defaulting tenderer could escape its obligations to provide the NIPs merely by paying the 10% penalty stipulated.
Third, in relation to DIPs it is not clear how many beneficiary companies are genuinely South African companies. SIEMENS, for example, is a preferred sub-contractor in relation to certain of the electronic systems. Benefits accruing to any local SIEMENS company may well leave South Africa in the form of dividends payable to overseas shareholders.

Finally, it has been suggested that certain of the tenderers, when required to commit themselves to providing off-set benefits to South Africa, merely obtained the names and identities of companies who were in any event considering investing in South Africa and thereafter (after entering into appropriate agreements with those investing companies) claiming those benefits as the promised benefits under their tenders. If this is correct, then any benefits that may accrue to South Africa, are not causally attributable to the arms transactions.

Despite the allegations of corruption that would surface in September 1999, Cabinet Memorandum No 14 was issued on the cost of the deal and permission was granted to the DoD to sign the contracts. On 3 December 1999 five main procurement contracts for four corvettes, three submarines, 28 Gripen fighters, 24 Hawk jet trainers and 30 light utility helicopters - representing the largest arms procurement purchase in South Africa’s history - were signed for a cash price of R30.3 billion.

8.7 Allegations of Corruption

In June 1999 the Coalition for Defence Alternatives (an NGO that had participated in the Defence Review process) was approached by ANC intelligence operatives on behalf of ANC MPs who believed the weapons expenditures represented a betrayal of the socio-economic upliftment anticipated by South Africa’s impoverished communities. They declared they had knowledge and evidence of massive corruption involving senior politicians and government officials (Crawford-Browne 2000, 2007). The CDA's response had been that this would be in keeping with international experience of corruption relating to the armaments industry, but that the CDA was not competent to judge such allegations. The evidence would be handed over in November 1999 to the Heath Special Investigating Unit to substantiate the allegations of corruption (Crawford-Browne 2007.)
In early September 1999, Patricia De Lille, then a Member of Parliament for the Pan African Congress (PAC) received a briefing document full of allegations of corruption in the arms deal signed by “Concerned ANC MPs”. In general, the allegations in the memo, which has a somewhat urgent and wild accusatory tone, point to significant flaws in the procurement process and is highly questioning of the off-set agreements. The document asks:

“What is happening here? Who are the beneficiaries within the South African private sector? Are government officials involved? Are the officials of the negotiations involved? Why the secrecy?”

The briefing document contained a host of connections and allegations of wrongdoing against senior ANC members and government officials who had apparently enriched themselves during the arms acquisition program. The document points to actual instances of alleged corruption by top officials and leading ANC politicians including a former minister of defence, as benefitting unduly from the deal. The memo alleged that millions of pounds went either to senior ANC members or their families through a web of companies that won lucrative positions as sub-contractors, including speculation that some of the money that changed hands in the arms transactions found its way into one political party’s coffers. Among those accused of benefiting illegally from the deal are Joe Modise, defence minister at the time; Tony Yengeni, the ANC chief whip, and Chippy Shaik, head of procurement at the Defence Department, and brother of local arms industry business man and financial advisor to Jacob Zuma, Schabir Shaik.

To give some idea of specific allegations contained in the document, under a section dealing with SAAB/Bae “Allegation of Corruption”, it notes:

“It is alleged that Mr Tony Yengeni, ANC Chief Whip in the National Assembly…is involved with British Aerospace/SAAB. Therefore the joint Standing Committee on Defence is not playing its watchdog role on arms procurement. Just before government confirmed British Aerospace as a

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11 1999 Briefing to honorable Patricia De Lille, Member of Parliament.
12 Mail and Guardian, 2-8 February 2000.
preferred bidder Tony Yengeni bought a Mercedes 4x4 ML 320 Auto. It is alleged that the money came from British Aerospace.”

The conclusion of the briefing memo (full of grammatical errors, along with the rest of the document) is worth quoting in full:

“South African companies, interested groups, senior government officials and members of parliament who are involved in the arms deal are corrupting the democratic process in South Africa. It also appears that these companies, groups and individuals are using the arms deal to create and finance an economic and political center within the ANC to undermine the President Thabo Mbeki. The absence of logical explanations for the armament acquisition, total lack of transparency about the offset proposals, and the industrial’s notorious corruption makes South Africa arms purchase programme a matter of enormous concern. Accordingly we endorse suggestions of a full (public) judicial investigation into the weapons acquisition and offset process. Further we call on upon the cabinet to halt any further acquisition programme until a national consensus has been reached on these issues. We support the most reverent Njongonkulu Ndungane Anglican Archbishop of Cape Town. Annexure F. Concerned ANC MPs.”

Having received the memo, PAC MP Patricia De Lille raised her concerns about the arms deal in parliament, an action that apparently resulted in panic by government ministers and officials to try and identify the “whistleblowers” with the minister of Defence even attempting, but failing, to browbeat Archbishop Ndungane into revealing their identity (Crawford-Browne 2000).

In November 1999 De Lille and Crawford-Browne (co-convenor of the CDA) held a press conference near parliament announcing that the evidence they had received had been forwarded to the high-profile anti-corruption fighter, Judge Willem Heath, head of the Special Investigating Unit. The decision to involve Heath was apparently endorsed by 16 organizations, including civil society organizations such as the Black Sash and the South African Non-Governmental Organization Coalition (SANGOCO) whose endorsement had noted, “Corruption is the antithesis of good governance and
the allegations must be fully investigated by a competent authority, and alleviation of poverty must take priority over weapons of war” 13

Jonathan Shapiro 9-16-1999

How would the government, in particular the executive and parliament, respond to these allegations?

8.8 Responding to the Allegations

Following the numerous allegations regarding possible irregularities pertaining to the awarding of contracts raised by De Lille and others, the government was quick to respond. On 28 September 1999 the newly appointed Minister of Defence, Mosiuoa “Terror” Lekota, approved a Special Review by the Auditor-General into the Strategic Defence Procurement package. The Special Review was included as part of the Auditor-General’s regulatory audit of the DoD. In conducting the review the Auditor-General’s office confirmed it was liaising with both the Office for Serious Economic Offences (predecessor to the Directorate of Special Operations) and the Heath Special Investigating Unit, as allegations of irregularities had been made to both these bodies

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that were reportedly waiting for the Auditor-General’s report before deciding on possible further action.

8.9 The Auditor General’s Special Review

The Special Review of the Office of the Auditor General - a Chapter Nine institution whose integrity and independence is protected by the constitution and is obliged to report regularly and directly to parliament through SCOPA - would come before parliament’s Standing Committee on Public Accounts (SCOPA) in September 2000. This review, conducted under the leadership of South Africa’s first black Auditor-General, Shauket Fakie, who assumed his position on 1 December 1999, would open the way for a comprehensive investigation into the arms deal allegations.

In September 2000 - a year after allegations of corruption had been raised in parliament by De Lille - the Auditor-General, Shauket Fakie, tabled the Special Review of the Strategic Defence Procurement Package [RP 161/2000]. Parliament’s main oversight committee, SCOPA would scrutinize this document closely. Chaired by opposition IFP MP Dr Gavin Woods, SCOPA would respond by releasing what became the infamous 14th Report, calling for an independent multi-agency investigation into allegations of corruption in the arms deal. In summary the AG’s Special Review found that there had indeed been several irregularities in the procurement process.

Serious shortcomings in the arms deal acquisition process were found in at least five areas, some of which will be looked at in more detail:

1. Conflicts of interest among decision-makers
2. The awarding of the fighter/trainer contract to BAe systems
3. The inadequacy of the offset guarantees
4. The disregard for personnel requirements to operate the equipment
5. The allocation of a naval sub-contract to French interests at a very substantial increase in costs over a local company tender
8.9.1 Conflicts of Interest

“Conflicts of interest” is defined “a situation in which a person, such as a public official or employee or a professional, has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties” (JIT 2001:271). The concern here related to Shamin “Chippy” Shaik, the head of defence procurement, and his inadequate recusal from discussions involving his brother Schabir Shaik’s company that had interests in the defence industry. Chippy Shaik clearly had a conflict of interest as chief of acquisitions. This was by virtue of his brother Schabir’s interests in the Thomson group and African Defence Systems (ADS) a company that he held through Nkobi Holdings, that was vying for a sub-contract in the arms deal.

On 4 December 1998 “Chippy”, as Chair had declared his conflict of interest to the Project Control Board, asking to recuse himself from the discussion on the combat suite element of the corvette and submarine requirement. However the minutes show that Shaik actively participated in discussions relating to the evaluation, selection and appointment of the main contractors and subcontractors in respects of which ADS and Thomson had been contenders and that led to the ultimate awarding of contracts to the said companies. He failed to recuse himself properly (JIT 2001:287).

Jonathan Shapiro 6-3-2000
8.9.2 Change in Tender Evaluations

The Auditor-General found with regard to the way BAe was awarded the LIFT contract in respect of Hawk jets: “the fact that a non-costed option was used to determine the successful bidder, is in my opinion, a material deviation from the originally adopted value system. This ultimately had the effect that a different bidder…at a significantly higher cost, was eventually chosen on the overall evaluation.” The DoD’s explanation on this point was found to be “unsatisfactory.”

The process of evaluation was changed after the tenders had been received and evaluated by the four evaluation committees and their results forwarded to the Strategic Offers Committee. In June 1998 the AAC, having been advised that a company other than the ultimately successful tenderer had achieved the highest marks in the evaluation system, had recommended that the contract be awarded to the second-placed tenderer, BAe. This result was apparently justified on the basis that BAe had performed better in respect of three of the evaluation criteria (the NIP, DIP and technical evaluations). It is not apparent on what basis the fourth criterion (cost) was ignored (Idasa 2001).

On 29 June 1998 defence minister at the time, Joe Modise had asked for a “separate recommendation where cost is not taken into account,” a move that ultimately benefited BAe. A little more than a month before this meeting, BAe had donated R5 million to the Umkhonto weSizwe (MK)Veteran’s Association – a donation earlier exposed by the Mail and Guardian.14 Asked for his opinion on this, Chair of SCOPA Dr Gavin Woods commented: “Given the failure of the government to offer convincing reasons for having broken its own rules by buying the more expensive Hawk, any suspicion regarding the BAe donation made through the previous minister to the MK Veteran’s Association is difficult to dismiss. My sense of proportion does however, suggest that this “donation” by itself would not have been sufficient to influence the decision.”15 Modise was under investigation for alleged corruption at the time he died (November 2001) and criminal investigations into corrupt payments made by BAe to secure its interests in the South African arms deal are ongoing.

14 Mail and Guardian, 2-8 November 2000
15 Mail and Guardian, 2-8 November 2000
8.9.3 Off-Set Guarantees

In respect of the inadequacy of the off-set guarantees, the Auditor-General’s report notes that while the performance guarantees required from contractors averaged 10% of the contract price, he was of the opinion that the guarantees, in the case of non-performance, may be “inadequate” to ensure delivery of the National Industrial Participation Commitments and that this could undermine one of the major objectives of the strategic defence packages which was the counter-trade element of the armaments package deal. Risks associated with the off-sets have been referred to earlier in this chapter.

8.9.4 The Case of C²I²

The fifth irregularity pointed to in the Special Review related to “a local company that was at that stage performing certain technological work on behalf of the SANDF, which was funded from a previous technology retention project” and had not been awarded the contract. Richard Young’s Cape Town based company C²I² was not selected for one of the subsystems of the corvette namely the Integrated Management System (IMS). The Special Review pointed out that while the SA Navy preferred the technical potential offered by the local company this was apparently “outweighed by prohibitive risk-driven cost implications as determined by the prime contractor. The prime contractor, who had to accept unlimited risk for delivery, added a risk premium of approximately R40million to the local product, which resulted in the acceptance of the French product.” The French product, it should be noted, was associated with Schabir Shaik’s network of companies.

Since the basis of determining the risk premiums did not fall within the scope of the Special Review audit, the Auditor-General suggested that a forensic audit of the matter be considered. This was eventually undertaken as part of the Joint Investigating Team’s report into the Strategic Defence Procurement Package, discussed later.

In short the Special Review highlighted “material deviations” from generally accepted procurement practices and recommended a forensic audit into the deals’ sub
contracts, an area which fell outside the scope of the Auditor General’s probe, and that had been the subject of repeated corruption claims. A number of follow-up activities were set in motion. The first was to address how parliament would deal with the report, in particular the main oversight committee, namely the Standing Committee on Public Accounts (SCOPA). The second was to decide which of South Africa’s many agencies with an anti-corruption mandate would undertake this highly politicized investigation and reassure the public of a truly independent and credible investigation. The politics of investigating corruption would dominate the political landscape and agenda for the coming months with the ultimate consequence of undermining the non-partisanship of parliament’s key oversight committee SCOPA, ultimately questioning the integrity of the entire investigation and the political will of the executive to fight corruption, wherever it might appear. This at least is what will be argued in this thesis and is illustrated starkly by the arms deal case-study.

8.10 SCOPA and the DoD

On 11th October 2000, after carefully reviewing the AG’s Special Review, SCOPA conducted hearings with the DoD in Parliament. It was during these hearings that the South African public would, for the first time, hear that the cost of the arms deal had now risen to R43 Billion.

The SCOPA meeting was attended amongst others by Chair of the Portfolio Committee on Defence, Thandi Modise, Director of Acquisitions, Chippy Shaik, Chief Negotiator of the Counter-trade Packages, Jayendra Naidoo, Armscor Chief Executive Officer, Sipho Thomo, Armscor Chairman, Ron Haywood, The Auditor General, Shauket Fakie, Judge Willem Heath, representatives from Treasury, and the British High Commission.

The media would report that “incredulous ANC MPs took the lead in questioning generals, admirals, and government negotiators about whether cabinet had been properly informed about the full cost and wanted to know whether projected cost escalations had been accounted for at the time the decision to award the contracts was
taken.” 16 IFP chair of SCOPA Dr Gavin Woods and two ANC members on the Committee, namely Laloo Chiba and Andrew Feinstein, were the most tenacious in trying to establish the facts around the cost of the deal, the NIP and the inadequacy of offset performance guarantees.

At the hearing it emerged that the real costs of the deal amounted at this time to close to R43billion, largely attributable to the depreciation of the rand as opposed to the previously quoted amounts of R29.8billion. Woods and Feinstein wanted to be assured that the economic benefits as promised by the off-set agreements would be forthcoming and that there were adequate monitoring mechanisms in place. Chief negotiator on the deal, Jayendra Naidoo’s response was not altogether reassuring:

“It is a highly questionable proposition that off-sets will generate economic development. Our exercise was to recoup some of the expenditure on the armaments approved by government. The acquisitions were not meant to generate a massive economic boom, but would be economically neutral. The defence industry works world-wide on the basis of offsets. If it failed to perform on its commitments, it would be unlikely to gain business elsewhere.”

Jonathan Shapiro 10-19-2000

At the hearing Shamin “Chippy” Shaik, DoD’s chief of acquisitions, confirmed that his brother Schabir Shaik was a director of African Defence Systems, one of the sub-contractors that benefited from the corvette contract to handle the combat suites, and also that he had recused himself. He admitted to the committee that a “weakness” in the process had been not to do so in writing.

8.11 SCOPA’s Fourteenth Report

On 30 October 2000, having thoroughly considered the Special Review of the Auditor-General and heard evidence, SCOPA issued its 14th Report to the National Assembly. On 3rd November 2000, it was unanimously adopted. The SCOPA report called for a multi-agency independent investigation into the arms deal, specifically mentioning individual anti-corruption agencies by name, including the Special Investigating Unit headed by Judge Heath.

For those observing parliament’s role in confronting the widespread concern and allegations around the arms deal, the SCOPA report was welcomed by civil society organizations and the media as a victory for parliamentary oversight over the executive and a real test of the countries democratic institutions. Idasa issued a special media statement: *Arms Purchases – Public Accounts Committee’s Recommendations: A test case for accountability*, noting how SCOPA’s recommendations “demonstrate the central role that parliament can play in ensuring that there is meaningful oversight of executive power.” It further noted: “The stakes are high: it is really a litmus test for the various institutions of democratic accountability.”17 SCOPA’s call for a multi-pronged probe was hailed by Business Day as SCOPA asserting “its power and authority over the executive in a dramatic fashion” and that “the case demonstrates the increasing effectiveness with which the committee is performing its watchdog function.”18

The euphoria about parliament conducting its own investigation was short-lived. Through an extraordinary series of interventions, parliament and its oversight role through SCOPA would be rendered impotent by an ANC executive that sought to

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steer the investigation away from parliament, sidelining its own members on the committee who dared to raise objections, and eventually excluding the one dedicated anti-corruption agency, the Special Investigating Unit, from the probe to appoint a Joint Investigation Team made up of the Auditor General, Public Protector and National Directorate of Public Prosecutions. In the weeks following the tabling of the 14th Report the precise interpretation and intention of the SCOPA report, particularly with regard to the multi-agency investigation, would cause unprecedented division in the ranks of the previously non-partisan oversight committee.

Noting the “high incidence of malpractice” in the international arms trade and with this in mind considered the transactions and broader financial and fiscal implications pertaining to South Africa’s recent arms purchase, the 14th Report commented on the cost of the deal to the state, raised concerns about the offset arrangements, the selection of prime contractors, the selection of sub-contractors, acquisition policies and called for a special forensic investigation. The latter point was based on having received “a large amount of unsolicited evidence, of varying plausibility, from a number of sources” which “reflected common ground to a significant degree” on the basis of “the need to prove or disprove once and for all the allegations which cause damage to perception of the government, (that) the committee recommends an independent and forensic investigation.” In what became the most controversial section, the 14th report stated:

“In noting the complex and cross cutting nature of the areas to be investigated, the Committee feels that the investigation would be best served by combining a number of areas of investigative expertise and a number of differing areas of legal competence and authority. It therefore recommends that an exploratory meeting, convened by the committee, be held within two weeks of the tabling of this report in the National Assembly. The Auditor-General, the Heath Special Investigating Unit, the Public Protector, the Investigating Directorate of Serious Economic Offences, and any other appropriate investigating body should be invited, so that the best combination of skills, legal mandates and resources can be found for such an investigation.”

The report noted that once this was established SCOPA would issue an investigation brief to the investigating team for its input. Also that the chosen investigative body
would be requested to report at regular intervals to the Committee, as well as at the conclusion of its work, in order that this might be included in the Committee’s final report to the National Assembly on this matter. The Report noted that “the committee will continue to complete a few areas of its own investigation, which could well include a meeting with certain Cabinet ministers.” It noted both the commitment of the Cabinet to co-operate fully with the investigations and acknowledged the extent to which the Departments and their respective ministers had “met their accountability commitments to parliament” in the course of the SCOPA enquiry.

In summary the 14th Report required that: certain aspects of the arms deal be investigated by a joint investigation team (JIT) comprising a number of specified investigation-type agencies; other areas be investigated by SCOPA itself (under Section 56 of the Constitution); a particular exercise be undertaken both by SCOPA and the Auditor General. According to Woods, the 14th report intended that the combined findings of these three investigative exercises be brought together in a final SCOPA report which would offer Parliament and the public, comprehensive answers to matters of concern in the public domain. Based on these findings, the report would have made recommendations covering any problems identified – both in dealing with these problems and in avoiding such problems in the future (Woods 2002).

However, parliament’s independent investigation into the arms deal would never materialize. Partisan factions within SCOPA would take sides and parliament would find itself “side-lined” from the arms deal investigation as the executive sort to control it. The legislature, dominated largely by ANC loyalists, would prove impotent in exerting its constitutionally mandated parliamentary oversight and scrutiny over public expenditure or the multi-agency investigation that SCOPA had called for in its 14th Report.

8.12 Executive Interference

Following the SCOPA hearing with DoD, ANC Chief Whip Tony Yengeni, himself mentioned in the De Lille memo for alleged corruption, called ANC MPs Andrew Feinstein and Laloo Chibe to a meeting. Here he conveyed the message that the matter of the arms deal would be “handled in an organizational way similar to the
Maduna affair”. This was a reference to the way in which the ANC had exerted its influence in parliament to achieve a certain end. An ad hoc committee, chaired by ANC MP Andries Nel and loaded with ANC MPs, had unsatisfactorily dealt with the Public Protector’s recommendations that the Minister of Justice, Penuell Maduna, be censured for having verbally attacked the integrity of the previous Auditor-General, Henri Kluever. According to Feinstein, “Laloo (who had spent 21 years on the island) was shocked, broken by this.”

On 9th November 2000, a week after the 14th report was adopted by the National Assembly, ANC members of SCOPA were summoned to Tuynhuis, the president’s residence to a meeting of the ANC’s governance committee that consisted of the deputy speaker, speaker, deputy President, parliamentary advisors, and senior whips. Here, amongst other issues, the Minister in the Office of the President, Essop Pahad severely berated ANC SCOPA members for passing the SCOPA resolution that called for the joint investigation. They were asked to explain the 14th report, in particular the inclusion of Special Investigating Unit, headed by Judge Heath.

As has been pointed out in Chapter Six, Heath was increasingly becoming persona non grata within the ANC government who felt he had overstepped the powers of his corruption fighting unit. Regarded as operationally independent and trusted by the public amongst whom the so-called “Heath Unit” through strong media relations had cultivated a perception of fearlessness in the face of official corruption, the government appeared wary of including an investigative capacity which they could potentially not control. The extraordinary over-reaction and response of the ANC to Judge Heath would from the start raise questions about the independence and integrity of the investigation.

At the meeting Minister Pahad spoke out against the probe, arguing that President Mbeki was named in allegations and that allowing the probe to continue could tarnish his reputation. According to Feinstein, Pahad screamed abuse for about an hour at SCOPA members saying “Who do you think you are taking on cabinet and the

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19 Interview with Andrew Feinstein, 21 August 2001.
president?” No one other than Feinstein stood up to him. From then on, according to Feinstein, two thirds of the ANC SCOPA members started towing the line.\textsuperscript{22} This can be seen by the way ANC SCOPA members conducted themselves in the coming months, by not supporting the chair’s call for an independent investigation by parliament as noted in the 14\textsuperscript{th} Report. While weekend papers reported that the Minister in the Office of the Presidency, Essop Pahad, had sought to derail the investigation, Pahad denied this calling it a “litany of lies”.\textsuperscript{23} Once Pahad left the meeting deputy president Jacob Zuma came in and took a much more conciliatory line.\textsuperscript{24}

8.13 The Investigating Agencies Meet

On 13\textsuperscript{th} November 2000 the exploratory meeting with the various investigative bodies mentioned in SCOPA’s 14\textsuperscript{th} report took place at the Auditor-General’s offices in Brooklyn, Pretoria. ANC chief whip Tony Yengeni, himself the target of (unproved as yet) allegations of corruption initially refused to authorise travel expenses for SCOPA committee members to attend the Pretoria meeting. He had earlier sought to curtail the investigation by saying it was causing disunity within the ANC.\textsuperscript{25} This disunity would continue, reaching a crescendo with the ongoing criminal investigation into corruption charges against the deputy president, Jacob Zuma. According to Feinstein, another meeting with the executive and ANC members of SCOPA took place a day later, on 14\textsuperscript{th} November 2000. Held at Tuynhuis this meeting was to further challenge SCOPA’s intended investigation and discourage ANC members on the committee from any meaningful involvement.\textsuperscript{26}

At the Pretoria meeting - whose objective according to Woods was to establish a joint structure within which investigators from all five units could work together - SCOPA members from all political parties were first briefed by the Auditor-General and then met with representatives from the office of the Public Protector, the Investigating Directorate for Serious Economic Offences, the National Directorate of Public

\textsuperscript{22} Interview with Andrew Feinstein, 21 August 2001.
\textsuperscript{23} “Investigators meet: Probe on arms deal starts,” Cape Times, 14 November 2000.
\textsuperscript{24} Interview with Andrew Feinstein, 21 August 2001.
\textsuperscript{26} Interview with Andrew Feinstein, 21 August 2001. Woods (January 2002).
Prosecutions and the Special Investigating Unit. Minutes from the meeting indicate that there was consensus on the need for further investigation into allegations around sub-contractors as well as the possibility that contracts might not be valid and the offsets agreed to not be enforceable. Since the Auditor-General’s office had no search and seizure powers and also lacked the powers to scrutinize the subcontracts, the respective roles of each of the agencies, including SCOPA, were discussed in relation to the proposed investigation. At the meeting it was decided that the Directorate of Special Operations of the NPA (DSO), the Auditor General, the Public Protector and the Special Investigating Unit would conduct a joint investigation in order to combine skills, resources and legal mandates, with the Auditor-General acting as coordinator of the investigation (JIT 2001:7).

In particular, the Special Investigating Unit’s role would be to consider the legal validity of the contracts themselves, whether they had met certain requirements laid down in the law during the procurement process, in international law, and relating to the public interest. It was also noted how the SIU could serve notice on private institutions and in this way back up the Auditor-General’s weaknesses with regard to an investigation into primary and sub-contractors. At the meeting the Unit confirmed it had written to the President requesting a proclamation to conduct an investigation. This was in terms of the SIU Act which requires a proclamation from the president before an investigation can proceed. On 21 November 2000 SCOPA chair, Gavin Woods received a letter from the Auditor General noting that because of its particular skills and mandate the SIU headed by Judge Heath SIU should be involved in the investigation.

However, on 22nd November 2000, a week after the meeting in Pretoria, the Public Protector wrote to Justice Minister, Penuell Maduna suggesting that a proclamation to the SIU was “unnecessary”:

“With regard to the application for a proclamation by the SIU, I am of the opinion that such a proclamation is not necessary at the present juncture…There is no evidence of any unlawful appropriation or expenditure of public funds and accordingly no need for the SIU to recover any assets or public money. The application for the SIU is based primarily on the Special Review by the Auditor-General and does not raise any new evidence.”
After agreeing to the involvement of the SIU a week earlier, Gavin Woods ascribes to “executive interference” the abruptly revised wishes of the Public Protector to now exclude the SIU (Woods 2002). Baqwa’s office denied he had changed his mind or political pressure had been brought to bear on him to do so saying that at no stage had he expressed an opinion on the appropriateness of the unit’s involvement. The sexual assault charges against the Public Protector, emanating from the Ministry of Justice may have had something to do with Baqwa changing his position. The Auditor General also denied that he had changed his mind when the SIU was eventually excluded from the JIT, saying:

“It is not correct to assume that we have changed our position with regard to the Heath investigating unit. Our stance has been all along that should the unit be granted a proclamation, they would be part of the investigation as was indicated during the preliminary strategy meetings. However, as time is of the essence and at the indication of the head of the unit, their specific participation would depend on them receiving a proclamation from the president. In this regard I urged the standing committee to expedite the finalization of a proclamation. If the proclamation is not forthcoming it is the view of the joint task team that the investigation could continue within the statutory powers vested in the various agencies.”

As it turned out a proclamation to the SIU from the president would not be granted hereby excluding the SIU from the final investigation. The report of the Joint Investigating Team - made up of the Auditor-General, Public Protector and National Directorate of Public Prosecutions - points to the formal reason for the exclusion of the one agency with a dedicated anti-corruption mandate: “The SIU was not formally instructed by Proclamation by the President, as required by law, and hence did not form part of the joint investigation.” (JIT 2001:7). Events that led to the exclusion of the SIU from the largest corruption probe in democratic South Africa will be discussed in detail in Chapter Nine that follows.

28 Interview with Andrew Feinstein, 21 August 2001.
8.13.1 JIT Linkages with SCOPA

Since parliament’s committee SCOPA had called for the multi-agency investigation in its 14th report, the accountability linkages between parliament and the JIT agencies in this unprecedented investigation needed to be resolved. In November 2000 Woods and Feinstein met with the Speaker of parliament, Dr Frene Ginwala to address her concerns about the accountability linkages between parliament’s SCOPA and the investigating agencies, especially the two executive bodies, namely the Special Investigating Unit and the Investigating Directorate for Special Economic Offences. There was also concern about handing over information SCOPA had to the investigating agencies. The Auditor General had requested SCOPA to forward all documentation and information in their possession to the his office.

On 17 November 2000 Woods sought a legal opinion from Prof Fink Haysom, Nelson Mandela’s former legal advisor, on how best SCOPA should conduct its relationship with the four agencies. His letter also dealt with the questions of confidentiality in respect of various documents in the possession of SCOPA. Haysom’s response had been that whilst executive bodies have operational accountability, as organs of state in the constitution they are still accountable to parliament and therefore SCOPA is entitled to ask these agencies to account to it on the progress of the investigation etc. (Woods 2002). On 21 December 2000, a SCOPA press statement released jointly by Woods and Feinstein (drafted with the assistance of Haysom) explained SCOPA’s proposed interaction with JIT. It was to be an informal level of communication in order to monitor whether their respective investigations (SCOPA’s and JIT’s) were together leading to comprehensive coverage of the issues concerned.

It was later established that both the Public Protector (PP) and National Director for Public Prosecutions (NdoPP) decided renege on their undertaking regarding the communication arrangements reached between JIT and SCOPA. The interventions that led to this can only be speculated about. It is now public knowledge that JIT agencies met with the President and particular members of cabinet on more than one occasion and that the investigation was discussed in a meeting between the Auditor General and the same parties in May 2001 (Woods 2002).
8.14 Conclusion

This chapter focused on the largest public expenditure to date in democratic South Africa, namely the Strategic Defence Procurement Package. A close examination reveals that there were obviously blatant in-built irregularities in the procurement process from the start that subsequent audits would reveal, for example the link between Chippy Shaik as head of procurement for the DoD with his brother Schabir who was tendering for a sub-contract, and the interference from the late minister of Defence, Joe Modise to favor BAe. Also, the rising costs of the deal that government was warned about and chose not to tell the public, and the unconvincing arguments around NIP and DIP commitments to off-set the huge expenditure, raise questions about the necessity for such an arms purchase in the light of more pressing socio-economic needs.

Government’s initial responsiveness in swiftly approving the Auditor-General’s Special Review into the arms deal following allegations of corruption raised in parliament by PAC MP, Patricia de Lille, is noteworthy. However, subsequent attempts by the ANC to scupper a truly independent parliamentary investigation by intimidating ANC members on SCOPA to toe the party line from the start, would bode ill for effective oversight of the subsequent investigation.

For anti-corruption agencies to work together in the first place on a joint investigation on the magnitude suggested by the arms deal, was new and as such there needs to be some leeway given to these agencies as well as other branches such as parliament and the executive in working out their respective roles in dealing with such a sensitive issue. The way in which the ANC government would “circle its wagons” and be incredibly defensive about the probe into the arms deal and who should be involved, or not in the case of the Special Investigating Unit, would raise suspicions about the political will to seriously fight corruption and in a sense, as in Watergate, the cover-up and defensive reaction of the ANC to perceived criticism of its intentions, would be worse than the crime.
Jonathan Shapiro 4-2-2001

In this chapter I have suggested that the arms deal investigation has exposed a weakness in the South African government’s anti-corruption agenda. This is a viewpoint shared by the independent media and illustrated by the political cartoonist, Jonathan Shapiro (Zapiro). In the next chapter we will evaluate the plausibility of the government’s defence of its actions, including the highly significant exclusion of the SIU from the arms deal investigation.
Chapter Nine: The Case for Excluding the Special Investigating Unit

9.1 Introduction

The perceived reluctance on the part of the government to include the Special Investigating Unit - regarded by the public as the most effective anti-corruption agency in the country’s arsenal – as part of JIT would continue to raise questions as to the independence, integrity and credibility of the arms deal investigation into alleged corruption.

This chapter takes a detailed look at the way the government justified its eventual exclusion of the SIU from the JIT investigation over a two-month period from November 2000 to January 2001. This includes reference to the constitutional court judgment of November 2000 (that raised questions about the separation of powers between the judiciary and the executive), the intervention of the Speaker in December 2000 that questioned the interpretation of SCOPA’s 14th report and would accuse SCOPA’s chair of acting “ultra vires” by requesting the president to provide a proclamation for the SIU, the ANC itself who undertook a “principled campaign” against Heath, the Cabinet’s press conference to defend the integrity of the deal, and finally the personal intervention of President Mbeki in January 2001, having taken legal advice on the matter, where in a televised address to the nation he announced that the SIU would not be given a proclamation by the executive to proceed with the investigation.

For the government not to make use of the one agency in the country with a dedicated anti-corruption mandate, namely the SIU, would raise suspicions as to the government’s stated commitments to fight corruption. Justifying this exclusion in the language of constitutionality and upholding the rule of law, would be even more sinister. The fight against corruption was becoming politicized in ways potentially damaging for the long-term integrity of various democratic institutions. This bears out proposition 4 of the original working hypothesis that argues: “formal institutions and mechanisms do not emerge in a political vacuum”.

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9.2 The Constitutional Court Judgment

The Constitutional Court ruling by Judge President Arthur Chaskalson in an unrelated matter involving Heath, would prove manna from heaven for those wishing to justify Heath’s exclusion from the arms deal investigation. An appeal to constitutionality based on the Constitutional Court’s ruling would provide the perfect cloak to silence those calling for the SIU’s participation and the timing of the judgment by the highest court in the land could not have served the ANC better. Whilst not casting aspersions on its integrity, the court could not have been unaware of the highly contested environment into which the judgment regarding Heath fell. An elegant argument focusing on separation of powers, this time between the judiciary and the executive, was a way out for the court that could be interpreted as ultimately preserving the integrity of the judiciary from executive interference, even if it meant that the executive would use the judgment to render Heath and the SIU impotent for the duration of the arms deal investigation.

On 28th November 2000 in South African Association of Personal Injury Lawyers vs Heath and Others 2001 (1) SA 883 CC, the constitutional court unanimously held that the appointment of a judge to head the Special Investigating Unit violated the separation of powers required by the Constitution. In terms of the constitutional requirement that judges be independent, the provision of the Special Investigating Units and Special Tribunals Act 74 of 1996 that permits a judge to be appointed as head of the Unit (S31) and the appointment by the President of Judge Heath to this position (Proclamation R24 of 1997) were held to be both unconstitutional and invalid.

In arriving at its decision the Court stressed the importance of the separation of the judiciary from the other branches of government in the constitutional scheme. Also the need for courts to be seen to be independent so that they can discharge their duty of ensuring that the limits to the exercise of public power are not transgressed. This separation of powers means that the Constitution prevents judges from performing non-judicial functions incompatible with judicial office, or which are not appropriate to the central mission of the judiciary. The fact that the head of the SIU performed executive functions that were ordinarily performed by the police, the prosecuting
authority or the state attorney, (for instance having to undertake partisan and intrusive investigations and litigate on behalf of the state to recover losses it has suffered as a result of corrupt or other unlawful practices) rendered it incompatible with judicial office. The court noted that in appropriate circumstances a judge can preside over commissions of inquiry where, ordinarily, the performance of the function calls for the qualities and skills required for the performance of judicial functions. Thus although aspects of the head of the SIU’s functions were akin to those of a commission of enquiry, these functions were inextricably tied to the litigation functions of the unit and thus could not be severed (CC 2000).

In order to ensure an orderly transfer of the leadership of the SIU to an appropriate functionary who was not a member of the judiciary, the Constitutional Court’s declarations of invalidity were suspended for a period of one year. This would mean that up until 28th November 2001 the unit could continue to function under the current arrangement. In reality, however, Judge Heath was now a lame duck having had his appointment declared invalid and unconstitutional by the highest court in the land.

President Mbeki’s key reasons for excluding the SIU from the arms deal investigation would be this judgment, couching the final decision to exclude the SIU from the arms deal investigation in the irreproachable language of constitutionality and a commitment on the part of the executive to uphold the rule of law. We have reason to doubt, as I have suggested and as will be shown in this chapter, that upholding the rule of law was Mbeki’s main motivation. Rather, our sense is of a man in power not willing to be guided by a public wanting the inclusion of a man they had come to trust in the fight against corruption (namely, Judge Heath) and that Mbeki was unwilling to compromise the close bonds that make up the ruling party by including an anti-corruption agency he might not be able to control, even in the face of alleged wrong-doing.

9.3 The JIT Proceeds

Further meetings of the investigating agencies in late 2000 while awaiting the presidential prerogative to issue a proclamation decided that each agency – AG, PP, IDSEO and SIU – would take responsibility for a “broad area of investigation” while
combining skills, legal mandates and expertise of the different agencies. On 1 December (4 days after the Constitutional Court judgment) it was decided that the team for each area of investigation (eight in total) would consist of members and co-opted members from each of the four agencies with the Auditor General as the coordinator of the project leaders. The budget for the multi-agency inquiry indicated an estimated budget of R13 517 200 with the SIU marked down as contributing R3 324 550 and being involved in 7 of the 8 investigations.

On 6th December 2000, in a confidential memo to the chair of SCOPA, Dr Gavin Woods, the Auditor General wrote to request “the special skills and experience of the unit” asking “the committee to make a recommendation to the president to approve the proclamation of the unit as the contribution of the unit to the investigation could be significant.” 1 It was on this basis as well as the 14th report that Woods wrote to President Mbeki on 8th December requesting that a proclamation be granted to Judge Heath, an action for which he would be publicly castigated. He wrote:

“SCOPA’s reasons for including a role for the Special Investigating Unit (SIU) as one of the investigating parties, related to the SIU’s particular powers and areas of competence and its relevant experience. It was apparent to us that the comprehensive investigation advocated would be weakened by its absence – mainly due to its authority in civil type actions and the role which could be played by its special tribunal arrangement.”

However, a meeting sometime in December convened between the Public Protector, a representative from the Auditor-General’s office, director of Public Prosecutions Bulelani Ngcuka, and head of the directorate for serious economic offences, Leonard McCarthy, would decide that the Heath Unit should not be involved. According to Woods it was “very strange” that they had met separately and called for the exclusion of the Heath unit without informing the committee of their change of view.2

9.4 The Speaker and SCOPA

The Speaker, an ANC sympathizer, would play a somewhat ambivalent role in protecting parliament’s oversight and accountability functions, and safeguarding the role of SCOPA in exercising its mandate. In December 2000 the investigative magazine Noseweek (Issue 32) would report on a meeting held at the home of Chief Whip of the ANC Tony Yengeni, attended by amongst others the Speaker, the Public Protector and the National Director of Public Prosecutions. Shortly thereafter, on the 27th December 2000, the Speaker would issue a “surprise” statement saying she was not aware of any resolution of Parliament or the National Assembly instructing the President to issue any Proclamation regarding the work of the Heath Commission and that any such action would be of dubious legal and constitutional validity. In doing so, she effectively accused SCOPA’s chair, Gavin Woods, of acting ultra vires by writing to the president to request that the Special Investigating Unit be given a proclamation to participate in the investigation.

Ginwala had apparently received legal advice first verbally, then in writing from the parliamentary law advisers on the interpretation of SCOPA’s 14th report with reference to the proposed involvement of the SIU in the special forensic investigation recommended by SCOPA. The legal opinion noted how whilst the report envisages a “chosen investigating body” that will undertake the investigation, there is no indication that that body should necessarily be the unit or include the unit. In their opinion, the lawyers argued, the 14th report does not amount to a recommendation to the Executive to refer the matter in question to the unit for investigation.3

Ginwala further noted that while SCOPA had recommended an independent forensic investigation and had met with a number of investigative bodies and that the parties had agreed to put together a brief on how they would function, the committee had not tabled a report on the meeting nor any brief that might have been issued, which would in any event have had to be advisory or informative only. Her statement pointed out that a committee of the national assembly has no authority to subcontract its work to any of these bodies, or require them to undertake any particular activity, or to report

directly to the committee. Nor are the chairpersons expected to act on major issues without the agreement of the committee. Such direction as the Assembly may wish to give would require specific referral by a resolution of the National Assembly, and be subject to the procedures provided in relevant legislation. The committee may however, meet with and discuss with these or any other bodies, or receive submissions from them. In effect, therefore, she implied that Woods had acted *ultra vires* in writing to the President in the terms that he did (Idasa 2001).

The Speaker’s interpretation of SCOPA’s 14th report thus sought to distance parliament from any wish for the inclusion of the SIU in the JIT, a position taken by the Speaker without conferring with the Committee as to the intention of their report. Ginwala’s statement effectively suggested that SCOPA had acted inappropriately with regard to JIT and that parliament had no power to instruct the executive to involve the SIU and more significantly that SCOPA had not specifically asked for Heath’s involvement. This action would have the effect of splitting the committee down party lines as ANC members on SCOPA felt forced to adopt an interpretation of the 14th report which served their master’s purposes, namely the exclusion of Judge Heath and the SIU from partaking in the investigation.

The Speaker’s statement was also significant in that Justice Minister, Penuell Maduna subsequently used her interpretation of the 14th report, among with the Constitutional Court ruling, in his recommendation of 15th January 2001 to the President not to issue a proclamation thereby excluding the Special Investigating Unit from the investigation.

### 9.5 Pressure to Include the SIU in the Probe

The weeks following the Speaker’s intervention and the delay on the part of government in deciding whether or not to include the Special Investigating Unit in the investigation were reported on vigorously by the local media who took to

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4 Statement on Parliament’s recommendations regarding arms procurement, 27 December 2000
editorializing on the gravitas of the moment as a test of the government’s commitment to fight corruption.⁵

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The Mail and Guardian in an Editorial “A test of integrity looms” alluded to the importance of the event:

“Let there be no mistaking the moment. The ruling ANC, the government and particularly President Thabo Mbeki face a decisive test of their integrity and will to combat corruption in the attitude they adopt to the investigation into the R43.8billion arms deal…The government needs to dispel all doubt that it is committed to a full and unfettered investigation by SCOPA. Its members need to demonstrate unambiguous support for one of the organizing principles of our constitution: That parliament, in this case represented by SCOPA, exercises as primary representative of the people, oversight over the executive arm of government.”⁶

In early January 2001 it was reported that the PAC’s Patricia De Lille was threatening to take President Mbeki to court if he did not include Heath’s unit. Justice Department

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spokesman, Paul Setsetse said De Lille was ill-advised to contemplate legal action as her threats had “no legal basis.” He pointed out the president’s discretion by the Special Investigative Unit and Special Tribunals Act to refer a matter to the existing unit, appoint a new unit or refer the matter to existing agencies such as the directorate for Public Prosecutions of the Auditor General.\(^7\) Indeed, the presidential prerogative would prevail.

Opposition parties said excluding Heath would have international repercussions as it would appear as if something unacceptable was going on and being covered up.\(^8\) In a letter to the Justice Minister, the UDM appealed to the Minister not to exclude the unit, saying the committee had good reasons to choose all four units and the decision had been supported by all four parties and that he “please respect this democratic decision…which will defuse any speculation of undue interference by the executive and government.”\(^9\)

Apparently Richard Young whose company C\(^2\)I\(^2\) was identified as the preferred supplier of the integrated management system for the four new corvettes but had been overlooked in the final deal, said he would not sue the government if Heath’s unit was appointed to the probe.

### 9.6 Some Background to the Exclusion

Earlier chapters have already alluded to the growing tension between Judge Heath and the SIU and the need expressed by the government to streamline and “rationalize” anti-corruption agencies.

In early January 2001, a disagreement arose between Judge Heath and Bulelani Ngcuka, National Director of Public Prosecutions. Heath had continued to argue that his unit had the experience and capacity to investigate aspects of the arms deal package that might otherwise be bypassed. Ngcuka responded by accusing him of being arrogant in suggesting his unit was the only body capable of conducting the

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probe and for doubting the independence and integrity of his directorate.\textsuperscript{10} According to Heath his words had been “misinterpreted”. “It’s not going to be easy” he said, “they believe Mr Ngcuka can do what we can do. He cannot, and he cannot apply the remedies we can (in terms of civil law). I have indicated all along that all four institutions should be involved because of the variety of matters that need to be investigated.” He added, “I’m treated as if I am an enemy of the government, when I’m actually a supporter in the fight against corruption. I do not see myself as an enemy of the government, but an ally.”\textsuperscript{11}

In early January Judge Heath met with President Mbeki. A press release from the presidency on 5th January 2001 reported that discussions had been held regarding the allegations the Judge had received in October 2000. Following this meeting, President Mbeki referred both the letters from Heath (asking for a proclamation) and Woods (requesting the president to issue the proclamation) to the Minister of Justice, Penuell Maduna to investigate and provide a recommendation to him on whether to issue a proclamation. Among the questions to be studied by Maduna and his legal advisers was on whether there was a prima facie case of corruption to be investigated; which agencies were best suited and equipped to investigate aspects of the case; whether the Department of Justice had sufficient capacity to investigate the matter thoroughly or whether a separate unit or entity should be created to conduct the probe.\textsuperscript{12} Maduna was also asked to consider Heath’s argument, based on a legal opinion, that the Constitutional Court decision giving the judge a maximum of one more year as head of the unit did not disqualify him from being involved in the investigation during the remaining period.

Before Maduna’s recommendations to the President were made on 15th January, the ANC National Working Committee would meet to discuss the matter. Subsequent events point to a well-organised set of responses on behalf of the ANC and the executive to tightly control and manage the increasingly awkward matter of the arms deal investigation and Heath’s involvement.

\textsuperscript{11} Marvin Meintjies, “Heath hangs on for Maduna’s final word”, The Star, 7 January 2001.
\textsuperscript{12} The Star, 9 January 2001.
9.7 The ANC’s “Principled Decision” to Campaign Against Heath

On 8th January 2001 the ANC National Working Committee met and the party’s most senior members decided they had had enough of being “pushed around” by the Judge. A decision was taken to “campaign” against Heath’s inclusion in the arms investigation and to fight against growing support for the judge. After a brief discussion on how to deal with Heath, the possible media response to his axing, and the political fall out, the ANC decided to turn the screws on him. A loose five member task team made up of Ministers Penuell Maduna, Steve Tshwete, Trevor Manuel, Alec Erwin and ANC spokesperson Smuts Ngonyama was formed. The following week at the ANC’s National Executive Committee meeting in Kempton Park, the decision was endorsed. 13

On 10th January 2001 in a radio discussion on SAFM, ANC spokesman Smuts Ngonyama defended the ANC’s rejection of the appointment of Heath’s SIU to the arms probe (even though this was not yet a position taken by government yet) saying that Heath had compromised himself by aligning himself with political parties. He accused Heath of arrogance and blackmailing the government, saying:

“Why must the government feel paralysed by the Patricia de Lille and Douglas Gibson’s of this world hobnobbing with Judge Heath. Heath has allowed himself to be completely compromised by the links between Patricia and him. The view of the ANC is that we don’t want Heath to be part of this probe. He has used the information he has obtained to lambaste the government and blackmail the government by saying that unless you put me to work, there is a cover up.”

Ngonyama added that the ANC would “mobilise” against the Special Investigating Unit’s involvement and that “we reject in the strongest possible terms that the work be given to Judge Heath” adding that there are a number of possible organizations equally equipped to investigate the matter, including the Public Protector and the Auditor-General’s office. 14

The ANC felt that opposition parties were using Heath to portray the ANC in a bad light and that Heath himself had started “acting like a politician.” Ngonyama noted further that “the view of the ANC is that the judge was appointed by special legislation (on the basis that) work must be given to it by government. Now all of a sudden he is touting. He is putting pressure on the government and saying if you don’t I’ll say that you are covering up.”15 Speaking after the ANC’s four day January lekgotla, Ngonyama reiterated the party’s opposition to Judge Heath, questioning his objectivity: “The trust and confidence given to him was put to the test. He sees himself as not being accountable to government.”16

Judge Heath rejected both the blackmail and hobnobbing claims: “I’ve most definitely not being playing games with political parties. It’s for the president to make a decision. We don’t pose a threat to anyone on the basis of politics.” 17 The PAC’s Patricia De Lille would also reject any suggestion she was “hobnobbing” with Heath, noting the only thing she had in common with Heath was wanting to see corruption eradicated “everywhere it rears its ugly head in South Africa.”

“The million dollar question is, who is hiding what? Who is prosecuting whom? If there’s nothing to hide, why not let them continue the investigation, all four agencies….Heath’s unit is the only agency that can apply for the audit and scrutinise the agreements in this case and how they are enforced. What has the ANC to be scared of? If we are to get to the bottom of these allegations (excluding) Heath makes me suspicious that people in high places are corruptly involved.”18

The ANC’s reaction was widely interpreted as arrogance. In an editorial - “ANC must curb its arrogance” - The Sunday Times warns that while Heath should not be seen as the country’s messiah “it is imperative that the probe be above all scrutiny…The four agencies were chosen specifically because they enjoy public credibility and between them hold a vast array of complementary power. The move to exclude Heath seems motivated by the ANC’s passionate dislike of the judge, rather than logic…What appears to be creeping into the culture of the party is a disregard for independent

institutions and voices in society. It is no longer just the voices of minority parties that the ANC refuses to hear. It also ignores the voices of progressive NGOs, civil society formations and ordinary people…The party must not succumb to the arrogance that often accompanies power for therein lies dictatorship and disaster.”

9.8 Cabinet Defends the Arms Deal

Cabinet was feeling increasingly defensive with growing pressure around the inclusion of the SIU in the investigation to ensure its credibility. On Friday 12th January 2001 the four Ministers of Defence, Trade and Industry, Finance and Public Enterprises called a press conference where they issued a media statement and Background Notes on the Strategic Defence Procurement Package. The purpose of the conference was ostensibly “to set the record straight and clarify questions that in our assessment reflect a misunderstanding of both the process and the substance of Defence Procurement” and to record “the firm view of Cabinet that this process was undertaken with the utmost integrity.” It was widely viewed as a damage control exercise.

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The conference led to a virulent attack on SCOPA and the Auditor-General’s office wherein the ministers said the conclusions drawn by both the Auditor-General’s Special Review and SCOPA’s 14th Report were “ill-informed” and “fail to understand the most elementary features of the defence acquisition process”. “It is our view that the review and the report were too cursory to do justice to this matter and have called into question the integrity of the government without justification.” The press statement recognized that the Auditor-General and SCOPA had come to the determination that further investigations were necessary and promised that relevant departments and Ministers would “fully co-operate with such investigations” as “government is as eager as anyone else that the matter should be thoroughly probed,” reiterated the offer of cabinet to avail themselves to SCOPA (something Woods would deny knowledge of).

An accompanying document “Background Information on the Strategic Defence Procurement” explained the choices made with regard to the equipment, the financial implications, the National Industrial Participation Programme and elements of the subcontracting arrangements. Responding to the cost of the package, the statement noted that an “erroneous view” has been propagated that the cost of the defence package has escalated from R30 billion to R43 billion. The cost price, which was calculated in 1999 Rand, is R30.3 billion. In keeping with the standard Government accounting practice, it is the actual payments to suppliers that represent expenditure of the State. Interest costs are part of deficit financing and not the cost of equipment.”

Strong statements were also made regarding the allegations of corruption: “It is government’s firm and considered view that no concrete facts have been presented to suggest that there has been any corruption in the processes administered by government structures responsible for strategic procurement.” Also that it was “readily apparent” from any study of this massive and complex exercise the evaluation procedure and decision making process did not allow for a single individual to determine what should be acquired and at what cost and that such situations were carefully avoided in order to prevent the possibility of corrupt practice within the primary contracting process. Accordingly “the Government rejects with contempt any insinuation of corrupt practice on its part.”
With respect to the ongoing investigation, the statement noted:

“The government remains committed to cooperate with any legitimate investigation into any elements of the defence acquisition process, but will not allow itself to be diverted to participate in what amounts to mere fishing expeditions. For its part government remains convinced that nothing was done in the context of the Strategic Defence Procurement suggests in any way that corruption occurred, we await convincing evidence to prove this otherwise. Whilst government is ready to cooperate with the investigation, we believe that it is our duty to challenge any insinuations that question the integrity of government’s decision-making processes in this regard. We will also not respond to campaigns by those who may have lost out in the bidding process or those who are in principle opposed to the decision to undertake the Strategic Procurement.”

9.8.1 Responses to the Press Conference

The ministerial press conference served to merely heighten concerns about the inquiry into SA’s R43.8bn arms deal. The minister’s statement set out to discredit both the Auditor General’s Special Review and SCOPA’s 14th report by attributing to it “inaccurate assessments”, “erroneous views”, “it being exceedingly misleading”, “stretching credulity”, “its ill-informed conclusions” and fuelling “unwarranted speculation and assertions in the public domain” etc. saying in effect that the proposed investigations were based on ignorance and therefore inappropriate and unwarranted (Woods 2002).

In his response SCOPA chair Gavin Woods prepared a detailed memorandum disputing many of the minister’s criticisms of SCOPA’s report as “untrue and unfair.” He noted it was “more than apparent that the ministers are not in possession of the extensive information….and have little knowledge of the process SCOPA followed in producing its report. The degree of inconsistency between the minister’s arguments and the documented arguments and evidence made available by very senior officials in their departments are considerable.” The suggestion, that a meeting with the ministers would have led to a more informed report, “discredits the vast information
the committee received from their departments.” 21 Woods reiterated that the public was not properly informed on the rising cost of the arms packages “and (the committee) has sufficient evidence to show that there can be no excuse for this”. He also accused the ministers of failing to comment on the issues of “conflicts of interests” which were vital to the public interest.22

The Auditor-General responded saying he would refrain from commenting on the veiled attack on his office until the government announced whether Heath would be included.23 A few weeks Business Day reported that the Auditor-General rejected ministerial allegations that his special review of the R43bn arms deal was based on misunderstanding and ill-informed and wrong conclusions. The review found that there had been material deviations from generally accepted procurement practices and recommended in the light of the many allegations of possible irregularities in contracts awarded to subcontractors that a forensic audit be conducted. Fakie stood by the special review’s conclusions and its recommendation of a forensic investigation noting that his “constitutional mandate to strengthen constitutional democracy by auditing and reporting has never been and will never be jeopardised.”24

Following the cabinet press conference ANC members on SCOPA would not support the Chairperson’s call to defend the integrity of the Committee’s report and thereafter refused to engage any further work on the arms deal. Notwithstanding that the 14th report had been adopted as a report of the National Assembly, the Speaker too chose not to take up this extraordinary attack by the executive on the work of Parliament.

9.9 The Recommendation to Exclude the SIU

On 15th January 2001, the Minister of Justice wrote to President Mbeki regarding the matter of the SIU.25 Citing the Speaker’s arguments in her statement of 27th

December, Maduna argued there has “hitherto been no request from Parliament or the National Assembly that the President should consider issuing a proclamation either establishing a special investigating unit or extending the mandate of the existing unit.” In other words the Speaker’s position was used in this instance to advise the President that he would not be in disagreement with Parliament if he were to refuse the SIU a proclamation. The letter from Maduna advised the President that “the matter should not, at this stage, be referred to the Unit headed by Judge Heath, and that no other unit should be constituted for the purpose of pursuing this matter.”

Maduna’s recommendation rests on four main points. First he relies on the constitutional court decision of 28 November 2000 arguing that “to continue referring new matters to the Unit would in my view fly in the face of the Constitutional Court judgment, therefore undermining its spirit and essence”. Secondly, he argues neither Judge Heath nor any person has provided him with any information whatsoever that suggests an unlawful appropriation of public funds or assets has occurred, which funds or assets have to be recovered by a special investigating unit as envisaged in the act. Since the Justice Department was “not given access to any documents or information upon which all manner of allegations and innuendo have been made with regard to this matter” this has not assisted him in doing the work required. (This lack of information would lead to the President furnishing himself with further information, including documents obtained from intelligence operatives from the SIU, before making his final announcement on the SIU’s fate on 19th January.)

Thirdly, the Minister points out that the Public Protector is of the view that “at present there is no evidence of unlawful appropriation of expenditure of public funds” and that the offices of the Auditor-General, Public Protector and NDPP through IDSEO “can adequately deal with the present allegations and issues” and “that such a proclamation by the President, is not necessary at this stage and that the application be pended for consideration by the President, at a later stage, if necessary.” Finally he notes that because of the current workload of the unit “it would have been absurd and illogical for me to recommend that the President should give additional work to Judge Heath’s unit that is already so over-laden, when Judge Heath will cease being the head of the unit and will have to hand over to a non-judge replacement within the
one-year period of grace granted us by the Constitutional Court.”26 Judge Heath’s “successes” were coming back to haunt him.

The Minister points also out that a joint investigative body would have no status in law, cannot issue enforceable subpoenas and cannot compel witnesses to answer questions among other things. Rather each separate investigative body only has the powers conferred upon it in terms of its founding legislation. He also suggests that in view of the allegations that have been made about possible criminal conduct, the SAPS should be brought into the suggested inquiry and requests the President to invite any person who may be in possession of any information that warrants a criminal investigation to lay charges.

9.9.1 Responses to the Recommendation to Exclude Heath

News of Maduna’s recommendation to the President not to issue a proclamation hereby excluding the SIU from the probe caused a furious outcry amongst civil society groups, the media and opposition parties. Whilst many disputed the reasoning and grounds upon which he made his decision, others pointed to the ANC’s “blind spot” when it came to Heath suggesting it was his personality as much as the unique powers of the unit that led to Maduna’s exclusion of him from the probe.

In its response, the SIU rejected Maduna’s reasons saying it would make its own representations to the president. In a statement it said that Maduna had misinterpreted a Constitutional Court ruling (that did not prohibit new referrals to the unit) and relied on outdated information in making his recommendation. “The SIU is of the opinion that it could have made a valuable contribution to the multi-agency probe, as we have the powers to both investigate and institute civil action arising out of the investigation.”27 The SIU also noted that neither the minister nor the Justice department had ever asked for the De Lille documents and that its units were not limited to recovering misappropriated public funds but also the investigation of improper conduct or irregular acts by state employees, negligent loss of public

money, and any corruption in connection with the affairs of a state institution. Whether or not there was unlawful misappropriation of public funds could only be established after an investigation had been conducted. A civil investigation of this nature was highly technical and dealt with policy, procedure and legal aspects of procurement, contracts and tendering.

Dr Gavin Woods, Chair of SCOPA expressed concern, disappointment and alarm at the government’s move to exclude the Heath unit. One of the aspects that alarmed him most was Maduna’s implication that his formal request, as a committee chair to the president in December last year, for a proclamation clearing the way for Judge Heath’s involvement, did not reflect the wishes of parliament. The committee report adopted by parliament indicated quite clearly the wish that Heath be involved. “On that understanding, I wrote to the president”. The greatest discrepancy was Maduna’s statement that to refer new matters to the unit would be contrary to the spirit of a recent judgment on the constitutionality of Heath’s position as unit head. The Constitutional Court has given a year’s grace for the appointment of a person who was not a judge. “No one has suggested that, in the final year, Heath should not be given further work to do”.28

Woods further rejected Maduna’s statement that there was no evidence of unlawful appropriation of public funds or assets in the arms deal. “To us and other parliaments around the world the hard facts of wrongdoing are not necessarily what stimulates an investigation”. The committee had called for the probe after the Auditor-General pointed out procedural weaknesses in the procurement process. And SCOPA’s hearings confirmed that after officials involved were unable to answer questions satisfactorily. International experience was that these sort of weaknesses were most likely to lead to irregularities and wrongdoing. He said it was “quite alarming” for a government minister to demand proof of wrongdoing before accepting the need for an investigation. If there was reason for doubt it needed to be checked out. SCOPA had included the unit in the probe because of the legal mandate and specific skills the unit offered. “So, when we now find that he has been excluded, we have a sense of there’s a gap. That is the basis for our concern.” Woods believed SCOPA would have to

focus on ways of filling that gap and ensuring that the investigation was “comprehensive and thorough” and that the members of SCOPA were aware of their role as perhaps the most important oversight body in parliament. However, the law said the president had the final decision, and nothing in law allowed the committee to override him. “At the end of the day he has to decide what is right and what is wrong”. “One doesn’t have to react emotionally. We are a committee that tries not to be party political.”

Unsurprisingly opposition parties criticized the announcement by Maduna. Tony Leon, leader of the DA said Mbeki would be “well advised to ignore” Maduna’s recommendation. Maduna had “become notorious for his bad judgment” and that his reference to a Constitutional Court finding was “spurious” adding “the court judgment allowed a year for the situation to be corrected – for the head of the unit not to be a judge, and while Judge Heath is still head of the Unit he must be allowed to do his work”. The importance of the inclusion of the unit was due to its perceived independence of the government and excluding the unit diminished the legitimacy and transparency of the investigation. “If everything is above board in the arms deal, if there is nothing to hide, why is the ANC so nervous? Are they suggesting that Judge Heath would manufacture evidence that does not exist”.

The Democratic Alliance argued that the reasons given by Maduna were “fundamentally flawed” and his argument that the Units workload was already too high, a smokescreen: “South Africa cannot afford a perception of a corruption-complicit executive to take root in the mind of the prospective foreign investor when they consider us an emerging market, foreign direct investment destination. No amount of spin-doctoring will be able to undo the damage done if the arms probe smacks of a cover up.” According to PAC MP Patricia De Lille, “At issue is the constitutional accountability of the executive to parliament”. “The investigation will not stand or fall by the inclusion or exclusion of the SIU but will stand or fall by the principles being violated by the government – that is transparency and accountability”

De Lille said. It was unfortunate that the ANC had “personalised the matter of Judge Heath’s inclusion rather than looking at the competencies of his unit.” To exclude him now will signal to the international community that democracy is under threat and that corruption is rampant in SA”.  

IFP defence spokesperson, Velapho Ndlovu said he was “outraged and very much concerned because the executive is not running parliament. I don’t know why Maduna wants to exclude Heath’s unit from the investigation. If Heath’s unit is needed the government should not stand in the way where public money has been misused or the investigation of public money concerned…Now the executive which is the second arm of government, is overruling what parliament has agreed upon, and in doing so it means parliament has no power whatsoever”.

UDM leader, Bantu Holomisa released an open letter to President Mbeki saying that if the Heath Unit was excluded from the probe, he was under a “compelling obligation” to set up a judicial commission with the same powers as Heath. Without such a commission, the remaining state agencies involved in the probe lacked the capacity to carry out their mandate from parliament. There were strong perceptions and suspicions of a cover-up as a result of the ANC and hostility to Heath from “some government ministers.”

Civil society groups expressed similar concerns. Idasa said it “deeply regrets this decision because it undermines the constructive role that parliament through SCOPA had defined for itself in giving life to the constitutional obligation to hold the executive to account.” It further noted that part of SCOPA’s clear recommendation was that the SIU be included in the investigation on the basis that is has unique powers of investigation that would be useful in such a complex case, especially given the range of possible improprieties they had identified. Idasa noted that the constitution makes it clear that the executive is accountable to parliament, however, “this does not mean as Minister Maduna rightly argues that the executive must do what parliament tells it”:

“However, in our view it does mean that the executive should take full account of parliament’s view and be able to explain and justify to parliament any decision taken. The decision taken to not grant the Heath Unit a proclamation is a legitimate exercise of discretion and not a defiance of parliament; the question is whether it was wise to choose to ignore parliament’s view. Rightly or wrongly the involvement of the Heath unit is seen as a test of government’s commitment to a full and comprehensive inquiry. Excluding it may well, therefore, be interpreted as being soft on corruption and weak on the rule of law and may thus undermine international investor confidence. In this way the President runs the risk of underestimating the symbolic nature of the case and the weight that markets, the public and international opinion are attaching to it.”

Even the local chapter of Transparency International wrote to President Mbeki urging him to include the SIU in the arms probe. According to TI SA “the perception locally and internationally is that the integrity of the government is in question.” SA could not afford to exclude any anticorruption agency that could contribute to the investigation. Speaker Ginwala, herself a patron of TI-SA hit back at the body for intervening saying its remit was not to say to the country that this is the way to do it... It should focus on ensuring a proper investigation took place, rather than who was doing it. She said the unit had a huge workload and “maybe” another unit with similar powers should be formed to assist the investigation.

Anglican Archbishop Njongonkulu Ndungane appealed to Mbeki to put the country and its future first by implementing parliament’s recommendation that the deal be properly investigated: “We call on the government to honour the recommendations of parliament without delay. A failure to do so would pose a very serious threat to the country’s fragile democracy. Were the executive to override parliament and set up its own terms of reference for this investigation as the apartheid government used to do,

South Africa would enter into the downward, slippery road to becoming a banana republic”.  

A range of editorials hinted at the negative impact excluding Heath from the investigation would have on the country and alerted the government that the consequence of Heath’s exclusion would raise questions of a cover-up. In a particularly strong editorial, the Mail and Guardian questioned the government’s political will to fight corruption, saying that the truth will come out:

“Like the leaders of the apartheid regime before then, leaders of the ANC will find that the truth will come out – if not now, then next week, in five years or even in 50 years. Without a well-resourced and conspicuously independent investigation that enjoys the public’s confidence this arms deal will, we fear, haunt the ANC for the rest of its days in power…The issues are clear: The government and the ANC stand accused of trying to squash the probe into the arms deal… Their actions undermine their own calls for accountable governance and the constitutionally assigned oversight responsibilities of parliament. A government that has conferred on itself the status of being a champion of moral renewal for the entire continent should lead by example. Given the prevalence of corruption and incompetence in government and the magnitude of the money involved, the government’s reluctance to act effectively in this case invites justifiable suspicion.”

How correct the Mail and Guardian’s prediction would turn out to be. As of April 2008 criminal investigations into the arms deal continue.

9.10 The President Requests Further Information

The widespread negatives reaction to Maduna’s recommendation appeared to give President Mbeki food for thought and also indicated his characteristic indecisiveness

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on moving forward on tricky issues. President Mbeki delayed the decision on whether
or not to issue a proclamation to the SIU until Friday the 19th January requesting his
Justice minister to gather more information on the issues from all investigating
agencies including Heath’s unit. In a way that was bound to have repercussions Judge
Heath refused to cooperate with Maduna’s request, instead writing a letter saying
“The information that the Unit has is extremely sensitive and any disclosure of this
information could jeopardize the investigation, lead to victimization of
whistleblowers, and place potential witnesses at risk. As a result of the possible
consequences the Unit is not in a position to disclose its information to your office. I
trust you understand the position.” This response, wherein Heath basically said he
did not trust his principal with sensitive information relating to the arms deal, would
prove to be the final straw for the executive.

Before making his final decision whether or not to issue a proclamation President
Mbeki sought an additional legal opinion on the issue from two experienced senior
counsel, Western Cape Public Prosecutions Director Frank Khan and Adv Jan Lubbe
SC (Heath’s legal adviser). On 18 January 2001 what came to be known as the Khan
Lubbe report was sent to the Minister of Justice. The full opinion would only come
into the public realm a week later (in a speech given to the National Press Club by the
Minister of Justice) by which time the President had quoted selectively from it.

Lubbe and Khan’s opinion notes:

“We are of the view that the preparatory criminal investigation being
conducted by IDSEO in terms of Section 28 (13) of the National Prosecuting
Authorities Act no 32 of 1998 is warranted and justified. In addition there are
sufficient grounds in terms of the Special Investigating Units and Special
Tribunal’s Act No 74 of 1996, for a Special Investigating Unit to conduct an
investigation, and in our opinion, such an investigation is warranted. We agree
with the conclusions of the Special (sic) Committee on Public Accounts,
namely that a multi-disciplinary team consisting of the Investigating
Directorate would best conduct the investigation: Serious Economic Offences
(under the authority of the NDPP) the Auditor General, the Public Protector,

41 Speech by the Minister of Justice and Constitutional Development, Dr Penuell Maduna, at the
and the Special Investigation Unit. Due to the scope of the investigation, it is in our opinion imperative that all the agencies referred to above be involved in the earliest possible stage.”

The opinion goes on to note that cognizance has been taken of the judgment of the Constitutional Court in the case of SAPIL versus Heath and others (CCT27/2000) in which the court declared section 3 (1) of Act 14 of 1996 and Proclamation R24 of 1997 invalid and “in the light of this judgment, we recommend that the Act be amended as a matter of urgency to meet the constitutional defects.” Given the magnitude and complexity of the investigation, and that a change of the head of the unit during the investigation might practically hamper the investigation, Lubbe and Khan ask that consideration be given to appointing another Special Investigating Units under an Acting Judge who could then be place in a position to continue with this investigation by reverting to his personal status after the act is amended. Some existing members of the present unit could be appointed to the new unit, thereby retaining experience and expertise gathered by the present Unit and such a step would ensure continuity and be in accordance with good governance expected of the President in view of the above-mentioned Constitutional Court judgment.”

From the full legal opinion it is clear that the SIU’s inclusion in the JIT investigation into the arms deal is warranted, if not essential. However, in making his announcement to exclude the SIU on 19th January, President Mbeki would quote selectively from the Khan Lubbe opinion in order to justify his decision not to issue a proclamation.

9.11 The Presidency Decides Judge Heath’s Fate

On 19th January 2001 the Government Communication and Information Services (GCIS) issued a statement from the Director General, Frank Chikane on behalf of the Presidency. The statement noted that having taken full account of all the information at his disposal including further information from the Auditor-General, Public Protector, National Directorate of Public Prosecutions, Judge Heath, NGOs and

private persons, “the President has decided not to issue a proclamation to authorize the SIU headed by judge Heath to investigate the Strategic Defence Procurement Package.”

Reasons given in Chikane’s press statement for denying the proclamation to the SIU refer to the November 2000 Constitutional Court judgment which found that an SIU headed by a judge was “unconstitutional and invalid” as it held that to have a judge performing executive functions serves to corrupt the noble principle of the separation of powers…and that to require a judge to perform these functions clearly compromises the independence of the judiciary. The government cannot be party to acts which compromise the judiciary”. In compliance with the Constitutional Court therefore the President asked the minister to attend urgently to the matter of ensuring the SIU be properly constituted and “in the meantime, and in deference to the Constitutional Court ruling, the President will not be referring new matters to the SIU.”

The Statement noted that whilst cabinet, after a “thorough assessment”, was of the firm view that the procurement process was undertaken with the utmost integrity, it respected the opinion of the Auditor-General and SCOPA that further investigations are necessary. In this respect the statement noted that “the Auditor-General, the Public Protector and the National Director of Public Prosecutions are engaged in preliminary assessments of the allegations made regarding the Strategic Defence Procurement Package” and that “government believed that these agencies, together with our courts, have the legal capacity and the jurisdiction, both criminal and civil, to deal with all aspects of the investigation.” Noting that these agencies would “receive the government’s full cooperation in their investigations” the statement reaffirmed its “commitment to the eradication of corruption from our national life and to transparent and open practices.”

On the same day a letter from the President to Judge Heath was made public. In the letter the Constitutional Court judgment is cited relating to the separation of powers, pointing out that Heath’s appointment was “inconsistent with the Constitution and

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invalid.” Referring to the judgment on the timing and replacement of Heath which notes “there are good reasons for the first respondent’s position as the head of the SIU to be regularized without undue delay,” the President’s letter says “I am certain you will agree with me that the “spirit and essence” of the ruling of the Court is that you be removed without delay.” Appealing to Heath as a member of the judiciary, he hopes that he would “appreciate the sentiments of your colleagues on the Constitutional Court that we all act urgently to ensure that the principle of the separation of powers, a principle that is critical to our nascent democracy, is not further compromised.”

President Mbeki reminds Heath vigorously that the “SIU that you head is an instrument of this government. You, as head of the SIU, are therefore accountable to this government.” Reference is also made to the fact that the government was brought into power by more than two thirds of South Africans. Heath is told he therefore has “an obligation to provide this government with whatever information he has which is relevant to a consideration of whether to issue a proclamation of not” and that he “does not understand on what basis you would reach the conclusion that information, about this country, is more protected in your hands, than in the hands of the President of this country.” Reference is made to the letter of 16 January and Mbeki contends these are “very serious charges that you will have to substantiate”, namely to suggest that “that this democratic government, elected by an overwhelming majority of our people, a government that is responsible for creating the SIU as an instrument to root out corruption that was endemic during the tenure of the apartheid regime, is a government that is prone to “cover-up.”

With regard to Heath’s contention that “vital civil aspects” of the investigation might be overlooked if the SIU is not involved, the President notes the Public Protector’s powers to investigate “any conduct” in state affairs where no distinction is made between matters of a civil or criminal matter, that the Auditor-general has extensive powers to investigate state institutions and that every person has access to the courts. Finally, he writes:

“Judge Heath, I am led to believe that you know that you do not have even prima facie evidence that, in law, any person or persons committed a criminal offence in connection with the matter under discussion…Instead you embarked on an unseemly campaign to tout for work, with a level of desperation I am still trying to understand.”

The personal sentiments expressed in the open letter to Judge Heath were expressed even more vehemently in an unusual public broadcast by the president on television later that day. At 6pm on Friday 19th January 2001, President Mbeki addressed his fellow South Africans “openly and honestly” for almost an hour on the matter of the Special Investigating Unit’s involvement in the arms deal investigation. In his address Mbeki wanted to make a number of matters “absolutely clear”, the first being that “precisely because we are committed to the fight against corruption, the Government fully supports all lawful investigations into any matter pertaining to the defence acquisition” and that and is “firmly committed to root out corruption in our society and… fully supports all lawful investigations into any matter pertaining to the defence acquisition and will continue to cooperate with and assist all those charged with this task.”

The second point Mbeki wanted to emphasize was this: “at all times, the Government will act strictly according to our Constitution and our laws. We will insist that on this, as on other matters, we must be absolutely loyal to the principle of the rule of law.”

This matter bears especially on the issue of the involvement of the Special Investigating Unit in these inquiries.

The third point he emphasized was that the government would not break contracts it has legally entered into, reminding fellow South Africans, “that when you elected us into Government in 1994, we honored all lawful contracts entered into by the apartheid regime.” As such “we will not submit to any demand being made with regard to the contracts we have entered into with other Governments and major international companies, that we default on our contractual obligations, simply

because some people find it in their interest to spew out a flood of unsubstantiated allegations.”

Mbeki referred to the reports of the Auditor-General and SCOPA, noting how on the 12th January, a number of our Ministers, acting on behalf of the Cabinet, issued documents to the public contested all the points made in these Reports.

“The conclusions drawn by the Auditor-General and SCOPA are wrong. In good measure, this has happened because neither the Auditor-General nor SCOPA spoke to the people who took the decisions about the defence acquisition, namely, the Cabinet and a Cabinet sub-committee that was chaired by me as Deputy President of the Republic. We have found it strange that the Auditor-General and SCOPA came to conclusions about various decisions without asking the decision-makers to explain any matter they felt needed to be explained.”

Mbeki notes he would therefore “not be issuing any proclamation mandating the Special Investigating Unit to be involved in the inquiry. The Director General has released my letter to Judge Wilhelm Heath to the public. “ Mbeki mentioned he had released a letter to the Chairperson of SCOPA, Dr Gavin Woods, written by Deputy President Jacob Zuma, in his capacity as Leader of Government Business, in which he raises various serious matters related to the Report of SCOPA and other issues. This letter would form an important part of the criminal case of corruption involving Schabir Shaik’s “generally corrupt” relationship with Jacob Zuma. It would later emerge that it was Mbeki, rather than Zuma, who had written this letter.

Thanking Advocates Jan Lubbe S.C. and Frank Kahn, S.C., Director of Prosecutions in the Cape of Good Hope, for the assistance they gave the Minister to correct the above weakness by focusing precisely on the documentation that is in the hands of Judge Heath, to establish whether they indicate any criminal offence, President Mbeki quoted the same statement twice from a letter to the Minister of Justice dated 18 January, 2001:

"Further to your enquiry we advise as follows that at this stage there is no prima facie evidence in law that any person or persons committed a criminal offence."
Mbeki also reacted to Judge Heath’s response not to release information to the Justice Ministry as it might threaten potential witnesses. At this point in the live broadcast the President held up two documents (organograms) allegedly found in the possession of Judge Heath pointing to President Mbeki and former President Mandela and others’ alleged involvement in arms deal corruption. Mbeki continued saying we cannot allow the situation to continue where an organ appointed by and accountable to the executive refuses to accept the authority of the executive. Further, the Constitutional Court has directed that we act "without undue delay" to replace Judge Heath with somebody else who is not a judge. This directive of the Constitutional Court will be carried out as soon as parliament reconvenes at the beginning of February. The Government will not be party to anything that seeks to defy the decisions of our courts as some have suggested with regard to the matter of the Heath Unit, so-called.

The President ended on a conspiratorial note:

“Our country and all our people have been subjected to a sustained campaign that has sought to discredit our Government and the country itself by making unfounded and unsubstantiated allegations of corruption. Among other things, this campaign has sought to force us to do illegal things, to break important contractual obligations, to accuse major international companies of corrupt practice and to damage our image globally, arguing that if we did these things, we would, inter alia, strengthen international investor confidence in South Africa. Nothing whatsoever, will force us to do any of these absolutely wrong and unacceptable things. We know that various entities have been hired to sustain this campaign to create a negative climate about our country and Government. I would like to assure you that the campaign will not succeed. We will leave no stone unturned in the effort to ensure that you, the people, know everything that needs to be known about this matter. All lawful investigations will continue. All wrongdoers, whoever they may be, will meet their just deserts.”

According to a Sunday newspaper, a phone call by Judge Heath to former President Mandela was behind Mbeki’s angry public attack on the judge on Friday. Heath confirmed he had indeed called Mandela on the Thursday asking him for a testimonial: “I did speak to Mr Mandela and we agreed that the discussion would
remain between us. But even if I asked Mr Mandela for a testimonial why should (Mbeki) be angry? If I had to ask him for one, what would he say?” Mandela is said to have agreed to write a reference but became suspicious when Heath asked him instead to testify to his abilities by phone to all who called. Mandela then informed Mbeki of the Judge’s call. Two of Mbeki’s close advisers said the president was so incensed that he urgently discussed the issue with Maduna and decided to publicly censure Heath and expedite his removal from the unit.  

Jonathan Shapiro 1-23-2001

9.11.1 The Organograms

Heath strongly denied that the unit had drawn up the organograms President Mbeki had shown on national TV. Obtained by intelligence agents these allegedly linked Mbeki, Mandela, Zuma, Pahad and Modise to various companies involved in the deal. He said he had never set out to prove Mbeki or Mandela had been involved in corruption regarding the arms deal and that Mbeki had been “wrongly advised” about excluding his unit from the arms probe and that the government had a “complete misconception” of the issue when it claimed there was no prima facie evidence of any criminal wrongdoing.

A few days after the Mbeki broadcast, Martin Welz, editor of investigative magazine Noseweek which in August 2000 was the first publication to highlight the arms industry interests of family members of the SANDF procurement chief Chippy Shaik, said he was shocked to see Mbeki dangle organograms on SABC TV news. He admitted he had personally drafted the diagrams – linking Mbeki, Mandela, Modise and other private people with close ties to top politicians – as a “hypothesis that could form the basis of an investigation” into the arms deal. “They are just a theory which is not based on fact”. “The president was misinformed. The people who informed him did not understand what the documents meant. They just sketched the power structure and did not prove anything”. Welz fully believed Heath when he said he had never seen the sketches before. Whilst he had shared the documents with some government investigators he had certainly not done so with Heath. Patricia De Lille confirmed that she too had never seen the sketches and these were not part of the dossier she had initially submitted to Heath as a basis for his probe.49

Presidential aides moved swiftly to prevent an apparent embarrassment over the matter. On 23 January a statement by the Director General of the presidency, Frank Chikane reiterated that the organograms were among the documents that Judge Heath refused to make available to the Minister of Justice. “The deliberate propagation of untruths about this matter will not change this reality.”50

9.11.2 Responses to the President’s Announcement

Following president Mbeki’s announcement, Judge Heath who had not been individually informed that he would be excluded from the arms probe said: “Of course I am disappointed. I know many other people in the country are disappointed. We were merely trying to protect the interests of the country as well as that of government.” Heath also said he had complete confidence in the expertise of the other agencies involved in the probe but that the exclusion of his unit affected exploring the maladministration aspect of the deal.51

Within the Heath Unit the falling of the axe was no surprise. “We have been expecting both the replacement of Judge Heath and the exclusion from the investigation”. Staff at the SIU wrote to President Mbeki and Justice Minister Maduna, imploring their loyalty to the president: “We accept the unit is an organ of state that only act in accordance with provisions of Act 74 of 1996. We further accept that the unit was created by the government as an important tool in the fight against corruption. We trust that we will be able to continue this important function. We respectfully ask you to distinguish between the position of Judge Heath as head of the unit and the position of members of the unit.”

Opposition parties expressed disappointment at the decision to exclude the SIU.

The PAC’s Patricia De Lille who had received death threats regarding her stance on the arms deal accused the ANC of placing their interests before that of the country. “We are not fighting government, we are not fighting the president, we are not fighting the minister of justice, we are fighting corruption. We want to help the government in rooting out corruption within the government. The credibility of this investigation will not stand or fall by the inclusion or exclusion of the investigative unit, but by the principle of accountability of the executive to parliament which the government is violating.” According to De Lille the SIU is the only unit that could effectively investigate the allegations. “It is a special unit with special powers and that is why it was first established. Firstly it has the ability to set aside contracts signed by parties in the event of corruption, and that is why we need Judge Heath to be involved because we want the contracts in the arms deal to be declared null and void. And secondly it has the power to investigate the validity of the contracts. The executive has personalized the issue. I don’t know what the Judge did to them but I saw this coming six months ago.”

The Democratic Alliance questioned why President Mbeki and the government had allowed the controversy around the arms programme to escalate to crisis level before

taking action.\textsuperscript{55} Leader of the UDM, Bantu Holomisa said “this indicates that the existing heads of the so-called independent institutions survive at the executive’s pleasure and do so as long as they are seen by the executive to toe the line.”\textsuperscript{56} The IFP commented “we thought the president would be above party politics but it is clear that he has listened to Maduna his minister and party colleagues…The allegations that the Heath unit is siding with the opposition are things that should have been investigated separately. Heath should have formed part of the investigation if it is to have any credibility. Many names have been mentioned in the newspapers. Who is going to clear those implicated?”\textsuperscript{57}

A range of editorials expressed dismay at the SIU’s exclusion from the probe and the consequences this would have\textsuperscript{58}. Political analysts tried to make sense of the SIU exclusion. Principal of Vista University, Sipho Seepe, commented “Heath was seen as a threat to the government because of his independence. The problem with this government is that they think they have a monopoly on what is best for South Africa.” Richard Calland from Idasa said, “This has been really badly handled. This government does not seem to want to learn from its experiences. There was Zimbabwe, then Aids and now this…The government is showing itself incapable of managing crises and in fact is exacerbating them.”\textsuperscript{59}

Political analyst Xolela Mangcu provided a possible solution to the resolution of the controversy: “What is at stake it the integrity of parliament, the presidency and the unit itself. We could preserve the integrity of parliament by involving the unit in the investigation, without Heath…Parliament’s integrity could also be maintained by appointing an equally vigorous individual who is seen to be neither a government apologist nor a hack with an axe to grinds. Appointing an independent black person would be even better. It would demonstrate to the world, and even more importantly

\textsuperscript{59} “Decision to bar heath shows government cannot manage crises”, Reuters, 24 January 2001.
to ourselves, that we can hold ourselves accountable. With Heath out of the way, the executive would then co-operate with the very unit it set up to investigate corruption. And voila, the investigation proceeds with the unit’s involvement, albeit without Heath.”

Kaizer Nyatsumba noted how the issue had divided the country almost neatly along racial lines: “Most whites argue for the inclusion of Heath in the team which will investigate alleged corruption in the arms procurement process. Meanwhile many blacks have publicly argues that Heath’s involvement is not paramount… For the country’s sake it is vitally important therefore that the investigating agencies conduct as thorough a probe into the alleged arms malfeasance as possible… That investigation should go on without Heath who, his protestations notwithstanding, has repeatedly come across as a man with an agenda to bury the government, at the behest of certain political players and parties. Heath, who should be replaced swiftly as the head of the SIU, is now damaged goods, after having performed so spectacularly at political hara-kiri. It is important that parties whose only interest is the unearthing of the truth should accept that Heath cannot be part of that probe. Those charged with such an important a job should be men and women whose integrity is accepted without reservation by everybody, including the government and the opposition parties involved.”

Jonathan Shapiro 1-25-2001

60 Xolela Mangcu, “Intellectuals have a noble role to play but they’re not playing it”, Sunday Independent, 21 January 2001.
9.12 Conclusion

So, in the final analysis, how convincing are the state’s reasons for excluding the SIU? They are not convincing at all. The overtly personal reaction to Judge Heath by members of the ANC would come to haunt the presidency as a question mark would hang over the credibility of the high profile corruption investigation. The exclusion of Heath brings to light a factor whereby a high-ranking official belonging to the previously advantaged group, and in this case white, was seen to be challenging the new black regime. Racial and personal politics would prevail above principle.

In an interview conducted in September 2002, with Willie Hofmeyr, previously and ANC MP who succeeded Judge Heath to head the Special Investigating Unit, Hofmeyr conceded that on the question of Heath’s involvement, the issue “got sort of involved with the whole debate of the SIU and my sense is that it was mainly overlaid with all sort of personal dynamics rather than any great issues of principle.” The issue became “very mess.” His sense was that “even if the SIU had been involved (in the investigation) and the same result had been achieved perhaps the results would have had more credibility than it does have at the moment.”

This completes our outline of the government’s initial response to the irregularities involved in the arms deal. In the final section of this thesis, Part Four, the focus will be on evaluating the quality of this response. As the arms deal is a test case for the anti-corruption capacity of various institutions as well as political will to deal credibly with corruption in South Africa, it will be necessary to go into some detail of further developments in the case. In this regard the unique challenges facing SCOPA in exercising parliamentary oversight of the executive and ensuring that the investigation proceeds, will be closely examined as will the case of two ANC MPs involved in the arms deal investigation, namely Tony Yengeni and Andrew Feinstein, in order to further tease out and test our thesis propositions.

62 Interview with Willie Hofmeyr, 3 September 2002.
PART FOUR: ARMS AND ACCOUNTABILITY

Chapter Ten: Parliamentary Oversight Under Pressure

10.1 Introduction

How have the anti-corruption mechanisms in South Africa fared with respect to handling allegations of corruption in the arms deal? In brief, the demands of loyalty to the party have, as we have already seen, come into conflict with the elements of strict impartiality required if anti-corruption bodies are to be successful. This conflict in the final analysis is best articulated by the words and especially actions of the ANC MP Andrew Feinstein.

This chapter simply allows Feinstein’s action to speak for itself. His resignation, in September 2001, is the most eloquent way of pointing to a structural problem in the politics of loyalty as opposed to accountability, and the impact this limited and partisan form of accountability has on the effectiveness of anti-corruption safeguards such as parliament, in South Africa. A further element which comes to the fore here is the critical role of the media. The government’s accusations of the press as being racist, alongside opposition parties’ views on the handling of the arms deal, points again to the fact, as far as senior members of the government are concerned, loyalty to the party’s position, even if misguided, is everything.

Following the president’s announcement on public television to exclude the SIU from the investigation, parliament’s main oversight committee, the Standing Committee on Public Accounts (SCOPA) would come under increasing pressure from the executive. The process is encapsulated firstly in the highly critical letter signed by the Leader of Government Business, Jacob Zuma, to the chair of SCOPA, the response and counter-response; and secondly (in Chapter Eleven) how the government dealt with the case of ANC Chief Whip Tony Yengeni, exposed in the media for having accepted a 47% discount from a company tendering for part of the arms deal. We will examine the Zuma letter controversy first.
10.2 Zuma’s Letter to the Chair of SCOPA

In the statement on 19\textsuperscript{th} January 2001 the Presidency had referred to a 12-page letter from Deputy President Jacob Zuma (in his capacity as Leader of Government Business) to SCOPA chair, Dr Gavin Woods. This letter would have continuing importance in the criminal trials that emanated from the arms deal investigation – not dealt with in any detail in this thesis - and it is important to discuss it as it shows the strategy of dealing with parliament (in particular SCOPA) from the perspective of the executive.

While Zuma had signed the letter, the true author of the letter was always in question and it was widely suspected that it originated from the Office of the Presidency, since Zuma was out the country at the time and the style was “very hostile and improper” (Woods 2002). Mbeki would admit to writing the letter himself five years later\textsuperscript{1}. What was the true intention of this extraordinary letter? Was Zuma being used to discredit SCOPA? Was Zuma himself being set up as part of a wider conspiracy within the ANC to get rid of him as a potential presidential candidate? The answers to these questions can without further evidence only be speculative.

The letter discredits SCOPA’s 14th report and in particular the investigation it recommended. Noting that “the executive has no desire to fuel controversy, however is obliged to defend the integrity of government,” the author drew Woods’ attention to both the 12 January 2001 government statement on the defence acquisitions and Justice Minister Maduna’s letter of 15 January which “contest the conclusions arrived at by the Auditor-General and SCOPA.”\textsuperscript{2}

In respecting the decision of the Constitutional Court, it stated: “there is no need for the “Heath Unit” to be involved in any “investigation” of the defence acquisition” and “we do not understand why you, presumably on behalf of your parliamentary committee, suggest that we should ignore the decision of the Constitutional Court on

\textsuperscript{1} Angela Quintal, “Mbeki admits he was behind Zuma’s letter to Woods”, Sunday Tribune, 26 February, 2006.
\textsuperscript{2} Letter from Jacob Zuma to Gavin Woods, 19 January 2001.
the “Heath Unit.” The letter then proceeded to quote the President of the Constitutional Court, speaking on behalf of the court saying, “Although there may be reasons for allowing sufficient time for all matters to be dealt with simultaneously, there are good reasons for the first respondent’s position as head of the SIU to be regularized without undue delay.” The case-load of the unit would make it as Minister Maduna noted “absurd and illogical for additional work to be given to the unit.” As such “we find it very odd indeed that the Auditor General, according to your letter, is keen that we act without reference to the decision of the Constitutional Court”.3

The letter noted that it was also “strange” that SCOPA considers expenditure for the acquisition of defence equipment as a “major diversion of public resources,” particularly because of the constitutional obligation to maintain a national defence force and the fact that the expenditure was considered by the Parliamentary Defence Committee and approved by parliament.”4 As we have seen earlier, the “approval” by parliament, was not so clear-cut.

Other “matters of grave concern” referred to in the letter arose from the 14th Report where SCOPA stated it was interested in carrying out an investigation “because our government, foreign governments and the prime contractors, major international companies, are prone to corruption and dishonesty. If this is the starting point for SCOPA, it seems the investigation is tantamount to a fishing expedition to find the corruption and dishonesty you assume must have occurred.” The letter questioned the 14th report’s accounts of corruption in the international arms trade industry and asked, “what work was done by SCOPA to establish that there was a possible role by which influential parties? Do these include members of the government? Which prime contractors and which subcontractors would have been influenced by these influential parties?”5 The letter further questioned the concerns raised by the 14th report about the NIP agreements: “The seriousness with which you take your assumption that our government, the trans-national corporations and foreign governments are prone to corruption and dishonesty, is illustrated by the steps you have taken to ensure that

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investigations take place.”\textsuperscript{6} The letter went on to observe that “natural justice demands that you both substantiate the allegation that the persons, governments and corporations…are prone to corruption and dishonesty and provide even the most rudimentary or elementary evidence that any or all of these acted in a corrupt or dishonest manner…it is a most serious matter indeed for our parliament or any section of it to level charges of corruption against foreign governments and corporations without producing evidence to back up such allegations.”\textsuperscript{7} The letter continued “it is clear from your report to parliament that you have a significant amount of written information…and presumably other evidence” and that it should be handed over to the Police Service and brought to the attention of the Speaker. “The rules, I believe, prescribe that any investigation pursuant to this information would not fall within the competence of SCOPA.”

The letter then addressed the “interaction between SCOPA and the Executive on the issue of the defence acquisition” observing that SCOPA had reached conclusions without having heard cabinet, despite the request the ministers made to meet SCOPA. Because this meeting did not take place, “SCOPA has seriously misdirected itself and thus arrived at conclusions that are not substantiated by any facts.” “We hope this strange manner of proceeding was not driven by a determination to find the Executive guilty at all costs, based on the assumption that the Executive is prone to corruption and dishonesty.” There was a need to ensure that “we do not repeat the obviously wrong things that have happened during the handling by parliament of the defence acquisition issue.”\textsuperscript{8}

In this regard reference was made to the Speaker’s letter of 27th December noting SCOPA “has no authority to subcontract its work to any of these bodies or require them to undertake any particular activity, or to report directly to the Committee. From the statement of the Speaker it is clear that your letter to the President (8 December) was ultra vires. This is true of any action you might have taken to cause any investigative unit to carry out any investigation. This has put the Executive and its organs in an embarrassing situation, to the extent that you and others have conveyed

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\textsuperscript{6} Letter from Jacob Zuma to Gavin Woods, 19 January 2001.  \\
\textsuperscript{7} Letter from Jacob Zuma to Gavin Woods, 19 January 2001.  \\
\textsuperscript{8} Letter from Jacob Zuma to Gavin Woods, 19 January 2001.
\end{flushright}
the false information that the National Assembly requested that various organs should carry out an investigation. It is therefore necessary that specific steps be taken to correct this situation, to ensure that all of us, including SCOPA and you, respect the rule of law.”

The letter also referred to Woods communication of 21 November to the Joint Investigating Initiative where Woods had referred to “uncertainties created through the media of possible interference in the investigation by government, it was felt appropriate to mention this offer (from some “international facility”) as a possible means through which SCOPA could assure the public of a comprehensive investigation.” Zuma or the letter’s author maintained “you felt that they did not enjoy sufficient credibility with “the public” to be able to reassure “the public” of the integrity and honesty of the investigation if the foreign “facility” was not involved.

On what information do you base this assessment of the AG, PP and NDPP who have all been confirmed in their positions by parliament? “I am not raising these questions so that you should report to the Executive. I mention them because they cause grave concern to the Executive which is keen to hear straightforward answers. Parliament will have to deal with these and other questions as we have to respect the principle contained in our constitution of the separation of powers.”

Referring to Wood’s 8 December letter and the decision of the Constitutional Court, the letter noted “it is clear that you disagree with the views both of the Public Protector and the Constitutional Court, believing that there are public funds to be recovered and that neither the police, nor the Prosecuting Authority nor the state attorney have the same competence to act as does the SIU.”

Woods was then asked to favour the executive with a response to the following questions:

• What are the particular powers, areas of competence and relevant experience to which you refer, distinct from the powers, area of competence and relevant experience of our judiciary?

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• In what way are the competencies mentioned under (a) especially relevant to the determination of the truth about the defence acquisition, which determination of the truth would be weakened by the absence of the SIU?

The letter requested SCOPA to indicate “the specific matters it wants investigated and why, providing the prima facie evidence which it believes justifies this investigation. As of now we do not have this prima facie evidence and are completely at a loss as to what the loudly proclaimed wrongdoing consists in.” The letter stressed that parliament is, of course, at liberty to interact with the Public Protector and Auditor-General as it wishes. The letter reiterated the Executive willingness to co-operate fully with any investigation necessitated by information that suggests that corruption might have occurred in the process of defence acquisition. Finally “the government will also act vigorously to defend itself and the country against any malicious misinformation campaign intended to discredit the Government and destabilize the country.”

10.2.1 Responses to Zuma’s Letter

The upshot of Zuma’s letter was to force ANC members on the committee to choose between their role as members of the ANC and of the committee. It also indicated a wish for government to take responsibility for the investigation out of the committee’s hands and thereby exclude it from any oversight of its findings. Woods said if this was indeed what government intended it was “chilling”. He believed that “prima facie” evidence existed for a probe and would propose that ministers who rejected the committee’s findings appear before it to explain themselves.

Ten days later, on 29th January 2001, the Speaker of the National Assembly Dr Frene Ginwala would write to the Deputy President on the matter seemingly as a damage control exercise, in a response that was seen as “inappropriate” by SCOPA members such as Gavin Woods. On the same day she appeared before the SCOPA saying the committee’s investigation must continue. She outlined the different requirements of accountability of the institutions involved in the JIT and the responsibilities of

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SCOPA and those of Parliament in terms of the investigation noting that while a Committee can engage researchers or other resources, it cannot “subcontract” its work. The meeting closed after Chairperson Woods expressed on what points he took issue with the Speaker, namely disputing her suggestion that SCOPA had subcontracted its work and, most particularly, the Speaker’s suggestion that he had exceeded his authority.

In Ginwala’s letter of 29th January to Zuma she acknowledged the letter of 19th January written to Gavin Woods, the chair of SCOPA, which had raised issues of procedure on the conduct of relations between the legislature and the executive as well as specific concerns of substance. She noted expressions of support for parliament’s constitutional responsibilities in the president’s public broadcast as well as his letter but is “perturbed” by the concerns raised noting, “the National Assembly will need to consider them very seriously and rectify any problems.”

Ginwala then responded systematically to the various points raised by the Deputy President in a way that Woods would later describe as “ominous and wholly inappropriate” (Woods 2002).

While the 14th Report adopted by the assembly “explicitly recommends an independent and expert forensic investigation for which the committee will prepare a brief as well as a exploratory meeting to which the four named “and other appropriate investigative bodies” should be invited, the Speaker argued that the report did not recommend that any or all of these bodies should be included, nor does it refer to the procedural and constitutional issues that would arise should Parliament wish to involve or instruct either independent or executive agencies or organizations in its inquiries. “Had there been a recommendation that the Executive authorize the SIU or any other organ of the Executive, I would have immediately drawn the attention of the relevant Minister as has been our practice for over a year.”

She noted how it was now evident that there are differences among SCOPA on what the report was intended to convey…”I want to take the opportunity to express my view that it is within the competence of the Legislature after due consideration to

make a recommendation to the Executive on areas within its jurisdiction which the
Executive may choose to accept or reject. Parliament’s authority is persuasive. The
legislature cannot instruct the Executive, except to the extent that legislation it enacts
defines and sets the legal framework within which the executive undertakes its
constitutional responsibilities. Parliament retains oversight over the manner in which
the Executive and state organs perform their function.”

In order to facilitate communication with the executive and ensure that
recommendations of the committee are considered timeously she noted that “I have
for the past year been writing to specific members of the Executive drawing attention
to report and particular recommendation concerning their portfolios and requesting
that the assembly be advised of action that is taken.” She concluded the letter by
saying: “We are all still developing our understanding and trying to give effect to the
constitutional relationship between the Executive and the Legislature….as recent
events have emphasized, much still remains to be done, and we need to continuously
review and improve the communication and relationship between the Executive and
the Legislature.”

Defining the relationship between the executive and legislature would form a major
theme of a debate held six months later, in June 2001, in support of the speaker and
her role. This is discussed later in this chapter. Feinstein would refrain from voting in
this debate, signaling his growing alienation from the ANC.

On 31st January, Zuma would acknowledge the speaker’s letter, thanking her for her
“efforts to guide SCOPA in the process of finalizing this matter ” and hoping that
SCOPA would respond to matters raised in the first National Assembly report with
more clarity in their second report to Parliament as this would assist the National
Assembly in its “earnest search for the truth in this matter.” His letter raised the
following questions that clearly perturbed the executive:

16 Letter from Jacob Zuma to the Speaker, 31 January 2001.
• What evidence was gathered by the committee upon which it based its assertions that defence acquisitions are usually attended by malpractice, with the purchasing countries being victims of such malpractice?
• What evidence does the committee have that in this specific instance, such malpractice occurred, as well as evidence of the resultant harm to South Africa?
• On what information does SCOPA base its conclusion that improper influence might have been exerted in “certain of these (subcontractor) selections?”
• Which of these selections are being referred to and who are the influential parties?
• What evidence caused SCOPA to reach for the conclusion that influential parties might have influenced the choice of subcontractors?
• Why did SCOPA omit to invite the Ministers who were involved in this process to clarify and answer questions, prior to the finalization of the National Assembly’s preliminary report?  

Whilst the correspondence to Gavin Woods from the Deputy President and the Speaker’s subsequent intervention were clearly attempts to undermine the proposed SCOPA investigation on procedural issues, executive intervention by the ANC was also occurring at committee level in parliament.

10.3 SCOPA and the ANC

The meeting of SCOPA on Monday 22\textsuperscript{nd} January 2001 was watched keenly. Would ANC MPs still stand by their decision of the past year to support the call by SCOPA for SIU as one of the investigating agencies to be involved in the probe? The meeting would also determine whether the non-partisan approach maintained by the committee had survived the intense criticism from the executive. The meeting and its outcome was reported by the local press as one that “could determine whether the country faces a crisis of public confidence in the government’s will to deal with corruption... …the trend-setting meeting of SCOPA which will determine whether

\footnote{17 Letter from Jacob Zuma to the Speaker, 31 January 2001.}
parliament and its committees will assert their independence and critical role or whether they will be cowed by pressures from the executive.”

SCOPA was considering calling Ministers Erwin, Manuel, Radebe and Lekota to appear before it. However inviting the ministers to appear before the committee would place the ANC in the difficult position of having to question and possibly challenge the party leadership. The day before, ANC members on SCOPA had been called to an emergency session in Cape Town to discuss their strategy. Senior members of the ANC apparently gave the members instructions on their short-term involvement in SCOPA and the arms deal. Both the Speaker and Chairperson on the National Council of Provinces were present with the latter participating actively in the drafting of an ANC press statement released on 22 January after the SCOPA meeting that rejected the inclusion of the SIU in the JIT (Woods 2002).

There were also reports of ANC committee members coming under strong pressure to back down on the inquiry. The first cracks in SCOPA unity appeared when ANC member Don Gumede said “the language of the committee report was quite unfortunate. That resolution was taken with undue haste” and that the committee would have to re-examine its position on Heath in the light of the Constitutional Court decision.

At a press conference in parliament later that day the ANC said that SCOPA had not singled out the Heath anti-corruption unit in its recommendations in the 14th Report that allegations of serious irregularities should be investigated. Andrew Feinstein, chair of the ANC study group said that this did not mean that all four agencies had in fact been mandated to be part of the probe. At the time of drafting the resolution “it wasn’t clear which units we wanted involved.” The ANC group denied that it had reneged on its original position and reaffirmed its strong support for a comprehensive investigation saying that calling for an exploratory meeting did not mean giving them

a mandate. Feinstein would recall that he had been forced to read the statement and that “Gavin had been devastated.”

Woods would however, stick to his guns insisting all parties including the ANC members on SCOPA had wanted the Heath unit involved in the probe: “It is quite clear in my mind that every member of the committee was of the opinion that the report expressed the need and desire of all four of the agencies to be involved in the investigation. Any deviation from that position would be incorrect.” He said the exploratory meeting was to ensure all four agencies were brought together to see how best they could co-operate. Woods said he had staked his reputation on this interpretation and had been attacked by the executive for it. He had done so on the basis that all committee members had voted individually in favour of the involvement of all four agencies.

Opposition parties charged ANC members with submitting to pressure from the executive for the unit’s exclusion. DA MP Raenette Taljaard described the ANC view as a legalistic interpretation of SCOPA’s recommendation: “We all know what was intended…the ANC has missed a wonderful opportunity to call the executive to account”.

10.4 The ANC’s Response to Accusations of Backtracking

In a section entitled “The REAL Arms Scandal”, an ANC statement on arms procurement released on 23 January would attack the media noting it “has almost without exception acted as uncritical participants in fuelling this so called crises” and propagated the following myths:

• The involvement of the Heath Unit was a test of government’s commitment to fight corruption (sufficient permanent institutions with a proven track record – also constitutional court ruling)

22 Interview with Andrew Feinstein, 21 August 2001.
• The President did not respect the oversight role of Parliament (Presidential prerogative to issue proclamation, PAC should desist from “creating confusion and making unnecessary noise)

• The ANC was trying to prevent a thorough investigation (media have no confidence, only in Heath – what is so special about this individual?)

• The arms procurement process was riddled with corruption (no evidence to support this sweeping conclusion, bring information forward, executive support to the investigation, conviction of integrity, availability to committee.)

It further noted that the ANC viewed this as “a crisis of trying to make a serious issue out of nothing” and “part of a sustained campaign to try and destabilize the government, the ANC” and “yet another desperate attempt to create another banana republic out of our beloved South Africa”. The statement warned that “the ANC would like to condemn in the harshest terms, the role that some members of the media in conjunction with the opposition are playing, in trying to deviate the attention of the public from matters of national importance.” The statement continued to say that the debate had now moved from the investigation of possible fraud and other irregularities, to the need to the involvement of Judge Heath and finally to the meaningfulness of the arms deal. “The fact is that there is not prima facie evidence of criminal misconduct.”

Finally, the ANC believed “no sinister forces” would succeed in changing the president’s politically and legally informed position. The statement ended:

    Forward to Democracy and the Liberation of the People of South Africa
    Down with Corruption!
    Down with the destabilization of our Democracy!

It was clear that the ANC’s leadership perceived the proposed SCOPA investigation into corruption as a serious political challenge.

SCOPA Chair, Dr Gavin Woods would try and get the committee back on track, expressing the sentiment that the committee must rise above political differences in dealing with the arms deal issue and continue the proud tradition of SCOPA that
operated along consensual, non-partisan lines, a position strongly supported by ANC MP Andrew Feinstein and Raenette Taljaard from the DA. This stance ultimately failed as the committee’s Second Report on the arms deal would not be accepted unanimously by the committee but pushed through by the ANC majority.

10.5 Further Executive Justifications for the Exclusion of the SIU

At the Pretoria Press Club, Justice Minister Penuell Maduna added his justification for excluding the SIU from the arms deal investigation. He first warned the media “against sensational reporting” before firmly rejecting any suggestion that government had been “attempting to conceal alleged corruption regarding the arms deal” and that excluding the SIU was “proof of the fact that Government has something to hide.”

Maduna cited five reasons for the exclusion of the SIU including: the constitutional court decision; the limited human resource capacity of the unit; the fact that various other agencies were investigating the matter and believe they can adequately deal with the present issues; the wide mandate required by Heath which raises questions about duplication or overlapping and the creation of possible tension between agencies; and the powers of the existing Unit to approach the Special Tribunal for the cancellation of contracts, indicating the Public Protector’s opinion of lack of evidence of any unlawful appropriation or expenditure of public money.

Maduna referred to the Annual Report (1999/2000) of the SIU that had been submitted to parliament. In it Judge Heath had said, “…the Minister of Justice has in the past year since the 1999 elections, save for a few amendments to proclamations and a few already in process, refused to process proclamations to the President’s Office. The Minister has unilaterally informed the Unit on several occasions during the financial year that he had decided to refer matters to the NDPP, the PP and lately referred matters back to the Premiers who have already requested that the Unit investigate matters which originated in their Provinces.”

Objecting to this Maduna said a number of factors were taken into account in decisions whether or not to refer a particular matter to the unit and that in terms of the
Act there was no obligation that each and every matter submitted to the department should be submitted to the Unit for an investigation, noting the range of other anti-corruption bodies: “The Act provides for the establishment of SIUs for the purpose of investigating serious malpractices or maladministration in connection with the administration of state institutions, state assets and public money as well as any conduct which may seriously harm the interests of the public. The investigations contemplated by the Act should be of an involved nature which require investigations normally done by a commission of inquiry.” Also as there was a cost factor where “one should determine whether it is financially justifiable to refer a particular matter to a SIU which is a very costly instrument, in circumstances where the responsible Department has indeed a mechanism or structure to adequately deal with that matter.”

Finally, he reiterated the important role of the press in an open and democratic society as one of the watchdogs of government, which had a moral obligation to bring facts to the attention of the public. The media should ensure that the facts that are brought are accurate and it must guard against the tendency to draw inaccurate conclusions from such facts.

Maduna assured his audience that “the government will do anything in its power to investigate the arms deal and if certain irregularities are exposed, the government will ensure the law takes its course. For these purposes the investigation of the matter is entrusted to three constitutional legitimate structures, namely the Public Protector, the Auditor-General and the NDPP.”

In what would raise a political storm, Maduna quoted from the Lubbe and Khan opinion, made public in its entirety for the first time. Here it was revealed that their opinion had in fact called for the SIU to be involved in the investigation. This is something the President had conveniently ignored in his decision of 19th January when on national television he refused a proclamation to investigate to the SIU (see chapter nine). Maduna’s reasons for doing this are unclear; possibly he was naïve in

believing the public would not pick up on this inconsistency, or perhaps the executive was confident that it could ride any further controversy this revelation of the full legal opinion might bring.

10.5.1 Responses to Maduna’s Reasoning

The following day, in a headline story “Mbeki ‘ignored’ plea for Heath role” and an editorial “Cynical manipulation” Business Day reported that the legal opinion requested and handed to Minister Maduna on 18th January and used by President Mbeki on 19th January in excluding the Heath Unit had in fact strongly recommended the inclusion of the unit, or one with the same powers! Sunday newspapers took up the President’s misrepresentation of the Khan/Lubbe opinions in editorials entitled “Explain yourself, Mr President” and “Mbeki spares truth, cedes public faith”.\(^28\)

In a letter to the editor of Business Day, Director General in the Presidency, Rev Frank Chikane said the headlines and editorial “do not correctly represent the President’s reference to the views of Advocates Frank Khan and Jan Lubbe.” He noted that “the President referred to what they had to say in response to a request for an assessment of the nature of the information in the documents in question so that he could apply his mind to the question of whether to issue a proclamation. You report that Khan and Lubbe said that “at this stage” there was no prima facie evidence that anyone had acted unlawfully. This is what the President said. That was the nub of the issues and the fact that he did not refer to other matters in his address does not constitute his “ignoring” them…The President’s powers are constrained by the law and the constitution and thus the President carefully considered all views presented to him and made his determination within the constraints of the law…It was none other than the government that released the full Khan-Lubbe assessments, offering the public maximum information. That is not manipulation, neither is it cynical or non-transparent.\(^29\)

In response, Adv Khan said Mbeki had not “misrepresented” him but that he would normally determine whether there was a prima facie case at the end of an

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investigation and after sworn statements had been taken. “The second memo must be read with the first one”. Later he said that he had not meant that the Heath unit should be involved but another unit of the same kind. Maduna in response said he did not know how Khan and Lubbe had reached their conclusions, that there was no legal basis to send the case to the unit and that the unit would be shut down once it had completed its investigations.

During the following week, a more sinister crackdown on independent minded ANC members of SCOPA occurred, with the party bringing in loyalists to the committee and putting in place structures to ensure “political control”.

10.6 The ANC’s Replacement of Feinstein on SCOPA

On Monday 29 January 2001, a meeting chaired by Chief Whip Tony Yengeni, whose name had come up in connection with some of the allegations being probed, was attended by 17 MPs. It’s purpose was to reshuffle ANC members serving on SCOPA. In particular Yengeni stressed the need for the party’s leadership to guide the work of the ANC’s study group on SCOPA, indicating that from now on he would attend all study group meetings to provide “political authority and guidance” to their deliberations since there was a need for the ANC from the president downwards to exercise control over the committee. This intervention followed earlier reports of party heavyweights putting pressure on MPs like Feinstein who had backed the probe.

At a press conference later that day, the Chief Whip of the ANC Tony Yengeni said “that as it was the ANC government that was under attack, it was imperative that the lines of accountability between the ANC members on SCOPA and the ANC leadership be strengthened.” He also announced that the ANC component of SCOPA was being strengthened so that “the ANC from the President downwards, could exercise political control”. From now on nothing would go from the Committee to the plenary of the National Assembly without first going through the ANC caucus, and all leaks would be investigated. Making the announcement Yengeni said “I don’t want

to cast aspersions. We really wanted to improve our capacity but also wanted people who are going to be the political link with ANC structures so that the ANC from the president down could exercise political control.” “I know of no committee in respect of the ANC which is above party political discipline.”

Andrew Feinstein whom with Woods had led the charge to ensure that the executive was accountable to parliament, was replaced as chair of the ANC study group on public accounts by ANC Deputy Chief Whip, Geoff Doidge. This was a move ostensibly aimed at “strengthening the study group because it has important matters to consider.” As the ANC’s official spokesperson for public accounts Feinstein had incurred the wrath of Essop Pahad last year for his views on the arms deal but was reportedly defended by Zuma. He would remain an ordinary member of SCOPA.

In his response, Feinstein said he was “saddened by the ANC’s lack of confidence in his leadership” of the study group, adding that he had considered resigning but that the issues at stake were “far bigger than my own position. They run to the heart of our democracy, specifically to the issues of good governance and the accountability of the executive to the legislature.” It was crucial a “comprehensive and thorough investigation take place that will determine the veracity of the myriad of allegations made”. “It is essential that the investigators and MPs involved in the probe are free of any influence or pressure. The integrity of this process will be a touchstone of our new democracy”. By staying on he was honoring the principles of the party he joined seven years ago and that “defending the ANC does not imply defending possible corruption by any individuals within the party”.

Here Feinstein was expressing a sentiment that goes to the heart of this case-study which is attempting to illustrate the challenges of fighting corruption credibly in the context of a dominant party democracy. According to Woods, the ANC’s introduction of new “political players” into the committee was precisely in order to thwart the Committee’s oversight activity over the arms deal. Woods’ view seems correct, as

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from then on existing members became far more politically partisan and aggressive in the way they conducted themselves in SCOPA meetings showing little initiative regarding matters of public finance but were very conspicuous in the ANC’s political management of the Committee. Understandably, the leadership instruction to the ANC members of SCOPA to defend the party’s interests almost immediately spilt over to Committee work areas which did not concern the arms deal.

At an Idasa seminar on parliamentary oversight a week later Feinstein called on SCOPA to rise above party politics if it was to perform its oversight role successfully. There was a need to “insulate” SCOPA members from party political influence. He said that government could have avoided the controversy surrounding the arms procurement deal had it played its cards openly from the outset. “My own plea is for the development of a framework of understanding of what role a public accounts committee should be playing in a democratic parliament. This could be written into the rules.” Feinstein said he believed a public accounts committee needed to be nonpartisan, and chaired by an opposition MP.

Feinstein’s conclusions point to the gap in the anti-corruption architecture in South Africa and which further analysis of these events will prove correct. SCOPA would be seriously weakened as a non-partisan oversight committee of parliament and Feinstein would submit his resignation.

10.7 The JIT’s Report Back to SCOPA

On 7th February 2001, the Auditor-General’s office, as co-coordinator of the proposed investigation in order to facilitate the combination of skills, legal mandates and resources of the different investigating agencies, would report back to SCOPA. Speaking on behalf of all three agencies involved in the JIT (the Auditor General, Public Protector and National Director of Public Prosecutions), deputy Auditor-General, Terence Nombembe told SCOPA the agencies were “co-operating and working very closely together” and that “in view of the nature and extent of the investigation we have agreed to produce a joint report to SCOPA towards the end of

July 2001.”

This report would be delayed (and edited by the executive) and never in fact come to SCOPA. Eventually it would be released to an extraordinary joint sitting of the National Assembly on 15th November 2001.

Following a meeting on 10th January 2001 and taking into account the President’s decision (on the SIU on 19th January 2001 not to issue a proclamation), the following division of labor was agreed by the JIT agencies: that the DSO would focus on the allegations and suspicions of criminal conduct, the Office of the Auditor-General would conduct an extensive forensic investigation and the Public Protector would look into the quality of the contracts and unethical conduct by any of the public officials (JIT 2001:8).

In summary, the broad framework of the investigation included:

- Alleged irregularities
- Cost to the state of the Gripen and Hawk deals
- Selection of prime contractors for the LIFT programme (Hawk)
- Selection of subcontractors for all programmes
- Review of the arms procurement process and system
- Review of all final contracts (both NIP and DIP).

Nombembe assured SCOPA that the three agencies were confident they had the necessary powers and competencies to undertake the investigation without the Heath unit and that outside audit firms would be brought into assist “with respect to the compilation of company structures, the flow of funds between bank accounts and the capacity of the entities”.

Following this briefing, the Auditor General apparently forbade his staff from communicating with SCOPA on the arms investigation, even telling SCOPA’s most senior members (Gavin Woods and Andrew Feinstein) not to communicate with key officers on the matter. It is also worth noting that the two key staff members in the

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39 See Appendix 4: Joint Investigation Team (JIT) Scope of Investigation
Office of the Auditor General were removed from the investigation for reasons that have never been adequately explained (Woods 2002).

At the meeting SCOPA chair, Dr Gavin Woods, noted he had received a letter from the chief procurement officer in the Department of Defence asking for the return of confidential documents given to the committee, accusing it of holding onto them illegally. The nature of the documents included NIP and DIP arrangements (Armscor), cabinet minutes, minutes of the cabinet sub-committee, copies of documents relating to affordability studies done by treasury, documents relating to tendering and the submission of offers. Woods - who apparently had the documents in his bedroom - had taken legal advice and discussed the issues with the Speaker, following which it had been decided that the Speaker would keep the documents in safekeeping on behalf of parliament.41

Following the presentation by Nombembe the committee attempted, once again, to interpret whether the intention of the meeting with the four agencies on 13th November in Pretoria had been merely exploratory or if the intention for all four agencies mentioned in the 14th Report to investigate the defence procurement programme was clear. ANC and opposition parties agreed to disagree on the interpretation of this point. Woods stated that this means both hold legitimate interpretations of the intention of the report. He invited further reflection on the transcript of the meeting.

While failing to reach a conclusive view on the Heath question, the meeting of 7th February 2001 was significant in that even though opinions remained sharply divided, the consensual nature of the committee did not rupture. Woods noted that he had consistently and publicly stated that the committee was of the opinion that the Heath unit should be among the unit’s investigating the deal and questioned why there had been no response from the ANC members of SCOPA at an earlier stage if they were so set against having the Heath unit as part of the investigation. ANC members

effectively told Woods that if he persisted with this line of questioning his competence would be called into question.\(^\text{42}\)

10.8 Divisions in SCOPA and Challenges to its Oversight role

The following week, on 14\(^{\text{th}}\) February 2001, SCOPA met to deal with a number of issues. At this critical meeting of SCOPA Woods led the discussion around the 14\(^{\text{th}}\) Report noting that follow up was required on certain key areas:\(^\text{43}\)

- Regarding “cost to the state” of the deal (which had escalated from R30,1 Billion to R43 Billion) he noted that SCOPA’s mandate deals with both under and over spending of the public purse and that the committee needs to decide how to monitor this. It was agreed to arrange a meeting with the Finance Committee and Treasury to be regularly briefed on the costs of the deal.
- Regarding the Gripen and Hawk deals there was a concern regarding the costings namely that whilst the unit price was initially R15m, R30m had been paid and that clarity would be sought from the department of defence on the difference.
- Regarding the offset arrangements and the economic benefits from the NIPs the committee in the 14\(^{\text{th}}\) Report had asked to receive bi-annual reports and would communicate with the Department of Trade and Industry to this effect.
- The concern about the optimistic estimates regarding jobs was raised and the committee of trade and industry was asked to express its view on this regard with a meeting of the two committees suggested.
- In terms of the acquisition policies it was noted that a review of arms procurements policies and practices was taking place under the Auditor General’s team who would report back on “best practices”.

As an oversight committee of the public purse, SCOPA was playing a key role by asking questions that needed to be asked about the largest public expenditure ever undertaken by the South African government. Woods was clearly intent on SCOPA conducting its own investigation on behalf of parliament into the deal. This was not a role that ANC members of the committee were comfortable with.

\(^{42}\) Andre Koopman, “Public accounts fails to bridge the divide”, Cape Times, 8 February 2001.
\(^{43}\) SCOPA meeting 14 February 2001. www.pmg.org.za
The relationship of SCOPA with other committees of parliament was also raised, whether other parliamentary committees should report to SCOPA or rather the National Assembly, for SCOPA, in their words, was not a “super committee.” Woods suggested that it would be important to check the parliamentary rules in this regard and that he hoped there could be horizontal interaction with other committees around issues of public accounts. In terms of accountability to SCOPA this was a “tricky area”. For one, it was ground breaking to be asking a Chapter 9 institution other than the Auditor-General as well as executive bodies, to account to a parliamentary committee.

The DA noted that SCOPA should not abdicate its responsibility to interrogate the costs of the deal. At this meeting the DA argued that in order for SCOPA to exercise its oversight function with respect to the executive it would need to prepare for the meeting with the ministers and therefore have access to certain information. It was eventually agreed that SCOPA members would be allowed limited access to certain confidential documents in the safekeeping of parliament in order to prepare for the meeting with the ministers, although ANC members who questioned the necessity and usefulness of committee members having access to these documents, initially resisted this.

A meeting was convened with the Speaker’s office to spell out the access procedure. The number of hours spent by individual members of SCOPA looking at the specific documents in order to prepare for the briefing with the ministers is instructive. Of 12 SCOPA members who made use of the opportunity to access the documents, 7 ANC members spent a total of 7 hours 5 minutes looking over the documents (an average of one hour each), while two opposition DP members clocked up a total of 17hrs and 50 minutes.44 This alone clearly illustrates a lack of will to of ANC SCOPA members to conduct proper oversight of the public purse through serving on SCOPA.

SCOPA members disagreed about whether or not to summon deputy President Zuma to appear before SCOPA to explain his criticism of the proposed corruption investigation. As a way forward UDM leader Bantu Holomisa proposed that SCOPA

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should express reservations about the tone of the letter, that matters in it be referred to
the investigating bodies or National Assembly where necessary, and that the
correspondence between the deputy president and the speaker be ignored to send a
signal that the executive not intervene in parliamentary committees. This was a
position that ANC members agreed with. They noted that mistakes had been made in
the past on both sides (citing that it was neither correct for the chair to write to the
president – Woods disagreed with this - nor the deputy president to write to the chair).

In response the DA’s Raenette Taljaard disagreed: “The letter to us is from the
Deputy President, and it goes to the role of Parliament. We cannot disengage from
these issues. The fault line will continue to plague SCOPA unless we stop brushing
these issues aside. Resolving it will not be dealt with by General Holomisa’s
proposal.”\(^{45}\) She noted that the committee’s role was that of oversight and that the
speaker was merely an interlocutor between the legislature and the executive and
could not be relied on to defend SCOPA.

Regarding oversight, ANC members felt matters of oversight should be referred to the
correct committee, and that this was not SCOPA. In response the DA noted that the
committee on Oversight and Accountability had not yet adopted a conclusive report
on these issues and that SCOPA’s experience could provide a case study. DA MP
Nigel Bruce said: “We have not had a previous occasion when four ministers said this
committee did not understand its work. Plus the President, the deputy President and
the Speaker. This is an unprecedented onslaught on a parliamentary committee. This
cannot be fobbed off onto the rules committee. Four ministers have offered to explain
themselves and the Speaker’s letter was helpful. The Deputy President says that he is
writing with the authorization of the President. This Committee must deal with it. The
Democratic Alliance has gone out of its way to be helpful, but executive interference
remains the sticking point.”\(^{46}\)

At this point Woods as the chair of SCOPA was asked to take the discussion forward.
He noted that the situation was unprecedented in that no other committee had had to

\(^{45}\) Special Review of Strategic Arms Acquisition: Parliamentary Monitoring Group. SCOPA 14

\(^{46}\) Special Review of Strategic Arms Acquisition: Parliamentary Monitoring Group. SCOPA 14
deal with such a situation before. Also that SCOPA had not created the issues. Possibly the meeting with the four ministers would create a way forward. “As regards to the Deputy President, what is right? Our work is under question. Do we defend our work, when all parties say that they support the 14th Report? Was our work misguided: even my integrity is attacked. The dismissive approach of General Holomisa would be one approach. But what of the criticisms of our work? On at least eight occasions the Committee is accused of saying that the government and foreign governments are corrupt. Do we ignore these accusations, or do we defend our work and out intentions? What is our responsibility to Parliament, and to the people of South Africa? How do we check out whether the Deputy President’s accusations may be right?”

The ANC suggested that “we must take collective ownership of what has transpired” (something Woods questioned saying “I do not yet see where SCOPA has gone wrong”) and that “the vindication will be when the report is made…We must hope that the delay will be short, and that the report is as comprehensive as possible.” The UDM suggested a meeting with the deputy president with a multi-party delegation. Woods liked this idea and suggested it might result in a joint statement with SCOPA and the deputy president. The ANC rejected this approach saying it would create further confusion and that SCOPA needs to report back to parliament through SCOPA reports.

Woods was still concerned that the specifics of the deputy president’s letter would remain unchallenged. The ANC felt that the ministers would elaborate on some of the issues at the briefing, which could then be integrated into a report. The chair agreed to capture the different opinions on the way forward which the subgroup would consider and then propose a way forward.

49 Scopa meeting of 14th February 2001. www.pmg.org.za
10.9 SCOPA and the Ministers

On 26th February 2001, SCOPA members had the opportunity to question the Minister of Trade and Industry, Alec Erwin, the Minister of Finance, Trevor Manuel and the Minister of Defence, Mosiuoa Lekota, on the controversial strategic arms procurement package. Also present was the Auditor General, Mr Shauket Fakie. 50

Apparently an hour before this meeting the ministers met with ANC members of the Committee and it was decided which questions they would be asked. 51 The strategy, as was then played out, was for ANC committee members to ask questions proposed by the Ministers and to attack the Chairperson and any opposition member who voiced any criticism of the arms deal (Woods 2002).

In this regard Idasa would later comment that it would be naive to think that Ministers of the ruling party should not communicate with and strategize in relation to political issues… “It would be surprising if this had not happened. That is the nature of party politics. But the fundamental system flaw that lies behind it gives rise to some important constitutional questions. Should a ruling party be able to use its majority to protect its political issue when performing an oversight function? For a party to exercise discipline and loyalty when pushing through policy or law is one thing – giving effect to its electoral mandate one could say – but is there a distinction to be made in the case of oversight?” 52

Opening the meeting SCOPA chair, Gavin Woods noted that the purpose of the meeting was to ascertain where the Ministers disagreed with SCOPA’s 14th Report. Responding, Minister of Trade and Industry, Alex Erwin, said while it had been Cabinet’s intention to await SCOPA’s hearings before expressing the government’s concern, extreme speculation and debate regarding the arms acquisitions had led to the public statement of 12 January and that it was “not an attempt to stop a proper investigation.” 53 Rather the Ministers concerns were that SCOPA’s 14th report did not understand how the decisions were made. They asserted the government was

51 Interview with Andrew Feinstein, 21 August 2001.
responsible for prime contracts only and could not be held responsible for sub-contractors.\textsuperscript{54}

This would prove to be a recurrent theme in defence of any wrongdoing or corruption in the arms deal, namely that the government’s contracting position could not possibly be flawed as responsibility for corruption in sub-contracting was not something for which the government was liable. The reality is that prime-contractors were only able to secure contracts if they could demonstrate BEE partners as sub-contractors, a position the Shaik brothers exploited for their own personal interests. As Feinstein would put it, “pressure on the companies bidding for the main contracts compelling them to appoint favoured (BEE) sub-contractors before they would be awarded the main contracts was a crucial flaw in the procurement process.”\textsuperscript{55}

ANC MP Bruce Kannemeyer asked the Ministers to explain the apparent rise in the cost of the deal from approximately R30 billion to R43 billion. Responding, minister of Finance Manuel noted that the increase in cost was due to exchange rate fluctuations and future values, among other things, apparently normal in contracts of this nature. ANC MP Andrew Feinstein noted however, that “the cost is going to be considerably more than R30,3 billion” and that “the government should have considered the rand escalations.”\textsuperscript{56}

Minister Manuel also asserted that the government had a mandate from Parliament to purchase equipment for the South African Defence Forces and had done so.\textsuperscript{57} Once again parliamentary approval of the deal was used as a defence to justify the cost of the deal. He also added that it was the Minister of Defence who had initiated the investigation by asking for the review by the Auditor General, wanting to claim executive credit for the fact that there was an investigation underway at all. This statement was strongly refuted by Auditor-General, Shauket Fakie who said “No, the Auditor-General’s office and SCOPA took it upon themselves given the implications

\textsuperscript{55} Andrew Feinstein, “Arms deal returns to haunt ANC”, Mail and Guardian, 11 February 2007.
for democracy. We initiated the review. We later got co-operation from the
Minister." Fakie was under increasing public pressure to show his own probity in
the handling of the deal, which would come increasingly into question.

The aspersions cast on the integrity of the international armaments industry by
SCOPA was an issue raised by two ministers who took offence to statements made in
the 14th report. Minister Erwin said the fact that the report had declared that the
armaments industry has a reputation for corruption “is a judgment call which colors
the Fourteenth Report”. The ostensible naïveté of the government in this regard was
surely disingenuous given widespread reporting that would emerge of British and
German investigations of more than $200 million (R1,4billion) in bribes that were
paid by just three of the successful arms companies (including BAe) in the deal. 59

Defence minister Lekota also felt the Committee was wrong to begin its investigation
with the premise that the international arms industry was corrupt, whatever the World
Bank or Transparency International might have said: “It is wrong for this Committee
to start from such a premise. The assumption is that anything to do with Africa and
Africans is corrupt. It does enormous damage to this country.” 60 This defensive stance
and resort to racist assumptions underlying accusations of corruption, legitimate or
otherwise, would reoccur both in statements by ANC chief whip Tony Yengeni and
by Thabo Mbeki.

Responding to the ministers’ concerns, DA MP Raenette Taljaard noted “We would
be deluding ourselves if we thought that South Africa’s arms deal could isolate itself
from malpractice in the arms industry.” 61 ANC MP Andrew Feinstein conceded,
“Perhaps we might have been more judicious in our drafting, but the history of the

58 Parliamentary Monitoring Group. SCOPA 26 February 2001. Discussion with Ministers of Trade
and Industry, Finance and Defence. www.pmg.org.za
59 Maureen Isaacson, “You can never be too clean in arms-deal land”, The Sunday Independent,
November 18 2007.
60 Discussion with Ministers of Trade and Industry, Finance and Defence. Parliamentary Monitoring
61 Discussion with Ministers of Trade and Industry, Finance and Defence. Parliamentary Monitoring
arms industry must be considered. Feinstein’s current book project is to examine corruption in the international arms industry.

Indeed, there is a strong feeling that the South African government was somewhat naïve, particularly in negotiating the terms and offsets agreements of the arms deal with experienced international arms dealers who recognized the opportunity to sell billions of Rands of arms to a country who was for the first time at peace with her neighbors, when clearly other more pressing socio-development needs prevailed.

10.10 The Second Report on the Arms Deal

Two days later, on 28th February 2001, SCOPA met to prepare a second committee report on their investigation into the Defence Procurement Package. At this meeting, buoyed by their interaction with the ministers, the ANC passed a majority resolution that stated “…interpretation and understanding of the 14th Report of SCOPA, as adopted by the National Assembly on 3 November 2000, nowhere provides for the definite inclusion of the special investigative unit headed by Judge Heath”. Opposition members walked out of the meeting, objecting to what they called the non-adherence to rules, and the politicization of SCOPA.

The drafting of a second report to the Fourteenth Report was discussed at further SCOPA meetings from March through May 2001. While the ANC invited minority parties within SCOPA to provide their views and input into the second report, they would not entertain a minority report (even though this was allowed by the rules of parliament), with ANC MP Vincent Smith saying the ANC would “defend the report to the death” and not agree to the attachments of minority reports since these opposed the ANC report.

The report that was eventually tabled completely exonerated the executive of any responsibility, was silent on its attacks on SCOPA, implicitly criticized Woods for

65 “ANC says minority parties can have say on arms-deal report” Sapa. The Star, 17 May 2001.
asking President Mbeki to include the SIU in the probe without the committee’s mandate and reiterated a committee resolution passed with its majority vote that the committee did not intend the SIU to be involved. The executive’s position on the contract price was accepted for “any attempts to affix any possible future costs would be merely one of a number of projections.”

Woods, as the embattled chair of SCOPA, could not agree to this second report that was, in his view, a capitulation to the executive - making apologetic reference to the 14th report as having been “unintentionally” offensive towards the executive - as it rejected the interpretation of the original resolution. Woods felt it imperative the committee defend its work and integrity and that its accountability role would be undermined if this were not done. He objected to the ANC apologizing to the executive for the committee’s supposed accusations of corruption and dishonesty, which he said were never made.

UDM MP Bantu Holomisa proposed an amendment that would reflect the lack of unanimity in the committee when it came to adopting the second Report, a suggestion agreed to by the ANC, UDM and IFP. The DA dissented: “We are of the view that the majority report is an inadequate response to unacceptable criticism and an attack by the executive on the integrity of Parliament’s key watchdog committee.” “By adopting a meek and apologetic report on the actions of the executive, ANC members on the committee deferred to the interests of their party leadership and failed to put the interests of Parliament and the people first.”

At the end of May 2001 the second SCOPA Report as favored by the ANC was adopted by SCOPA, with voting, as had now become the norm, along party lines.

In a letter to SCOPA members on 6th June 2001, Woods continued to argue that the committee was obliged in terms of its 14th report approved by the National Assembly to continue its own investigation into the deal, and that the Speaker had in fact enjoined it to do so. Woods asked the committee for a mandate to request documents

68 “ANC says minority parties can have say on arms-deal report” Sapa. The Star, 17 May 2001.
from the Department of Defence in an attempt to revive parliament’s oversight of the deal. ANC committee members however, argued that SCOPA did not have the capacity or time to further investigate the government’s arms deal although this should not stop individual members requesting and studying new information on the deal. The ANC said SCOPA should concentrate on its own work and leave the probe to the three agencies.\textsuperscript{70}

From this attitude amongst ANC SCOPA members it is clear that no further independent oversight role for SCOPA as a parliamentary committee protecting the public purse was foreseen. Instead, the investigation into the arms deal was now up to the three agencies making up the JIT. An independent investigation had effectively, through a range of executive interventions, been taken away from parliament, and in the process undermined the integrity and non-partisan functioning of SCOPA. Trust in parliament and the Speaker herself had also been called into question by the range of events that started when SCOPA’s 14\textsuperscript{th} Report had called for an independent investigation into the arms deal. The challenge for a dominant party democracy to oversee itself and uphold accountability in the public interest, was clearly taking its toll.

\textbf{10.11 The “Side-lining” of SCOPA}

The steam-rolling by the ANC of the Second Report on the arms deal through SCOPA was precipitated by a comment made to a newspaper on 6\textsuperscript{th} May 2001 by SCOPA chair Gavin Woods. He stated that the committee was “pretty much in the dark regarding the investigator’s plans…We have been sidelined. We had interventions by the Speaker which by design created uncertainty about accountability. That uncertainty has been exploited to the point where we are in the dark.” While Woods had written to speaker to clarify the accountability arrangements he had yet to receive a response.\textsuperscript{71}

At a special meeting on 9\textsuperscript{th} May requested by the ANC members of SCOPA, the party said Woods had commented on the arms deal without first consulting the committee

\textsuperscript{70} “ANC against SCOPA delving into multibillion arms deal” Sapa. The Star, 13 June 2001.
members and the ANC members wanted to dissociate itself from the chairperson’s recent remarks that the committee appeared to be kept in the dark about the probe into the deal. ANC MP Vincent Smith warned Woods not to speak on behalf of the committee without consulting members first. Woods rejected this saying he was “quite entitled to” his personal views and challenged the ANC to make a decision about his position as chairperson if they did not agree with his position. ANC MP Andrew Feinstein left the committee meeting in apparent embarrassment as his party colleagues launched an attack on the chair. 

On Sunday 13th May 2001, the Speaker, in a letter to Woods (made public) called on him to apologize for remarks he had made in the press. Failing this SCOPA should table an official report on Woods’ claim that she had influenced moves to keep the committee in the dark on the investigation.

A day later, in an open letter to the Speaker, UDM leader Bantu Holomisa would echo Woods comments that SCOPA was being “systematically side-lined”. For Holomisa, the Speaker’s public pronouncements on the arms deal probe “both inside and outside parliament leave much to be desired and have cast more shadow on the credibility of the investigation. It can be inferred that you and the executive are monitoring and directing the investigation.” He claimed her conduct in relation to parliament and the arms deal investigation involved dereliction of duty, intentionally obstructing the parliamentary processes, stalling the report by SCOPA and improper interference in the committee’s function.

Now the Speaker, meant to protect the integrity of parliament and its committees, was herself being attacked by members of SCOPA, with her personal integrity as to how she had handled herself regarding the arms deal investigation, brought into question. How would she, and the ANC, respond?

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10.11.1 The Speaker Responds

On 21 May 2001, the Speaker held a news conference regarding Holomisa’s allegations that she had abused her office in her handling of the arms deal investigation by Parliament. She attacked both Woods and the media saying they had failed to give her credit for standing up to the executive.\(^74\) In her defense Ginwala pointed out several rulings she had made against the executive, including her rejection of the executive’s demand that all the arms contracts be returned to them and her letter to Deputy President Jacob Zuma declining some of his requests for information from parliament. Ginwala also reacted to charges that her continued membership of the ANC’s National Executive Committee and the national working committee compromised her ability to represent the National Assembly in a neutral way. She said she had not been present at meetings where the alleged arms scandal was discussed. In reference to the discussion that was ongoing in SCOPA with regards to the second arms deal report, she said it was her personal opinion that opposition parties should be entitled to have their minority views reflected in SCOPA reports to parliament.\(^75\)

Clearly the Speaker’s statement of December 27\(^{th}\) 2000 had aroused suspicion and indicated that she did not seem to be acting on parliament’s wishes to conduct an investigation involving the SIU. Her interpretation of the intention of the 14\(^{th}\) report was seen by some commentators as “the razor’s edge which has sliced SCOPA into party factions and been systematically used by ANC members to undermine Woods’ standing” with the civil society organization Idasa asking why Ginwala had been so emphatic in her interpretation of the 14\(^{th}\) Report even as the ANC study group still believed it was open to different interpretations.\(^76\)

When she took over as Speaker and retained her ANC positions Ginwala had argued that this was a world trend. However the question could be asked: “How easy is it to sit on the inner counsel of the party, to hear and take part in its most sensitive strategy

\(^{74}\) Clive Sawyer, “Ginwala defends her actions on arms deal probe”, 22 May 2001.
debates and remain impartial in Parliament?” Some answers to this can be gleaned from the debate called for by the ANC on 7th June 2001 in support and appreciation of the Speaker.

10.12 Debate on the Role of the Speaker

The debate on the Speaker is important to record in some detail as it points to the relationship between the legislature and the executive as understood at this point in South Africa’s democratic history.

In the debate opposition parties raised concerns that the ANC had not dealt with the allegations concerning the Speaker, as had been suggested by the Speaker herself, in an all-party committee of parliament, but had rather chosen to debate the issue in parliament. This would almost certainly lead to the ANC pushing through a motion of confidence with their substantial majority, which is indeed what happened. The DA noted “It is clear that the ANC decided to demonstrate to the Speaker that she does not have an independent power base in Parliament of among the minorities. They want to show her that she is beholden to the ANC…A motion of confidence is an entirely inappropriate way of dealing with this crisis.”

Opening the debate, the ANC MP Pallo Jordan said: “The Speaker is accorded that title because the holder of that Office speaks on behalf of Parliament. An attack on the Speaker is therefore an attack on Parliament as an institution… Honorable members, what is at stake in today’s debate is not merely the integrity and dignity of one person. I consider the unsubstantiated, reckless accusations made against our Speaker as an attack on the dignity and the integrity of this Parliament.”

UDM leader Bantu Holomisa commented that the Speaker had “created the conditions in which one day the moment would arrive when she would have to withstand intense political pressure from within her own party to exercise judgment in a way that would

78 Republic of South Africa: Debates of the National Assembly (Hansard) Third Session – Second Parliament 5 to 8 June 2001.
79 Mr D H M Gibson DA MP
80 Dr Z P Jordan ANC MP
serve its short term interests,” something that had occurred in his view when the Speaker offered only one interpretation of the 14\textsuperscript{th} Report that was “expedient and useful to the executive.”

81 Holomisa went on to say “For Parliament to operate as an institution of independent accountability over the executive requires that members of the ruling party exercise oversight over colleagues of their own caucus, especially those comrades who always shout “Viva!” on a Saturday and on Monday change and receive motorcars from companies.”

82 This was a direct reference to the allegations of corruption hanging over the head of the chief whip of the ANC, Tony Yengeni, whom had received a discounted vehicle from a company bidding in the arms deal.

The Democratic Alliance noted that while Ginwala had made a “great contribution to the establishment of democratic parliamentary traditions” and had “created a democratic tradition of being prepared to listen to the voice of minority parties” but that this “does not mean that the Speaker is above criticism” her “duality of roles” (as a Speaker and as an ANC politician) has “led to very unfortunate consequences.”

83 Regarding the handling of the arms deal saga, DA MP Douglas Gibson noted: “This has not been a credit to Parliament or to the ANC. There is a suspicion right around the country that it has been poorly and ineptly handled by the executive – and controversially by the Speaker – and the reason is that substantial donations were made to the ANC election fund by many of those who have benefited from the arms deal.”

Allegations that it was not just individuals, but also the ANC as a political party that had received millions of rands from successful bidders, would continually surface, and is something that subsequently ousted ANC MP Andrew Feinstein would note as a reason for the party’s unwillingness to comprehensively investigate the deal, and indeed scupper any independent investigation such as that proposed by SCOPA, that they could not control (Feinstein 2007). However, because of no laws currently regulating disclosure of private contributions to political parties in South Africa, it is impossible to confirm such allegations.

81 Mr B H Holomisa UDM MP
82 Mr B H Holomisa UDM MP
83 Mr D H M Gibson DA MP
The DA noted how the Speaker’s conduct “left much to be desired and has raised legitimate questions about her balancing party loyalty with parliamentary responsibilities. With us it created the impression that her conduct in this regard was part of the suspected wide cover-up regarding the arms deal. Secondly, in too many instances the Speaker is seen not to defend the interests of Parliament against the interests of the executive. She too easily abandons the protection of the rights of members of Parliament vis-à-vis members of the executive, or overly protects members of the executive in this house. The Speaker’s responsibility is to defend the rights of Parliament, not the members of her own party in Cabinet.”

The IFP pointed out how the Speaker had become involved in the functional work of SCOPA by unjustifiably challenging the committee’s work, imposing her will in ways in which have weakened the committee in its arms deal related work, actions leading to very damaging conflict within the committee and effectively hampering the oversight function and accountability of the committee.

10.12.1 Separation of Powers

Speaking in support of the motion was Minister of Public Service and Administration, Geraldine Fraser-Moloketi who drew attention to the constitutional dimensions of the debate as being about separation of powers where the constitutional preamble determines there shall be a separation of powers between the legislature, executive and judiciary, with the appropriate checks and balances to ensure accountability, responsiveness and openness.

While arguing that the liberals in our midst persist in interpreting the separation of powers as an “absolute divide” Fraser-Moloketi held that they ignored a court judgment in this matter, as handed down in 1996 by the Constitutional Court when it concluded: “No constitutional scheme can reflect a complete separation of powers. The scheme is always one of partial separation.” I will extract her argument at length here, due to its importance for our theme on the efficiency of anti-corruption institutions to prevent abuses of power.

84 Mr M C J Van Schalkwyk DA MP
85 Mr J.H. Van Der Merwe IFP MP
Fraser-Moloketi quotes the Constitutional Court from 1996, when it certified the Constitution:

The separation-of-powers doctrine is not fixed or is not a fixed or rigid constitutional doctrine. It is given expression in many different forms and made subject to checks and balances of many kinds. It can thus not be said that a failure to separate completely the functionaries of the executive and the legislature is destructive of the doctrine. Indeed the overlap provides a singularly important check and balance of the exercise of executive power. It makes the executive more directly answerable to the elected legislature. Cabinet members are compelled to provide Parliament with full and regular reports concerning matters under their control, and, finally, the legislature has the power to remove the President, and indirectly the Cabinet.

The minister notes that “the paranoia with complete separation comes when we attempt to see our constitutional democratic system as made up of separate parts, instead of seeing the very dynamic relationship between the parts, looking beyond the structures and concentrating on the various checks and balances.” She goes on to explain:

“When we drafted the South African constitution, we consciously opted for a model that would take cognizance of our historical circumstances. We opted for a system that would allow the executive to actively lead, yet keep them answerable and accountable. We designed the legislative process in which the executive provides impetus for new policy and legislation, but through deliberative process in Parliament, and particularly in the committee system, the legislature shapes and moulds the contents thereof. In the end, it is only the legislature that can pass legislation and formally adopt policy. Obviously, the legislature can also initiate its own legislation separately from the executive and the constitutional right remains. However, nowhere does the Constitution, which is supreme in this country, dare I remind the House, allow the legislature to give instructions to the executive through any other avenue other than passing an Act… The executive still has the choice and the responsibility, after having weighed up all the information at its disposal and having taken into consideration a broad range of dynamics to make the decisions. Any
attempt to have it differently is unconstitutional and the Speaker, justifiably and rightfully so, rules on such matters accordingly.”

Specifically relating to the composition of the JIT, she noted that even Idasa, in its review on democracy and the arms deal, stated: “As the Speaker rightly pointed out on 27 December, for Parliament to instruct the executive to grant the SIU a proclamation, this would be of dubious legal and constitutional validity.”

Focusing on the oversight role of the legislature the Minister noted: “The parliamentary system we have in place provides for abundance of mechanisms that fulfill this role and strengthen it. The committee system, where a commensurate parliamentary portfolio committee accompanies every Cabinet portfolio, is a very powerful mechanism. In addition, the question-and-answer sessions in Parliament have been reformed to allow more access for smaller parties, who cannot spread themselves adequately across the various portfolio committees to exercise some democratic oversight. The Constitution also provides for another category of checks and balances, these being the Chapter 9 institutions.”

In his remarks defending the Speaker ANC MP Pallo Jordan pointed out the distinction between partisanship and partiality and that “impartiality does not imply that the Speaker should play a passive role. A Speaker is expected to be active… A Speaker is expected to make judgment calls….It was in the exercise of that discretion that Madam Speaker referred the Auditor General’s report to the Public Accounts Committee of this Parliament. It was Madam Speaker who directed SCOPA to examine that report. But it was equally her duty to offer guidance to the committee and its chairperson regarding the limits of its powers.”

Offering guidance to SCOPA, was very different from what Holomisa in his letter had accused the Speaker of, namely “dereliction of duty to prioritize the integrity of parliament…intentionally obstructing parliamentary processes on behalf of the Executive and improperly interfering in the committee’s functioning.” With regard to Holomisa’s letter ANC MP Jeremy Cronin responded: “But who referred the Auditor-

86 Dr Z P Jordan ANC MP
General’s report, which had been requested by the Defence Minister in the first place\textsuperscript{87}, to SCOPA? It was the Speaker. It was the Speaker who sought to protect SCOPA in a letter to the parliamentary leader of Government Business and the Deputy President, and it is the Speaker who has consistently offered extra resources to SCOPA for the arms procurement follow-up.\textsuperscript{88}

This view was disputed strongly by ANC MP Andrew Feinstein who would abstain in the vote at the end of the debate on the Speaker, an action for which he would be disciplined, and resulted eventually in him resigning from parliament. In his book he strongly supports Woods and Holomisa’s assertions of the Speaker’s failure to protect parliament and SCOPA’s key oversight role:

“Sadly, I had seen at first hand how she had done this, changing her tune from a crusading defender of Parliament to a calculating accomplice of the Executive. This proud, intelligent woman who had served the struggle so courageously for decades and who had guided the democratic parliament through its first difficult years, had capitulated in the face of pressure from the Presidency. In the final reckoning she had chosen the party over the nation, the President over Parliament” (Feinstein 2007: 202).

10.13 At the Crossroads, Feinstein Resigns

In an article written shortly before the Speakers’ debate in June 2001 for a Cambridge university alumni publication and later published in the Mail and Guardian\textsuperscript{89}, ANC MP Andrew Feinstein would articulate the challenge of being a loyal member of a political party and a committed parliamentarian fulfilling a constitutionally mandated oversight role.

His article provided insight into the more general context surrounding the arms deal investigation noting how besides concerns at the spiraling costs of the deal expressed by many in civil society, allegations were made that there had been serious procedural problems in negotiating the deal. SCOPA had received a report from the Auditor

\textsuperscript{87} Note this was not the case, as pointed out by the Auditor-General in the ministers briefing to SCOPA, but was a view continually perpetuated by the ANC.
\textsuperscript{88} Mr J P Cronin ANC MP
\textsuperscript{89} Andrew Feinstein, “We are at the crossroads”, The Mail and Guardian, 6\textsuperscript{th} July 2001.
General that also expressed concern about the procedures and following public hearings SCOPA had particular concerns about “lack of measures to deal with conflicts of interest, changes to decision making procedures and possible irregularities with respect to the allocation of sub-contractors which might have influenced decisions of the prime contractors.”

Feinstein noted that he was critical of a decision taken by Mbeki not to grant the SIU a proclamation to participate and of other aspects of his party’s approach to the issue and that soon thereafter the ANC leadership took the decision to replace him both as chairperson of the ANC component of SCOPA and party spokesperson on public accounts. “While this was disappointing to me personally the issues at stake were far more important than my situation. They run to the heart of our democracy specifically issues of good governance and the accountability of the executive to the legislature.”

Reference

Feinstein wrote that he decided not to resign but hoped he could still contribute to “ensuring that a comprehensive and through investigation takes place that would determine the veracity or otherwise of the myriad of allegations.” Stressing the importance of investigators and parliamentarians not to be pressured politically, Feinstein wrote: “I must acknowledge that it is not easy attempting to operate as an independent-minded MP within a party in the context of our restrictive constitutional environment. However, I believe that it is important that individuals in public life act according to their conscience. Considerations of a long-term political career should be subservient to matters of principle and public interest.”

The space for the independence MPs such as Feinstein demonstrated to exercise their conscience was further restricted by changes in the modus operandi of SCOPA in the wake of the arms deal where both the ANC and DA have deployed senior politicians to SCOPA issues resolved by voting along party lines. “I feel strongly that these developments are a tragedy for good governance as they could be enormously damaging to the accountable management of public finance in South Africa. I do believe that the integrity of the arms deal investigation – and the future functioning of

90 Andrew Feinstein, “We are at the crossroads”, The Mail and Guardian, 6th July 2001.
the public accounts committee in its wake – will be a touchstone of our new democracy. Our commitment to real accountability of elected representatives and public officials, of the oversight role of the legislature over the executive, and of the primary of the national interest over party interests is at stake. We are at a crossroads: we can threat the path of a politics of principle and truth, or we can begin the slide into politics of expedience and deception.”91

Feinstein noted in an interview I conducted with him before he resigned how meaningful oversight was weakened by the system of Proportional Representation (PR) in South Africa where party bosses and their lists rule. Whereas in a majority context committees need to be insulated from party politics, need more resources to do their jobs properly and have specific rules “under the present leadership this won’t happen. The ANC is a family and operates with primary loyalty to the party. The national interest, unless it coincides with the party interest is nonsense. There is a small group of people running the country, and not all are in government. It is a responsibility on the part of individuals to raise concerns, and organizations to be accountable. The ANC list plays a big part in speaking out or not.”92

On 1st September 2001 Andrew Feinstein, who had become increasingly isolated from ANC members in Parliament, took the painful decision to resign as a Member of Parliament citing his party’s handling of the arms deal investigation:

“I have realized over the past few months that I can no longer play a meaningful role in Parliament under the present political strictures. I have been saddened by the manner in which government and the ANC in Parliament has handled the controversial armaments deal and the subsequent investigation thereof.”

Apparently the final straw was proposed disciplinary action by the chief whip, Tony Yengeni, for abstaining in the Speaker’s debate. “I said it was not appropriate if the chief whip oversaw the process, because he had a potential conflict of interest.” At the time Yengeni was being investigated for the discount he received on the 4x4 from one of the companies seeking an arms sub-contract. Feinstein then met with Kgalema

91 Andrew Feinstein, “We are at the crossroads”, The Mail and Guardian, 6th July 2001.
92 Interview with Andrew Feinstein, 21 August 2001
Motlanthe ANC Secretary General: “I told him my position was untenable. I said my position and behavior wouldn’t change.” At this meeting there was “mutual agreement” that he should resign from parliament. “My political home is still the ANC.”

In an interview conducted ten days before his resignation, Feinstein stressed there was a “critical role” for parliament as part of the institutional fabric in terms of the legislature providing oversight over the executive in terms of the constitution. The misuse of abuse of public money for private ends falls under this, hence the role of the public accounts committee. However, since 1994 he believed that parliament had not grappled meaningfully with its role, pointing out that at the various anti-corruption summits held in parliament, the public accounts committee had not been invited. “There is ambivalence in the ANC towards these issues.” Whereas the first parliament had bought into the idea of an opposition chair of SCOPA – “what was crucial was the protection and support of the chief whip, Max Sisulu for SCOPA” – with the arms deal things went “awry.”

According to Feinstein the arms deal allegations were seen by the ANC as “a conspiracy against the government by forces wanting to undermine it” and as such, the ANC strategy was three-pronged 1) get rid of Heath, 2) weaken SCOPA and 3) weaken the investigation. By September 2001 these objectives had largely been achieved with the exclusion of the SIU from the investigation and SCOPA’s proud tradition of non-partisanship in tatters.

10.14 Conclusion

In November 2001 the final JIT report would come to parliament, discussed in Chapter Twelve. Before then however, in October 2001, another ANC MP would be forced to resign from parliament. This time the resignation was not for speaking out against the party’s handling of the arms deal investigation, but rather because of being criminally investigated for corruption in the arms deal. The case of ANC MP Tony

94 Interview with Andrew Feinstein, 21 August 2001.
Yengeni, discussed in Chapter Eleven, is instructive to look at in some detail. It confirms the increasingly impotent role of parliament and its committees – in this case not just SCOPA but also the Ethics Committee – and the failure of parliament in a dominant party democracy to exercise any real oversight over an all-powerful executive.
Chapter Eleven: Executive Intervention and the Case of Tony Yengeni

11.1 Introduction

This chapter looks at the specific allegations of corruption in the arms deal involving ANC chief whip, Tony Yengeni. The handling of the Yengeni case is illustrative in that once again a parliamentary committee, this time the Ethics Committee, would be prevented from exercising its constitutionally mandated oversight role by conducting an independent parliamentary investigation, with the ongoing JIT investigation increasingly controlled by the executive, taking precedence.

The events around Yengeni illustrate the role of the independent media in exposing corruption, the increasingly impotent role of the opposition parties and parliament to exercise meaningful oversight, and how what should have been a relatively simple parliamentary investigation, was “hijacked” by the ANC. A consequence of this intervention was a drawn out criminal investigation and multi-year jail sentence for Yengeni, for what was essentially a breach of the parliamentary code.

Yengeni would maintain his innocence all the way to Pollsmoor prison, declaring he was the victim of both abuse of power by the National Prosecuting Authority and a larger political conspiracy.

11.2 The Sunday Times Report and Responses

Towards the end of March 2001, an eight month long investigation by the Sunday Times revealed that former struggle hero and ANC chief whip Tony Yengeni, had allegedly received a hugely discounted luxury motor vehicle - a Mercedes Benz ML320 4X4 - from Daimler Chrysler aerospace, a company which later became known as EADS, and was competing for a share of the defence contract. In terms of the parliamentary rules, the 47% discount Yengeni received on the R350 000 vehicle in October 1998 while still chairman of the joint standing committee on defence, should have been disclosed as a gift to the Registrar of Member’s Interests. The Sunday Times also revealed that the vehicle had been used free of charge by Yengeni for seven months prior to the first payment.
On 26th March 2001 Daimler Chrysler confirmed that a senior employee, Michael Woerfel, had bought the car which was later registered in Yengeni’s name, and that the matter was the subject of an internal investigation.¹

Responding to the report, ANC spokesperson Smuts Ngonyama, warned against a “witch-hunt” by the media, saying that the allegations against Yengeni were already part of the official probe into the arms deal (namely the ongoing JIT investigation). In a statement to parliament on 27th March 2001, Yengeni echoed this saying that while he would fully cooperate with parliament and the JIT investigators, he would not submit himself to a “witch-hunt” by the Sunday Times.² Committing himself to the legal process would, he said, afford him a fair process during which his rights and dignity would be protected and “not the trial by the media that I am currently subjected to.” He added, “the spotlight over public representatives by a vigilant media is important and helps to expose wrongdoers and more importantly acts as a deterrent to those who are contemplating wrong doing.”

In his statement Yengeni reiterated that the motor vehicle in question had been legitimately purchased, did not in any way amount to a gift or donation and more importantly, the acquisition of the vehicle did not in any way whatsoever, influence the award and/or is related with the award of any contract in the Arms Procurement under investigation. He was at pains to stress that the arms procurement process and the ultimate decisions relating to the award of the contracts were taken by cabinet and that “neither the Chairperson nor the Committee has any part in these decisions.”³

The opposition Democratic Alliance lodged a complaint with the chair of the Joint Committee on Ethics and Members’ interests calling on Yengeni to explain the circumstances surrounding the luxury vehicle and financing agreement. On the face of it, and at the very least, the DA argued that Yengeni appeared to have had the free use of an expensive motor vehicle for a lengthy period without that benefit being

³ Statement by Tony Yengeni regarding media reports in respect of his motor vehicle and the arms deal procurement investigation. March 2001.
disclosed. In terms of the regulations, members are required to declare all benefits in excess of R350 received by them and the use of a vehicle, reportedly worth in excess of R350 000, would, require therefore disclosure.  

DA Chief Whip Douglas Gibson, said Yengeni should withdraw as chief whip “because he is in an impossibly compromised position.” He also noted that Yengeni had put his own deputy chief whip into office at the public accounts committee (SCOPA), thereby exercising a decisive influence over the investigation into the arms deal.  

11.3 Parliament Tries and Fails to Assert Itself

A day after Yengeni’s statement to parliament, on 28 March 2001, the Joint Committee on Ethics and Member’s Interests met to determine whether there was cause to open a parliamentary investigation into the allegations concerning Yengeni. ANC MP Jeremy Cronin suggested that the Registrar of Members Interests be instructed to direct a letter to Yengeni asking for an explanation of the apparent breaches of the parliamentary code. On 30 March 2001 a letter was sent to Mr Yengeni detailing the allegations. In terms of the code, Yengeni had seven days to respond to the letter, following which the committee would decide whether to launch an investigation into the matter.

Yengeni’s reply to the Registrar’s letter on 6 April 2001 failed to address the substance of the complaints but instead questioned whether the relevant rules and procedures of the Committee vis a vis the code had been applied in terms of lodging the complaint. A further letter from the Registrar informed him he was required to respond to the letter. In a snub to the Committee, Yengeni's personal assistant responded saying that as Parliament was in recess the Chief Whip would only be in a 

4 Letter from Douglas Gibson to chairperson Joint Committee on Ethics and Members’ Interests, 26 March 2001.
6 Letter from Fazela Mahomed, Registrar of Members Interests to Chief Whip of ANC, Tony Yengeni, 30 March 2001.
7 Letter from Chief Whip of the Majority Party, Tony Yengeni, to Fazela Mahomed Registrar of Members’ Interests, 6 April 2001.
position to respond after the 2 May 2001. This did not go down well with the committee.

Finally, on 18 April 2001 the Registrar received a response from Yengeni to the “alleged complaints. In the letter he reiterated his statement made in parliament that “the motor vehicle in question has been legitimately purchased by me, its acquisition does not in any way amount to a gift or a donation and therefore there was no interest to be declared to your office. Anyone disputing this must substantiate his or her allegations.”

The Registrar of Members Interests, Fazela Mohamed would confirm from a preliminary investigation that Yengeni had not included the car in his annual declaration in November 1998, that he appeared to have received free use of a motor vehicle for a period of seven months and that the benefit was not disclosed. In the light of this, and noting significant public interest in the matter, she recommended that the Ethics Committee authorise an investigation and that the final report be presented to the National Assembly as soon as possible. Events would reveal how once again a committee of parliament would be divided along party lines as the ANC asserted its majority to prevent a parliamentary committee from conducting an independent investigation.

Speaking on behalf of the ANC, Cronin argued that a forensic investigation was already underway (the JIT) and that its wide ranging scope would cover the information contained in the Sunday Times report. As such, he argued, it would be redundant to institute a parallel investigation and would have many negative consequences for the effectiveness of the major investigation, which Parliament had already instituted. While it is true that SCOPA proposed the investigation, knowing how the ANC intervened to control the composition of the JIT to exclude the SIU and the subsequent side-lining of the committee from the investigation (documented in the

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8 Letter from Michelle McMaster PA to the Chief Whip to Fazela Mahomed Registrar of Members’ Interests, 10 April 2001.
10 Report No 1 to the Joint Committee on Ethics and Members’ Interests with regard to the complaint against Mr T. Yengeni
11 Joint Committee on Ethics and Member’s Interests, Continuation of deliberations, Parliamentary Monitoring Group. 9 May 2001.
previous chapter), Cronin’s reference to SCOPA and parliament, is disingenuous.

Opposition members disagreed with Cronin’s proposal saying that the investigation by the Registrar should be focused solely on a breach of conduct of the code, a separate issue as compared to the full arms deal investigation. Otherwise the Parliamentary Code of Ethics would cease to exist in any meaningful terms and that this would enable MPs to say they were not making a declaration until the police investigate. Gibson stressed that the committee was not investigating corruption nor criminal conduct but rather whether the code - that requires Members to make a disclosure if they've received a benefit in excess of R350 - had been breached or not.12 A breach would result in a penalty fine of not more than R15 000. Interestingly Yengeni’s notice of appeal against his criminal conviction in February 2005 would make this very same argument. On entering prison he would tell his supporters: “An issue that was blatantly a parliament issue was hijacked and criminalized.”13

Cronin argued that while the Registrar had rightly recommended that there should be an investigation process to establish all the relevant information it was the ANC’s belief that "this extensive, competent, professional and tri-pronged" investigation currently underway, is dealing with all of the matters that the Ethics Committee is interested in. As such, to achieve an effective outcome would be to allow the investigating process that Parliament has put underway - and to reconvene (the Ethics Committee) after the investigation has produced a report to see what facts could assist the committee so that it may move forward. This was not a matter of abrogating responsibility or authority but a matter of waiting for a few months, and then parliament could continue its investigation.14

The Ethics Committee was thus divided between those who contended that the investigation must be conducted by the already established JIT into the arms deal and those proposing a separate investigation of a possible breach of the code by the Ethics

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12 Joint Committee on Ethics and Member’s Interests, Continuation of deliberations, Parliamentary Monitoring Group. 9 May 2001.
13 Ethel Hazelhurst. “Stakes have been raised since Yengeni sentence”. The Star. 25 August 2006.
14 Joint Committee on Ethics and Member’s Interests, Continuation of deliberations, Parliamentary Monitoring Group. 9 May 2001.
Committee. A vote was finally taken, along party lines that saw the ANC dominated committee adopt the following resolution:

"In respect of the motor vehicle the committee recommends that this committee should await the report of the Joint Investigating Team. Should this Report show wrongdoing on the part of any Member of Parliament, including Mr Yengeni, the Joint Standing Committee on Ethics would then be in a position to take appropriate action on the basis of such Report".\(^{15}\)

Once again an oversight committee of parliament had been undermined. Earlier in the meeting Douglas Gibson had noted that when the committee was established its founder chairperson ANC MP Kader Asmal said that the people who sat on the committee did not sit primarily as party representatives but as representatives of the whole of parliament. Asmal had said that when he would have to take instructions from a party he would cease to be a member of the committee.

\textbf{11.4 Yengeni’s Defence and the JIT Investigation}

Yengeni’s defence, given under oath at the end of June before the Directorate of Special Operations (DSO, aka “The Scorpions”) was that the price of the vehicle was R230 052; the vehicle was damaged (resulting in a discount); he had paid a deposit of R50 000 for the vehicle. These points, it turned out, were not entirely true for the vehicle was neither damaged, nor did he pay a deposit for it. As for the price, he had only paid R182 563,63. Yengeni was reportedly very angry that the panel that interviewed him at the NPA had been all white and included someone who had been involved in investigating him when he was charged with treason in 1987.\(^{16}\)

In mid-July 2001 several Sunday newspapers featured a full page advertisement placed by Yengeni denying all allegations against him and accusing his detractors of engaging in a racist “witch hunt”.\(^{17}\)

\(^{15}\) Joint Committee on Ethics and Member’s Interests, Continuation of deliberations, Parliamentary Monitoring Group. 9 May 2001.
Opposition parties said Yengeni was in contempt of Parliament by defending himself in the ad instead of appearing in front of the Ethics Committee. He had as yet failed to provide details regarding the purchase of the vehicle even after several formal requests from the committee. The DA wanted Yengeni to explain how he paid for the ad in four Sunday papers at an estimated cost of R250 000. PAC MP Patricia De Lille commented that the ad seemed a “belated, expensive damage control exercise.”

11.5 The Broader Context

Meanwhile the Joint Investigation Team into the arms deal continued its probe. Now both of parliament’s key oversight committees, namely SCOPA and the Committee on Members Ethics, having ceded authority to this external investigation by the ANC exerting its majority, awaited the much-anticipated report, allegedly to be completed by the end of July 2001. It would only come before parliament in mid November. Chapter Twelve discusses the JIT Report’s findings and recommendations in detail.

The March 2001 revelation in the Sunday Times about Yengeni’s discounted Mercedes was further compounded by revelations towards the end of June and early July 2001 that the defence company EADS had supplied 30 other key stakeholders with luxury cars. These included amongst others, the chief of the SANDF Siphiwe Nyanda and former Trade and Industry director, Vanan Pillay, part of chief negotiator Jayendra Naidoo’s international-offers negotiating team who had also participated in critical aspects of the procurement process.

Daimler Chrysler distanced itself from EADS, which admitted it had facilitated special deals on Mercedes-Benz motor vehicles to at least 30 prominent South Africans. The company said that an internal investigation into the company’s record of motor sales to EADS had revealed “absolutely no connection” to the arms deal. “What happens beyond the sale is not something Daimler would get involved in. We have no knowledge of the involvement of our client company in the sale of our product to the company.”

“‘There is a world of difference between corruption and buying a car at a discount….We will not allow superficial, selective and deliberately destructive reporting based on distortion of facts, untruths and bias to deter us from our commitment to the growth of the South African economy.’”

In terms of the Public Service Act, regulations provides that all senior public servants from director level up have to declare the gifts and benefits they receive through a system of financial disclosure. Most major vehicle manufacturers offer a special discount to all public servants over and above the discounts offered to the general public and this would not normally have to be declared. However if a public servant received a “special privilege as a result of some contract that might be in the pipeline” he was obliged to declare it. The code of conduct for public servants says: “An employee does not use his/her official position to obtain private gifts or benefits for themselves during the performance of his/her duties. Nor does he/she accept any gifts or benefits when offered as these can be construed as bribes.”

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21 “Nyanda has until end of July to declare gifts, benefits” Sapa, 27 June 2001.
11.6 Tony Yengeni is Arrested

On the morning of 3 October 2001 former ANC chief whip and chairperson of the parliamentary defence committee Tony Yengeni, handed himself over to the National Directorate of Public Prosecutions. According to Spokesperson Sipho Ngwema there was “absolutely no deal” struck between the Scorpions and Yengeni’s lawyers nor any political pressure. “We only appreciated the co-operation.”\(^{22}\) The reference to political pressure is significant, showing that the NDPP was aware of ongoing allegations that its investigations into corruption in the arms deal might be construed as an abuse of state institutions and a way to target political enemies, something President Mbeki would be accused of with regard to his deputy Jacob Zuma.

Yengeni was arrested and charged by the Scorpions with corruption, fraud, statutory perjury and forgery arising from the arms deal\(^{23}\). According to the charge sheet he had violated the Corruption Act by illegally receiving “a benefit” (the R167 000 discount on the Mercedes-Benz) in return for undertaking to influence the arms acquisition process in favor of DaimlerChrysler Aerospace, and to facilitate introductions for Mr Woerfel and other defence company representatives involved in the process. Yengeni was also charged with fraud for giving an undertaking to Mr Woerfel that he would influence the arms deal when he had no intention of doing so. Regarding the charge of statutory perjury for “giving information under oath that was not true” this related to fabricated evidence he had given to Scorpions officials investigating the acquisition of his vehicle.

After a brief appearance in the Cape Town magistrate’s court he was granted bail of R10 000 and the case was set for 25 January 2002. A warrant of arrest – later withdrawn - was issued for EADS official Michael Woerfel who had been suspended by the company in late September 2001.\(^{24}\)

Following his arrest Yengeni would say that while people had called him arrogant in his handling of the parliamentary ethics committee it was the ANC that had said he should not work through the committee process and rather advise them that he would

wait for the bigger investigation into the arms deal to take its course. “I have no regrets about the ethics committee or the ads I placed in the newspapers. I think what I did was right.” In a further comment Yengeni said: “I’m not saying that it was wrong. I always want a nice discount on anything I buy. But with the public concern, in retrospect, I should have done it differently. In future I will be cogniscant of the impact of certain things I do. I’ll be more careful.”

This statement by Yengeni underscores the political culture of the ANC leadership to control the investigation into the arms deal and so doing undermine parliament and its committees from exercising any meaningful oversight in terms of probing alleged corruption and lapses of accountability. Yengeni, as a loyal cadre, was essentially following the ANC line both in terms of putting political pressure on SCOPA and in terms of ignoring the Ethics Committee. As seen in the previous chapter, Feinstein’s loyalty to the party over and above principle was found wanting. As such, his own position as an ANC MP became untenable within parliament forcing him to resign.

11.6.1 Reactions to Yengeni’s Arrest

What is the significance of these events for our thesis? In order to gauge this I will trace reactions from both the government and opposition political parties.

A number of reactions followed Yengeni’s arrest: the government vehemently denied his arrest had anything to do with corruption in the arms deal; a widespread concern was raised that on the eve of the release of the watered down JIT report, Yengeni was a scapegoat when others such as Schabir Shaik and Joe Modise possibly had more to answer for; other analysts said the arrest reaffirmed that the law enforcement and investigative capacities of the land were independent from the ruling party.

The government moved swiftly to calm domestic and international concerns over the fate of the arms deal issuing an official statement that there was no corruption

27 “Yengeni takes some heat off the ANC”, Cape Argus, 5 October 2001.
involved in the arms deal: “We remain confident…that the process of primary contracting, which was the core function of government, was water-tight enough to obviate the possibilities for corruption.” It was awaiting a report from the three agencies investigating the deal and only then would it determine “appropriate responses.”

The ANC issued a statement – echoed in a parliamentary motion – that Yengeni should be presumed innocent until proven guilty. The party recognized the independence of the judiciary and that the law should take its course. “Should there be any truth in the allegations against Comrade Yengeni, the ANC will not hesitate to take action.” The ANC’s alliance partner Cosatu said “we cannot afford to have anyone remain in a position of political leadership who is tainted with corruption, no matter how worthy his past.”

Justice Minister, Penuell Maduna, commented that Yengeni’s arrest had nothing to do with the arms deal telling the Sunday Times: “the state has no evidence connecting Tony to the arms deal. There is no suggestion in the charge sheet that Tony influenced any person about that deal. He was never part of the decision makers at any level and he was never part of the executive. On the contrary, the charge sheet says that he allegedly pretended to be able to influence the outcome of the deal. But there is no nexus whatsoever between what he did and the arms deal.” There was Maduna said “no evidence of impropriety around the arms deal.”

Suggestions were raised that the government was keen to avoid implicating more senior politicians and officials involved in the deal, fearing this could result in the cancellation of the arms contract. A clause in the contracts labeled “remedies in case of bribes” suggests that if a link can be shown between anyone found guilty of corruption and the decision to award a contract, then that contract can be cancelled. Many believe the government’s grim determination to exclude the SIU from the arms probe had the same roots, for of all the investigating agencies the SIU was the only

one with the legal power to rescind contracts. Also, as Feinstein points out in his book (2007:181) “Heath was the only actor in the drama who had little connection to or sympathy with the ANC.”

Commenting on Yengeni’s arrest former ANC MP Andrew Feinstein said, “This is extraordinarily good news for South Africa, for all South Africans, except for anyone who benefited inappropriately (from the arms deal).” “I sincerely hope this is the first of a series of arrests of others far more directly involved in the deal who have allegedly benefited from it. It places in sharp relief the ANC’s efforts to undermine SCOPA’s investigation. I hope that now the committee is given the space to work in a fearless and non-partisan manner.” But he noted, “Yengeni was always on the periphery”. The crucial question is whether the investigators take on the “big decision-makers in the deal.” This was a reference to the former minister of Defence, Joe Modise and arms dealer, Schabir Shaik. One ANC member however said that with the imminent release of the report on the arms deal to parliament, it was possible Yengeni had been prosecuted to “improve the response to a flaccid report. It appears that (the ANC leadership) have finally taken the decision to scapegoat Tony.”

SCOPA Chair, Gavin Woods said the arrest, while hugely disappointing for parliament as an institution, showed that the investigators were taking the allegations of irregularities seriously: “We have been aware for some time that there were unanswered questions about Yengeni’s involvement and the need for further investigation. The fact that criminal charges have been laid means there must be some substance to the allegations.” Woods said the arrest was good for the credibility of the probe and predicted there would be more arrests soon. It showed investigators were serious about getting to the bottom of the allegations. “I am encouraged that the investigation has led to action that will obviously not be popular, politically speaking.”

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PAC MP, Patricia De Lille, who had first raised allegations of corruption in connection with the arms deal, called for the ANC to suspend Yengeni: “At last! I think it is a commendable move by the Scorpions and we must now wait for the law to take its course…I hope that in the future when allegations are made against high profile people, our government should be more proactive and should not be lenient because it is one of their representatives.”

While praising the work of the multi-agency probe, de Lille again called for the inclusion of the SIU, which “by law” has the capacity to thoroughly investigate civil aspect of the arms deal, such as the validity of contracts.

UDM leader Bantu Holomisa said “We must guard against a situation where Yengeni and Woerfel are made the expedient fall guys whilst others are protected. In the end everyone, regardless of rank or position, must be equal before the law.”

The DA’s Raenette Taljaard was also cynical: “One swallow does not make a summer. One court appearance by Mr Yengeni on tough charges must not deflect attention from the serious allegations against others.”

DA leader Tony Leon took the opportunity to call on the Heads of Mission of the European Union to investigate the arms deal and “put pressure on their government and on EU structures” to investigate allegations of bribery and kickbacks involving European armaments companies awarded contracts where in terms of the OECD Convention on Combating Bribery of Foreign Public Officials it is a crime to offer, promise, or give a bribe to a foreign public official in exchange for favourable terms of business.

11.6.2 Yengeni Goes to Prison

Yengeni was sentenced to four years in prison in 2003. After a lengthy and ultimately unsuccessful appeal process he eventually started his prison sentence on 24 August 2006. His send off party and accompanying entourage of senior ANC officials to the gates of Pollsmoor prison were seen as fitting tribute to a loyal comrade prepared to

38 “Yengeni arrested over 4x4”, Cape Argus, 3 October 2001.
42 “Yengeni takes some heat off the ANC”, Cape Argus, 5 October 2001.
martyr himself for the party that would “let the law takes its course”. In mid January 2007 he was released on parole having served a sixth of his prison term.

In his book, Feinstein (2007:243-244) notes in relation to both Allan Boesak and Tony Yengeni, heroes of the liberation struggle jailed for corruption, that “both broke the law for personal gain and were, quite correctly, sent to jail after exhaustive appeal processes. Both men were borne to and from jail with the endorsement of senior ANC leaders ringing in their ears. Not one ANC functionary criticized what they had done. It is quite legitimate, in fact humane, to provide private, personal support to a friend or comrade who has erred. To fete them publicly, and not even admonish them for their crimes, is foolhardy. To do so in such a crime-ridden country is grossly irresponsible.”

Officially the ANC said that the Appeal Court’s decision is sad and unfortunate, but the organization nonetheless accepted the decision – “which is demonstration of an unflinching adherence to the rule of law on the part of the organization”.43

In a further twist, the new Speaker of parliament, Baleka Mbete, said she did not believe comrade Yengeni had defrauded parliament. Commenting on Yengeni’s case in an interview with the Sunday Times she denied she had diminished the image of parliament by seeing Yengeni off to prison. “If you approach Tony as a fraudster, of course you would then have that view. I don’t…But I saw a comrade who is being locked up at a time when (Dr Wouter) Basson is all over the place and I’m wondering: what the hell is this?” she said. She had checked with colleagues and officials and was convinced that Yengeni had not broken any parliamentary regulation when he accepted a discount on the car.44

11.7 Further Criminal Investigations

11.7.1 Schabir Shaik

The criminal investigations into the arms deal did not stop with Yengeni. On 9th October 2001 having obtained a court order and mutual legal assistance from the

43 Prince Mashele. “Yengeni is a convict and should face consequences of his actions.” City Press. 27 August 2006.
French government to carry out simultaneous raids on companies linked with Durban-based businessman, Schabir Shaik of Nkobi Holdings in South Africa and Thomson CSF (since renamed Thales) offices in France and Mauritius, the Scorpions carried out raids in France, Mauritius and Durban. The objective was to obtain documentary evidence of corruption in the arms deal, evidence that would link the deputy president, Jacob Zuma to the growing scandal.

On Friday 16th November 2001 (a day after the release of the JIT report in parliament, discussed in the next chapter) financial advisor to deputy president Jacob Zuma, Schabir Shaik, was arrested for allegedly being in possession of Cabinet minutes at which the arms deal was discussed and other classified documents and faced charges of theft under the Protection of Information Act. After being released on R1000 bail Shaik said that investigators had made him into a scapegoat: “I am rather surprised that I’m the first to be arrested. It came to me as a total shock. I was not directly involved in the arms deal, yet I’m the first to appear in court. I think I’m caught in the cross-fire of certain political interests.”

The mention of political interests is significant. This observation would find traction as Shaik’s eventual criminal trial that led to the dismissal of the deputy president of the country, Jacob Zuma by President Mbeki, throwing wide open the succession debate on the future presidency of South Africa. Charges of abuse of power by the NPA and a political conspiracy would be rife amongst the Zuma camp.

Shaik’s legal battle to resist prosecution, his indictment in August 2003 on charges of fraud and corruption, his trial that would start in October 2004 and conclude in June 2005 with a guilty conviction of fraud and corruption relating to the arms deal, would result in a 15-year jail sentence. His unsuccessful appeal against these charges would see him enter South Africa’s prison system in October 2006.

In his 160 page judgment, read over three days in May 2005, Judge Hilary Squires found “convincing and really overwhelming" evidence that Shaik, from whom Zuma had received directly to or for his benefit 238 payments totaling some R1.2million

from October 1995 to September 2002, were party to a generally corrupt relationship. In his judgment Squires argued Zuma was aware of Shaik’s efforts to facilitate a yearly payment, argued to be a bribe, of R500 000 from the French arms manufacturer Thint Holdings – formerly Thomson CSF. This was allegedly in exchange for deflecting the multi-agency probe into the multi-billion rand arms deal.

11.7.2 Jacob Zuma

On 14 June 2005, President Thabo Mbeki announced that he would be relieving his deputy president, Jacob Zuma, of all official duties. The reasons for firing Zuma related to the fact that a few days earlier, Zuma’s financial advisor, Durban businessman and struggle comrade Schabir Shaik, had been convicted and sentenced to 15 years on fraud and corruption charges relating to his role in the arms deal.

Following Shaik’s conviction and Zuma’s dismissal, the National Prosecuting Authority, whom two years previously, in August 2003, had decided not to charge him, would now charge Zuma on two counts of corruption, as well as his co-accused, Thint. The NPA under the leadership of Bulelani Ngcuka, an Mbeki ally, argued then that whilst they had a “prima facie” case of corruption against Zuma, it was not in the interests of the country to pursue the charges and it was questionable whether the state had a winnable case.46

Zuma, his defence lawyers and supporters would argue that the charges being brought against him were part of a “political conspiracy”. In a 2006 affidavit submitted to oppose a prosecution request for a postponement in his corruption trial, Zuma argued that the investigation was “designed solely or mainly to destroy my reputation and political role... My conviction on any possible type of offence is being pursued at all costs...I have been touted as a potential presidential candidate...Just as there are...ANC members who have come out in support of me being the next president, so there are those in public and in government who are very much opposed to me being

46 The subsequent Hefer Commission of Inquiry that was set up to investigate whether Ngcuka was an apartheid era spy (he was not), and the Public Protector’s investigation into whether Ngcuka had abused his powers (he was found to have), are not dealt with in this thesis.
president and indeed some who wish me not to have a role to play in the politics of this country…The charges against me have been initiated, and certainly fuelled, by a political conspiracy to remove me as a role player in the ANC."

11.8 Disbanding the “The Scorpions”

Despite corruption charges hanging over his head, in December 2007 Jacob Zuma became the ANC’s new president in a humiliating defeat for Thabo Mbeki who had run for a third term as president of the party. One of the first resolutions taken by the new ANC leadership at the party’s conference in Polokwane was to disband the Directorate of Special Operations, aka “The Scorpions”. This decision was met by huge a huge outcry from opposition parties who accused the ANC of dissolving the Scorpions solely to protect its members against prosecution.

At an ISS seminar organized in April 2008 to debate the decision, ANC national executive committee member and former defense force chief, Siphiwe Nyanda, cited five reasons for closing the Scorpions down:

- It is important to separate investigators from prosecutors to prevent an "abuse of authority" that may occur when prosecutors are also involved in investigations from the start.
- The Scorpions "illegally" gathered intelligence without being accountable to Parliament.
- The ANC has information that shows the Scorpions were going to prosecute five apartheid security operatives as well as five ANC leaders who were denied amnesty by the Truth and Reconciliation Commission. "This is not the fair and just manner in which we want our country to reconcile. The ANC doesn't think that the actions of apartheid operatives can be compared to the just war of the struggle."
- The Scorpions were "dabbling in politics" by holding a meeting of executives to discuss ways in which to "undermine" the ANC's resolution for dissolving the unit.
- There is unhealthy competition between the country's crime-fighting agencies,

particularly the Scorpions and the police. This undermines the country's crime-fighting capacity.\(^{48}\)

At the ISS seminar Nyanda lashed out at “opposition parties and the liberal media” for accusing the ANC of dissolving the Scorpions solely to protect its members against prosecution. However, it is increasingly apparent that one of the key reasons for disbanding the specialized anti-corruption unit with its high success rate (of 380 prosecutions undertaken by February 2004, 349 resulted in convictions - an average rate of 93,1%):\(^{49}\) was that it had become too political and perceived to be targeting specific ANC politicians. Nyanda said: “The DSO was used to pursue a political agenda and to target certain people in the ANC to the benefit of sectarian and foreign interests.” He admitted that the ANC’s resolution to disband the Scorpions “was informed by the view of how the DSO conducted itself in relation to Jacob Zuma…They charged Jacob Zuma without having sufficient evidence and, subsequent to that, launched Hollywood-style raids on his house…All of this amounts to human rights violations.”\(^{50}\)

Two other senior ANC members would echo these sentiments. Referring to the origins of the DSO, new ANC secretary-general, Gwede Mantashe, branded the Scorpions as a relic of the apartheid-era security establishment that had an “intense hatred for the ANC”. ANC chief whip Nathi Mthethwa labeled them as “adversaries of the democratic order.”\(^{51}\) In particular, Mthethwa said the Scorpions’ handling of the case of his predecessor, ANC Chief Whip Tony Yengeni, was troubling to the ANC: “It was supposed to be about the transgression of processes and procedures of parliament. Instead, the Scorpions turned it into a criminal matter.”\(^{52}\)

The irony of this last statement is shown up by events documented in this chapter, where at the time it was the ANC executive who insisted the Yengeni case be handled outside of parliament by the JIT investigators into the arms deal. As a loyal cadre, Yengeni had gone along with these orders from the party bosses.

\(^{50}\) Adriaan Basson, “Zuma case influenced decision”, Mail and Guardian, 11 April 2008.
\(^{52}\) Deon de Lange. “ANC boss’s new attack on Scorpions”, The Mercury, 24 April 2008.
11.9 Conclusion

Our study of anti-corruption measures in post-Apartheid South Africa has focused on the attitude of the government to confronting alleged irregularities in the arms deal. This chapter focused on Tony Yengeni who was the first high-profile ANC MP to be sent to prison on corruption related charges, even if these charges were peripheral to the main arms deal allegations. It highlighted the internal accountability mechanisms of parliament and the challenges individual MPs face in terms of fulfilling their constitutionally mandated role of exercising oversight and accountability over the executive.

The chapter also highlighted the important role of the independent media in South Africa in bringing cases of corruption to light, as demonstrated by the Sunday Times expose of the Yengeni case. Through media coverage the public was able to monitor the progress of the case that with the JIT’s investigation having lost credibility amongst the public, mainly because of the exclusion on the SIU, had become increasingly important. This point relates to the final thesis proposition: “because of the multiple institutions, interests and centres of power that exist in a democracy (as opposed to a closed political system) corruption and abuses of power will be mitigated and eventually come to light.”

The Yengeni case has illustrated the central point in our thesis, namely the need for a political culture that is willing to use, and not abuse, the independent institutions of accountability and oversight to fight corruption wherever it might appear. Also, where the commitment to do the right thing in the public interest trumps loyalty and solidarity to one’s comrades and narrow partisan or political interests.

From the Yengeni case it is clear however, that while voicing support for the rule of law to take its course, the ANC as a party are somewhat ambivalent about the criminal justice process that found one of their own guilty. The Yengeni as well as Zuma corruption-related cases seem to indicate some tension within the ruling party, with certain factions lining up behind President Thabo Mbeki, and others behind the Zuma camp. One supporter outside Pollsmoor prison where Yengeni served his brief
sentence was quoted as saying “Yengeni, just like Jacob Zuma, is a victim of political intrigue masterminded by those in charge of the state machinery.”

Institutions such as the National Directorate of Public Prosecutions can potentially be manipulated and become hostage to political considerations. In-fighting amongst various factions in the ANC however, brings with it a new set of challenges. State institutions such as the DSO and NPA are now perceived as being abused to target political enemies inside the party, as alleged with regards to the charges of corruption brought by the National Prosecuting Authority against both Tony Yengeni and Jacob Zuma.

Chapter Six of the thesis discussed specialized anti-corruption units and pointed to some of the dangers inherent in establishing anti-corruption bodies with far-reaching powers that can potentially be manipulated by the political forces. Clearly in establishing specialized anti-corruption units, such as the Scorpions, the mandate as well as accountability arrangements for such bodies need to clearly articulated and upheld to avoid a situation where the anti-corruption agency itself is accused of abusing its powers, leading to a breakdown of trust in the criminal justice system.

In Chapter Twelve the final stages of parliament’s interaction around the arms deal investigation, resulting in the release of the JIT report in November 2001 are discussed, including the report’s findings, recommendations and responses to it. The chapter concludes with the resignation of Dr Gavin Woods in February 2002 as chair of SCOPA, having become another casualty in the fight for parliamentary accountability.

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53 Prince Mashele. “Yengeni is a convict and should face consequences of his actions.” City Press, 27 August 2006.
Chapter 12: The JIT Report as a Test of Political Will

12.1 Introduction

In this chapter the release of the JIT report in mid November 2001, its findings, recommendations and reception are discussed including the resignation of Dr Gavin Woods as the chair of SCOPA in February 2002. To frame this discussion, a look is firstly taken at indicators of political will that indicate a credible reform agenda to address corruption. Over and beyond the existence and effectiveness of institutions that have an anti-corruption mandate, there are a number of other indicators of political will that have been identified in the literature. These will be discussed before discussing the JIT report. The concluding section evaluates the shortcomings in the South African government’s approach to fighting corruption, most starkly demonstrated by the arms deal case study.

12.2 Indicators of Political Will

How can one gauge the credibility and seriousness of a government’s stated intention to fight corruption?

"Political will" is the key ingredient of effective anti-corruption efforts and a critical starting point for sustainable and effective anti-corruption reforms. Without a clear indication that political will exists, a government’s statements to for example reform the civil service, strengthen transparency and accountability mechanisms, and reinvent the relationship between government, citizens and the private sector to prevent abuses of power, ring hollow and remain mere rhetoric.

Kpundeh (1999) notes that the principal challenge in relation to anti-corruption reforms is the need to distinguish between reform approaches that are intentionally superficial and only designed to bolster the image of political leaders, and substantive efforts that are based on strategies to create change. In order to do this, several indicators that demonstrate genuine political will to fight corruption have been identified and include:
• Understanding the phenomenon: Has the regime, through analytic rigor and information, sought to recognize the context and causes of corruption, as well as ways to address it?

• Issues of process: Has the regime adopted a strategy that is participatory, incorporating and mobilizing the interests of many stakeholders?

• Strategic considerations: Has the regime weighed up the strategic dimensions of achieving specific outcomes in relation to the selection of reforms that are desirable, context-specific and cost-sensitive?

• Incentives and sanctions: Has the regime considered strategies other than criminal sanctions that can mobilize functional relationships to instill normative institutional change?

• Monitoring: Has an objective process been created, which monitors the impact of reform and incorporates those findings into a strategy that ensures policy goals and objectives?

• Checks and balances: Is the society a plural one, allowing meaningful competition in both the economic and political spheres through institutions that provide a check on the arbitrary abuse of power?

The above factors all resonate in the South African context where over the past ten years, since 1997, the government has indeed put in place various anti-corruption strategies that seem to indicate political will to tackle the problem. Appendix 2 for instance, provides a benchmark of anti-corruption reforms based on resolutions drafted at national anti-corruption summits over the past few years. One can see that efforts have for instance been made in terms of issues of process, namely one that is participatory and involves all stakeholders, and of monitoring, two of the factors of political will explicitly referred to above.

Lodge (2002d) provides a set of six broad indicators for the extent to which authorities are committed to taking effective action against corruption, suggesting that an effective anti-corruption program should incorporate most if not all of these. The six indicators are broadly: measuring corruption; publicity; removing incentives; increasing penalties; political support; and bureaucratic reform.
Political support, as an indicator of the extent to which authorities are taking effective action against corruption is expanded upon in the following way: Such support for action against corruption must include endorsement of agency and judicial action against corruption, refusal to tolerate or sanction corrupt behavior by political colleagues, limiting political appointments within the civil service and curbing other forms of political patronage, public disclosure of political party finance and politician’s assets and acceptance of ministerial responsibility for major instances of departmental corruption. Politicians who are proved to have been guilty of corrupt behavior should be prevented from reassuming any elected or appointed public office.

From our account of recent corruption-related events in South Africa, it is clear that the government scores lowest on indicator 5 (political support). The concluding chapter expands on the failure to regulate political party finance, described as the Achilles heel of anti-corruption reform efforts in South Africa, pointing to lack of demonstrable political will on the part of the ANC in this regard.

12.3 The Context Behind the Release of the JIT Report

The Joint Investigation Team (JIT) that probed the arms deal, a first multi-agency investigation of its kind in South Africa, was meant to be an optimal utilization of the distinctive mandates of each of the three investigative bodies that were involved. It was not however plain sailing as noted in the press release accompanying the report’s presentation to parliament: “The joint investigation was unique in that the three organs of State, for the first time, conducted an investigation into alleged irregularities and criminal conduct simultaneously. This was by no means an easy task as all three agencies had to pioneer their way through uncharted and, at times, difficult territory.”

The exclusion of the one agency identified in the Public Service Commission report on anti-corruption agencies as having a dedicated anti-corruption capacity, namely the Special Investigating Unit, has been discussed at length in previous chapters.

Before we look at the content of the report, a number of factors, over and above the exclusion of the SIU from the investigation, cast some doubt on the JIT’s...

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independence and thus the credibility of the final report. First, the role of SCOPA’s interaction with JIT was impeded through the Speaker’s interventions. Second, as a result the JIT did not report back to this parliamentary committee that had called for the further investigation into the arms deal. Third, the delay in the release of the report (promised by July and presented in November) and subsequent revelations that the executive had edited it during this period instead of being presented directly to parliament did not inspire confidence in the final report.

The JIT would in the end not report back to SCOPA, but rather release its report at an event in the national assembly in mid November 2001. The main reason given for the delay in the report coming to parliament was a controversial decision by the Auditor General to present the draft report to the executive for comments, in terms of a provision of the Auditor-General’s Act relating to national security issues. Unsurprisingly, this action was interpreted by some as “executive interference” into the final report and the Auditor General’s credibility and integrity as an independent Chapter 9 institution would be challenged by the media and certain members of Parliament (in particular Gavin Woods and Raenette Taljaard).²

A successful court challenge using the Promotion of Access to Information Act against the Auditor General and Others by the unsuccessful bidder, Richard Young of arms company C²I², eventually led to Young accessing copies of the draft JIT report, documents that would find their way into the media. A week before the release of the final JIT report to parliament, the Mail and Guardian reported that the office of the president – and the ministers of defence, finance, trade and industry – had already seen a copy of the draft JIT report in October 2001. Asked for his comment, Gavin Woods said he was certain suspicions existed that the report may have been rewritten since then and found it strange that when Auditor General appeared before a SCOPA meeting on 16 October he did not mention the fact that the report had already been shown to the executive.³

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The same newspaper article revealed that the Auditor-General had also shown a draft of his first report to parliament in September 2000 (the Special Review) for comment to among others Chippy Shaik, the head of procurement. Shaik had then suggested an amendment that would be incorporated into the report. While Fakie’s draft had stated: “The South African navy expressed its preference for the C²I² [system]”, in a letter marked secret and dated June 7 2000, Shaik had replied that he did not agree with the draft saying: “The South African navy did not express ‘its preference to the C²I²’; rather “although the South African navy appreciated the technical potential offered by C2I2 this was outweighed by the risk-driven cost…” When Fakie tabled the reworked report it had been amended along the lines suggested by Shaik and now read: “Although the South African navy preferred the technical potential offered by the local company, this was outweighed by prohibitive risk driven cost implications…” The Mail and Guardian noted: “What makes Shaik’s meddling extraordinary is the fact that the issue was of direct interest to his brother, Schabir Shaik. The French company that C²I² was competing against – and lost to – was Detexis, a sister company of African Defence Systems, in which Schabir Shaik is a director and shareholder”.

The media reports calling into question the independence of the Auditor General would eventually compel him to issue a Special Report “to present facts to deal with certain unfounded allegations reflecting upon the integrity and dignity of the Auditor-General and his Office, made both in Parliament and in the media”. This report was at pains to detail the normal process (planning, execution and reporting) that followed any audit and was “necessary to give credibility to the process and ensure factual accuracy of the finding”. In reference to the JIT report, it noted that it was only considered a final report once it had been signed off by the three heads of the investigation teams and that the consolidation of the three reports into a single joint report dictated the elimination of duplication and technical details specifically with a view to condensing the reports into a user-friendly format.”

such as the Auditor General having to defend his integrity in the face of evidence that the final report had been tampered with, was embarrassing to say the least.

Once again it is the media driving the anti-corruption agenda, pointing out discrepancies in the official version of events as well as conflicts of interest that clearly undermined the integrity of the arms procurement process and the investigation. Institutions such as a vigilant media, independent judicial process and powerful legislation such as the Promotion of Access to Information Act, ensured that this information came to light at all and serves to highlight how all of these elements are required to support the anti-corruption agenda in a country, more so when the party in power’s political will to fight corruption, is being questioned.

Two of the thesis’ framing propositions, namely two and six are relevant here: to prevent abuses of power and promote democratic accountability, formal institutions such as a multi-party parliament and functioning criminal justice system, including specialized anti-corruption agencies, must be complemented by a vibrant civil society and independent media to both check and balance power; and because of the multiple institutions, interests and centres of power that exist in a democracy (as opposed to a closed political system) corruption and abuses of power will be mitigated and eventually come to light.

12.4 The Release of the JIT Report

On 14\textsuperscript{th} November 2001 the 380 page Joint Investigation Report into the Strategic Defence Procurement Packages was tabled in Parliament at a joint sitting of the national assembly. What did the report find, what recommendations did it make, and how was it received?

12.4.1 The Format of the Report

The format of the 14 Chapter report of almost 400 page report, that included reviewing some 700 000 pages of documents, was the following: Chapter 1 and 2 provides some background information and the methodology adopted for the investigation; Chapter 3 deals with the review of the procurement process and
policies; Chapters 4 - 7 explain the four procurement packages i.e. Alfa/Liff, LUH, Submarines and corvettes – background, what happened, how it happened with findings and recommendations at the end of each chapter; Chapters 8 - 12 deal with IONT, Cost to State, Selection of sub contractors and conflict of interest, C² I² complaints and National Industrial Participation and Defence Industrial Participation; Chapter 13 deals with drafting of the contracts; Chapter 14 summarizes the key findings and recommendations from the individual chapters.

12.4.2 Overall Findings of the JIT Report

The joint statement on the arms deal investigation issued by the JIT team found that during the comprehensive investigation no evidence was found of any improper nor unlawful conduct by the Government: “The irregularities and improprieties referred to in our report, point to the conduct of certain officials of the government departments involved and cannot, in our view, be ascribed to the President or the Ministers involved in their capacity as members of the Ministers' Committee or Cabinet. There are therefore no grounds to suggest that the Government's contracting position is flawed.”

Second, the decision that the evaluation criteria in respect of the Lead-In Fighter Trainer (Hawk) had to be expanded to include a non-costed option and which eventually resulted in a different bidder being selected, was taken by the Ministers' Committee, a subcommittee of Cabinet. This decision was neither unlawful, nor irregular in terms of the procurement process as it evolved during the SDP acquisition. As the ultimate decision-maker, Cabinet was entitled to select the preferred bidder, taking into account the recommendations of the evaluating bodies as well as other factors such as strategic considerations.

Third, the Affordability Team and International Offers Negotiation Team took adequate measures under the circumstances to present to the Government a scientifically based and realistic view on these matters. The Ministers' Committee was put in a position by the Affordability Team to apply their minds properly to the financial impact of the procurement.
Fourth, there was a conflict of interest with regard to the position held and role played by the Chief of Acquisitions of Department of Defence, Mr S Shaik, by virtue of his brother's interests in the Thomson Group and ADS, which he held through Nkobi Holdings. Mr Shaik in his capacity as Chief of Acquisitions, declared this conflict of interest in December 1998 to the Project Control Board, but continued to participate in the process that led ultimately to the awarding of contracts to the said companies. He did not recuse himself properly.

The JIT statement concluded: “It is evident from the investigation that the perception of widespread corruption within the Government is without justification. Whilst there may be certain individuals and department officials who used their positions to derive some form of benefit from the acquisition process, which might render them criminally liable, the integrity of the Government and its institutions is unquestionable.”

This position would become a constant refrain from the ruling party and for years it would literally “stick to its guns” asserting that the executive was not involved in any wrongdoing.

12.5 Ongoing Criminal Investigations

At the release of the report the National Director of Public Prosecutions, Bulelani Ngcuka’s made a statement to parliament summarized the status of the various allegations of corruption in the arms deal that had been brought to the JIT, some that involved ongoing criminal investigations.

Regarding allegations still the subject of the ongoing investigation, these included suspicions of the commission of offences of corruption and/or fraud in the following specific areas:

- the shareholding of various role players in some of the companies which benefited from the overall acquisition process;
- the receipt of gifts by role players in the acquisition process (apart from those already charged);

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7 See Appendix 4 for the full text of the Joint Statement
the undue payments to certain successful subcontractors for the supply of various services and/or programmes; and

the conflict of interest in respect of various role players in the acquisition process.

In respect of investigations into the allegation that persons including high-ranking officials involved in the overall acquisition process received various gifts from the bidders, the JIT had found substantiation for this in certain instances. Ngcuka reported that action had been taken against individuals who have unduly benefited in a corrupt manner from the acquisition process and in this regard mentioned searches in respect of various business premises and residences in South Africa, France and Mauritius that were conducted after search warrants were obtained from a judge in South Africa and the foreign authorities. These searches related specifically to the suspected commission of offences more pertinently in respect of African Defence Systems (Pty) Ltd, as subcontractor for the supply of the Corvette Combat Suite, Futuristic Business Solutions (Pty) Ltd and Thomson-CSF for the supply of an Integrated Logistic Support Services.

Ngcuka dramatically announced that within the next 24 hours his office would be taking action with regards to the area of conflict of interest as there were “indications that certain officials have found themselves in incompatible positions, which might have led to the perception that the credibility of the acquisition process has been compromised in specific instances”.  

In his address to parliament Ngcuka noted that a “golden mid-way” was needed “where a balance is struck between the demands for accuracy, rigorous investigation and the rights of privacy of those affected.” He noted that the investigation had essentially been about probity: “whether those representing the government have conducted business diligently, properly and in the best interest of the country” and “whether the contracting parties have followed the rules of good faith and fairness”. Relating to this was the question whether crimes had been committed and, more specifically, whether prosecutions could be and ought to be instituted. In essence, he

8 Address by the National Director for Public Prosecutions, Mr B T Ngcuka, to parliament on the joint report in the investigation into the strategic defence packages, 15 November 2001.
noted the investigators were “duty-bound to conduct our business in a measured, accountable and objective manner that instills legitimacy and respect for the law” and hoped they had done so “without abuse of power or process.”

The question of whether prosecutions could and ought to be instituted and Ngcuka’s specific reference to “abuse of power” with regard to the criminal investigations, is particularly pertinent and would come to the fore two years later.

On 23 August 2003 Ngcuka would make a controversial decision (some would allege politically influenced) not to prosecute deputy president Jacob Zuma for corruption, although stating publicly that a prima facie case existed against him. As a consequence, Ngcuka would be accused of being an apartheid era spy – a charge investigated and dismissed by the Hefer Commission - and of abusing his powers. An investigation by the Public Protector and report to parliament would find him to have abused the powers of the NPA and he later resigned. His wife, Phumzile Mlambo-Ngcuka would take up the reins of the deputy president of the country in June 2005, replacing Jacob Zuma whom Mbeki fired in what may have been his biggest error of judgment. Zuma would be become increasingly popular and be elected president of the ANC in December 2007, opening the way up for his future presidency of South Africa.

12.6 Recommendations of the JIT Report

A number of specific recommendations came from the JIT report:

First, a recommendation that the policy document, developed during the Strategic Defence Packages Procurement process be further refined with specific reference to the lessons learnt from the acquisition process under investigation. In this regard the staff of the Department of Defence and Armscor involved in procurement should be properly trained to ensure that they assimilate and fully understand the policy with a view to its effective implementation.

9 Address by the National Director for Public Prosecutions, Mr B T Ngcuka, to parliament on the joint report in the investigation into the strategic defence packages, 15 November 2001.
Second, the Department of Defence and Armscor should develop specific rules and guidelines to address conflict of interest issues and to ensure that personnel are properly informed in this regard. These rules and guidelines should be developed, taking into account the principles contained in the Code of Conduct of the State Tender Board and the King Report on Corporate Governance, 1994, regarding improved ethics and probity as well as international norms in this regard. Steps should also be taken to ensure that a particular individual irrespective of his/her position is not tasked with incompatible functions in multifaceted procurements. This will prevent a conflict or perceived conflict of interest, which could have a detrimental effect on the overall acquisition process.

Third, parliament should consider taking urgent steps to ensure that high ranking officials and office bearers, such as Ministers and Deputy Ministers, are not allowed to be involved, whether personally or as part of private enterprise, for a reasonable period of time after they leave public office, in contracts that are concluded with the State.\(^\text{10}\)

### 12.7 Responses to the JIT Report

Opposition parties responded negatively to the release of the report. At the parliamentary briefing the opposition United Democratic Movement (UDM) and Democratic Alliance (DA) staged a walk-out of what they said was a public relations exercise stage-managed by government to exonerate itself. The DA objected to the tabling of the report the day before the parliamentary recess, saying it prevented a proper debate.\(^\text{11}\) The PAC described the report as a “white-wash and a sad cover-up” with PAC MP Patricia De Lille saying she was sure the version of the report released had been sanitized.\(^\text{12}\) The New National Party’s media director, Francois Beukman, said the report raised more questions than answers and that his party was “not satisfied with the final product”.\(^\text{13}\)

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\(^\text{10}\) JIT Report  
\(^\text{13}\) Mungo Soggot and Barry Streek, “More a cock-up than a cover-up”, Mail and Guardian, 16 November 2001.
In a detailed statement released the same day, the government however, welcomed the result of the inquiry as vindication, citing the key finding of the report that “no evidence was found of any improper or unlawful conduct by the Government. The irregularities and improprieties ... therefore no grounds to suggest that the Government's contracting position is flawed”.

The government noted its concern along with the report’s findings that there may have been individuals and institutions who used or attempted to use their positions improperly ... to obtain undue benefits in relation to these packages. “To the extent that there were such individuals and actions, applying, as the report says, in particular to the secondary contracting process, these were acts as much of self-enrichment as they were against the ethos of our government. We have noted that the Directorate of Special Operations (DSO) is investigating these matters; and we express our full support for this. It is in the interest of the government and the country as a whole that the law must take its course and be seen to do so.” At this point it seems the DSO had the support of the executive for pursuing its criminal investigations.

Government ministers were quoted as saying that many of the allegations had been made by “pawns of those (who) were losers in the bidding” lashing out particularly at former judge Willem Heath and PAC MP Patricia De Lille. Minister of Defence, Mosiuoa Lekota referring to the public interest NGO, Idasa, commented: “Indeed, let those who chorused that the investigation into the arms deal would prove a litmus test for our young democracy now proclaim with equal volume that the test has been passed with flying colors. The 15 minutes are over. It’s time to move on.”

Richard Calland from Idasa who had coined the “litmus test” phrase, responded in his column in the Mail and Guardian later that week: “Only if the recommendations of the JIT and Parliament are heeded can we say the test is passed. It is only if the government learns from the errors and defects from the arms deal – the single biggest piece of expenditure in South Africa’s history – that we will be able to say it is time to move on.” While the report was by no means a white-wash, Calland wrote “the litmus

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test has not yet been passed,” at least not by all parties. While members of JIT “because of the thorough professionalism of the report” and “who clearly saw this as a defining moment in their constitutional existence” have passed the test, “regrettably, because of its inadequate conceptual starting point” - what is and is not “government” - the report fails to examine the question of ministerial accountability in this light and so its cause remains stagnant and undeveloped, and the litmus test cannot yet be said to be fully passed”. 17

In his weekly letter to ANC Today, President Mbeki wrote an angry response to those who accused the report as being a cover-up, insinuating his critics as having a racist agenda. The letter is vintage Mbeki, not dealing with specific accusations point by point but rather mocking his accusers in general. To demonstrate the president’s mindset at this point in time it is worth quoting at length:

“In spite of everything we have said, for a long time our country and people have been subjected to an intense campaign that sought to convince that there was clear evidence of corruption. Names of persons, institutions and organizations were bandied about. Firm predictions were made that the heads of important people in our country would roll. Intense public battles were fought around the question of who should be mandated to dig up dirt and who was courageous enough to expose evil-doing. The charge was made that our young democracy faced its worst ever crisis. The very top of our government, the national Cabinet, had been exposed as the heart and source of corruption. The mass media went to town to emphasize these messages. Every accuser was given the necessary space to be heard and seen both domestically and internationally. People who still have to account for the role they played in perpetuation of the apartheid system, including involvement with murder, became the greatest possible defenders of high morality. Others, who discharged other functions in the counter-offensive of the apartheid system, emerged as the greatest democrats and representatives of the people that our country has ever seen. Various individuals were publicly found guilty, long before any charge was laid against them and long before any court of law

made any determination about the truth of any allegations. It became an established view that what the accusers said was obviously true and requires no substantiation. Genuine opinion makers came to be defined as those who were most daring and outrageous in the accusations they made. Each allegation of corruption was immediately marketed as an established fact and the expectation created that the team would find the accused guilty. Thus was it said that if this result was not achieved, it would prove that the investigators themselves were part of the corruption. Now it has been said that the report is a cover-up and that the team’s presentation to parliament was nothing more than a public relations exercise. \textit{At the base of all this lies the racist conviction that Africans, who now govern our country, are prone to corruption and mismanagement.} (my italics). We have the facts about the defence acquisition. Do we have the courage and morality to demand an end to the insulting lie communicated everyday, that, as Africans, we are less than human?” \footnote{18 Thabo Mbeki, “Racists expect Africans in government to be corrupt”, The Sowetan, 19 November 2001.}

This theme of racism would be picked up by Justice Minister Penuell Maduna, who would say “certain members of Parliament…displaying an attitude of disrespect” for these bodies, was “racist” because it was motivated by the “misperception that everything worked upon by black people could not be trusted…” \footnote{19 “Playing the race card”, Natal Witness, 21 November 2001.}

Interestingly it was deputy president Jacob Zuma who would tell reporters “I think it (racist motivation) is a debatable issue…the legacy of apartheid will always leave those kind of utterances whenever people have got problems. They are going to run to it as an easy area to go to”. Zuma’s comment, openly contradicting Mbeki’s assertion that critics of the arms deal are racist, would be interpreted by political analyst Dumisane Hlope of the Center for Policy Studies as statesmanship, arguing that although politicians may have a valid historical background to claim racist individuals undermine potential and competency, it seemed Cabinet was over-using the race card. \footnote{20 “Zuma’s race stand lauded”, The Citizen, 23 November 2001.}
12.8 Committee Responses to the JIT Report

In SCOPA meetings held on the 11th and 12th December 2001 ANC members of the committee insisted that only the recommendations in the JIT report be discussed and took the position that to discuss the actual investigation and the findings of the JIT would be inappropriate as it would amount to a questioning of the competence and integrity of the JIT bodies.

ANC MP Vincent Smith stated that the ANC was totally opposed to any further inquiries by SCOPA into the arms deal and was determined to conclude the matter by 12 December 2001.21 Notwithstanding the protestations of the opposition parties who indicated that there was much work yet to be done, the ANC decided to impose a final report they had pre-drafted on the Committee. As was now becoming modus operandi in parliament’s previously non-partisan oversight committee, the document was duly voted through by the ANC as the “final” report. This was something Woods would later comment suggested, “(falsely) that SCOPA has fulfilled its responsibility to Parliament and the South African public.” After blocking SCOPA from undertaking its obligatory investigative work during 2001, Woods (2002) argued the ANC had now succeeded in preventing it altogether.

Without going into the detail of the separate committee reports on the JIT report, the findings and recommendations of the Standing Committee on Public Accounts (SCOPA) on the JIT report can be seen to be largely representative of the findings and recommendations of the other committees, and are presented here verbatim:

3: Findings and Recommendations

“3.1: The Committee accepts the findings and recommendations contained in the Report of the JIT, in particular the finding that “No evidence was found of any improper or unlawful conduct by the government. The irregularities and improprieties referred to in the findings as contained in this report, point to the conduct of certain officials of the government departments involved, and

cannot, in our view, be ascribed to the President or the Ministers involved in their capacity as members of the Minister’s Committee or Cabinet. There are therefore no grounds to suggest that the Government’s contracting position is flawed.”

3.2: The Committee notes that the government has accepted the findings and recommendations made by the JIT in the Report without reservation.

3.3: The Committee further notes and supports the ongoing criminal investigations that are being conducted, and urges that they be concluded speedily.

3.4: The Committee commits itself to monitor, through its ongoing oversight role, the implementation of recommendations falling within its areas of competency.”

Parliament’s Justice committee said that in the light of the JIT report it would consider making recommendations to government on changes to anti-corruption laws and would suggest that the revised anti-corruption bill that was currently with an inter-ministerial committee be “introduced as quickly as possible”. Chairman of the committee, Johnny de Lange noted “There are big gaps in the law and it is very apposite that changes be introduced as soon as possible…There’s clearly a gap, and something must be done. The quicker it gets introduced (the rewritten act) will be the best response to where there are gaps.” These gaps included specific provisions to be included in the new act relating to conflict of interest and post-employment regulations.

The Justice committee would spend the next two years working on comprehensive new anti-corruption legislation (see chapter seven) that would come into force on 27th April 2004, a date celebrating ten years of democracy in South Africa. One can argue persuasively that the investigation into the arms deal that resulted in the JIT report may actually have served a constructive purpose in tightening up gaps in the corruption laws in the country. It would not however, go far enough, failing to tackle the key issue of regulating money flowing into the political process.

24 “Arms-deal loopholes may lead to changes in corruption laws.” Sapa. 21 November 2001.
12.9 SCOPA Chair, Gavin Woods, Resigns on Principle

By adopting its “final report” in December 2001, SCOPA had formally ended its work on the arms deal. However according to the chair, Gavin Woods, in a document entitled *SCOPA’s intended arms deal investigation – the interventionist causes of its failure*, this important oversight committee had stopped considerably short of meeting its obligations “reneging on its undertaking to parliament (and thus to the South African public)” – to undertake further investigative work (Woods 2001). Woods argues persuasively that a number of interventions took place once the JIT final report was tabled in Parliament on 14th November 2001, all which he believed strongly suggested a determination on the part of senior ANC leaders to use the occasion in a way which would discourage any further parliamentary oversight over the arms deal and related matters (Woods 2001).

In February 2002 Woods released a further paper entitled *The arms deal investigation – accountability failure – a critique of the JIT report*. In it he would seriously interrogate the findings of the JIT report and note how SCOPA, through decisions and actions of the majority component, was prevented from undertaking its further investigation and therefore meeting its obligation to Parliament and to the South African public. He would argue that significant questions and concerns remained largely unanswered in relation to the following issues:

- Cost of the Strategic Defence Package
- Offsets/Industrial Participation Projects
- The Selection of Suppliers/Awarding of Contracts
- Policies and Procedures followed
- Selection of sub-contractors
- Conflicts of Interest
- Allegations of (Criminal) wrongdoing
- Responsibilities of Cabinet/Cabinet Sub-committee

On 25th February 2002, at a press conference held at parliament, Woods who had been SCOPA chair since July 1999 announced that despite his efforts to restore the functionality and purpose of SCOPA (considered in many parliamentary systems around the world to be Parliament’s single most important instrument of scrutiny and
oversight over government activity) he would be vacating his position as Chairperson of SCOPA. His reasons included the fact that his efforts to restore the functionality of the committee had “been dismissed by the majority component of the Committee” leaving SCOPA “facing another year of possible dysfunction and failed oversight.”

More fully, Woods said the reasons for his decision were:

- That studies I have just completed, and which I make available to you today, confirm the extent to which SCOPA was prevented from ensuring that the public had its serious concerns over the Strategic Defence Packages properly looked into. I cannot accept the outside interventions, and the complicity therewith by the majority of the Committee members, which caused the Committee to fail in its responsibility to Parliament and the public.

- That the majority party’s rejection of my attempts last week to deal with the structural problems which are damaging the Committee, would leave me chairing a Committee which can not achieve the role it is meant to play in influencing good financial management throughout government.”

- That the majority party’s on-going attitude of hostility towards me will continue to have them withhold their co-operation with me as Chairperson. This in effect undermined the working of the Committee.

Woods said his resignation “must be seen therefore as being both in protest of that which has undermined the Committee’s oversight role and compromised Constitutional accountability arrangements, and also the Committee’s refusal to take any positive action towards restoring its effectiveness.” His statement outlined various lines of action to be urgently pursued in order to make corrections necessary to re-establish SCOPA as a committee that exercised effective oversight over public finances.

Woods ended his statement by acknowledging his former colleague ANC MP Andrew Feinstein “together with whom I believe we would have achieved a highly effective Public Accounts Committee, which would have translated into many millions of rands

being spent better in the South African interest. I am pleased that I have been able to sustain the difficult fight for the principles to which Andrew and I subscribe and for which he had to sacrifice his career. I am grateful for the support he has continued to give me in this regard.”27 In his book published five years later, Feinstein (2007:xii) would give Woods a similar accolade: “Gavin Woods is a man of courage and conviction. Despite our political differences we were united in the pursuit of truth. It was a difficult journey made easier by his incorruptibility and his stoicism. Along the way we became friends. I am proud to still call him a friend.”

The ongoing criminal investigations into the arms deal would cast a deep shadow over President Mbeki’s presidency and the first decade of South Africa’s fragile democracy. The clumsy handling of the arms deal investigation from the composition of JIT to the bullying of SCOPA would serve to question the credibility of the government’s oft-stated “zero tolerance” stance against corruption. More damaging was the executive interference into the independent functioning on democratic institutions, systems such as the Auditor-General, SCOPA and parliament, institutions meant to promote the public interest. The damage done to the integrity of South Africa’s good governance institutions by the government’s handling of the arms deal would be felt for years to come.

12.10 Further Reflections

Our case study focused on post-Apartheid South Africa, a new democracy, where anti-corruption efforts have been primarily directed at creating functioning governance systems and institutions that promote the public interest and service the broader public needs, as opposed to the narrow partisan interests that characterized the apartheid system.

Democracy involves certain limits and constraints on the behaviour of both citizens and the public officials that represent them. For example, the “rule of law” is one such idea, where the “rules of the game” take place in a consistent and lawful manner, as opposed to ad hoc, arbitrary, opaque and secretive practices, which do not apply to all

citizens. It is clear however, that while the value of democracy is necessary in order to uphold ideals such as openness, transparency and accountability, it is not sufficient to prevent corruption – as seen by the scandals that dominate even developed democratic societies - and therefore additional measures, over and above a commitment to democracy, are necessary to strengthen anti-corruption reforms.

Chapters Six and Seven discussed the range of anti-corruption mechanisms that have been introduced in post-Apartheid South Africa. In general the South African anti-corruption agenda has been impressive and included common elements for such reform efforts including structural changes, moral and ethical attitudes and cross-sectoral involvement.

As an emerging democracy South Africa has, following the anti-corruption literature and in line with the first proposition, focused on developing strong institutions to promote democratic accountability, as these were largely absent before 1994. These structural reforms have been underpinned by new “rules of the game”, i.e. the constitutional values agreed to by all political actors. This structuring is clearly evident in the arms deal case study, through for example, continual reference by the government to upholding “the rule of law” and to constitutional values. This creates a benchmark for the critique of subsequent divergences from and corruption of these norms.

In part anti-corruption reforms since 1997 can be linked to the numerous high-profile scandals that have dominated the local media but also the impetus of the international community in this regard, culminating in the UN Convention Against Corruption. Over several years a comprehensive national anti-corruption strategy has been developed through a conscious partnership approach involving all sectors of society.

In many respects the anti-corruption reform policy process in democratic South Africa has been both systematic and sequenced and benefited from the global context that since the mid 90s strongly promoted good governance as the key to sustaining democratic reforms. Over nearly a decade specific programs and policies have largely realized the three key policy objectives identified at the First National Anti-
Corruption Summit in April 1999, namely 1) Combating Corruption; 2) Preventing Corruption; and, 3) Building Integrity and Raising Awareness. These three goals have continually been assessed with each of the national summits (see Appendix 2).

In 2006 the African Peer Review Mechanism’s (APRM) Country Self Assessment Report for South Africa noted the culmination of the government’s anti-corruption efforts in the 2002 adoption of a comprehensive Public Service Anti-Corruption Strategy, as a “blueprint for consolidating and reinforcing the anti-corruption legislative and regulatory framework as well as strengthening the institutions mandated to monitor, investigate and prosecute corruption.” A further “corner stone” of South Africa’s anti-corruption effort, noted by the APRM report, was the development of key partnerships between the government, civil society and the private sector in fighting corruption. Examples of this partnership include the two National Anti-Corruption Summits (held in 1999 and 2005) and the launch of the tri-partite National Anti-Corruption Forum (www.nacf.org.za) in 2001.

In Chapter Six we reviewed the various anti-corruption legislative and regulatory measures adopted since 1994 that are “strong and in keeping with international practices.” These included various laws such as the Promotion of Access to Information Act, The Protected Disclosures Act and The Prevention and Combating of Corrupt Activities Act. The latter “state of the art” Act focused on preventing and combating corruption came into force on 27th April 2004 – significantly on the 10th anniversary of South Africa’s transition to democracy. It is a particularly comprehensive law that spells out over twenty specific corruption offenses and was crafted against the backdrop of the finalization of the United Nations Convention Against Corruption, taking into account other regional anti-corruption protocols such as those developed by the OECD, SADC and the African Union.

In addition to these specific laws South Africa’s range of specialized anti-corruption agencies include the National Prosecuting Authority, Directorate of Special Operations (aka “The Scorpions”), South African Police Services, The Special Investigating Unit, the Independent Complaints Directorate, the Public Protector, the
Auditor General, the Public Service Commission and various Parliamentary Committees, are deemed part of the national anti-corruption reform agenda.\textsuperscript{28}

Indeed, South Africa’s anti-corruption arsenal, developed systematically since 1994, is impressive and the country appears to have in place, at least at the national level, many of the key institutions and laws cited in the good governance and anti-corruption literature as being important to expose and prevent abuses of power.\textsuperscript{29} However, not all anti-corruption laws and regulations are in place, nor do the ones that do exist always work in practice.

12.11 The Achilles Heel of Anti-Corruption Reforms

Corruption scandals do not materialize out of nowhere. They are rooted in the absence of key regulatory mechanisms and their effective implementation. The Achilles heel of South Africa’s anti-corruption architecture, the key area where there is currently no regulation or legislation, remains the funding of political parties. It is this area that has fuelled ongoing allegations of corruption in the arms deal and led critics to question the government’s political will in tackling corruption. This lack of regulation is increasingly linked to the government’s Black Economic Empowerment strategy, where state intervention in the economy, namely through preferential policies for black-owned businesses to acquire assets and shares, have led to accusations of corruption where for a price, those benefitting from successful business deals are expected to contribute funds to the ruling party.

For example, it was recently reported that factions representing the old and new guard of the ANC are fighting for control of lucrative empowerment deals, in return for donations to the party. “As a result of the Chancellor House audit, details have now emerged of how the ANC backed efforts by big empowerment players to secure lucrative deals, in return for donations to the party.” Here the example of politician turned businessman Saki Macozoma is cited where he has been called to account for millions paid to the party following a R1.5billion empowerment deal involving Standard Bank, Liberty Life and asset management company Stanlib. Shortly after the

\textsuperscript{29} See The 2006 Global Integrity Report at www.globalintegrity.org
deal was completed last year, an amount of R9 million from the proceeds was paid to the ANC. Macozama – a former ANC NEC member who is worth about R617 million – confirmed that a trust with links to the ANC’s front company Chancellor House, had benefited from the Stanlib deal.  

When it comes to knowing who funds the political process in South Africa, the corrupting nexus between power and money, this remains a shocking lacuna in an otherwise impressive array of anti-corruption mechanisms. And it is something that the ruling party (as well as other parties in parliament) seemingly has no real interest in remediing. Allegations of corruption in the arms deal have continually harped on whether kickbacks from arms companies to secure lucrative contracts were possibly funnelled into ANC party coffers, rather than purely individuals within the process who might have benefited from the deal. Recent allegations in the Mail and Guardian newspaper point to a number of significant donations given to ANC related charities at around the time that the German arms company Thyssen was successful in its bid for arms contracts.  

South Africa currently does not have regulations governing private contributions to political parties, nor are there limits on individual or corporate donations to candidates or political parties or any limits on total political party expenditure. Most importantly in law there are no requirements for the disclosure of donations to political parties or candidates, nor any legal requirements for the independent auditing of political parties' finances and candidates, in respect to private party financing. Since there are no regulations, these cannot be effectively implemented.

As noted in Chapter Seven, the public interest NGO, Idasa's legal attempt to gain access to financial records of political parties in terms of the Promotion of Access to Information Act proved futile. The “conspiracy of silence” between political parties and private contributors is clearly a major fault line that undermines anti-corruption efforts. Only members of parliament can put in place laws to regulate the funding contributions to political parties. So far it seems there is no will to do so, and as

demonstrated in the case study, parliament’s ability to exercise its key oversight role is severely weakened by at least two factors; the structural constraints imposed by an inherited Westminster tradition of parliamentary sovereignty, as well as the current electoral system that works against parliamentary assertion.

While there is agreement that is nothing wrong with money playing a role in politics and that this is the norm in democracies world over, as Mondli Makhanya, editor of the Sunday Times notes, “the issue of regulating campaign finance in one that the ANC cannot put off indefinitely. The ANC now has to accept the reality of and find ways to formalise this practices so as to avoid corrupt elements capturing South African politics.”

Calland and February, Idasa analysts who seven years on believe the “litmus test” of democratic accountability for dealing with the arms deal allegations has largely failed, note the ANC’s apparent “addictive dependence on secret donations and its increasing willingness to use state tenders and contracts as a pump for its own finances,” demonstrated by recent revelations around Chancellor House, a company that has benefitted from a number of government tenders and is allegedly an ANC funding vehicle.

As noted earlier, there is an increasing perception that BEE is a ploy to extract money from the private sector to secretly fund the ANC. Indeed the larger questions of Black Economic Empowerment (BEE) – How much is BEE political patronage rather than a rational political program to distribute assets? If BEE is an attempt to buy influence, how is this different from corruption? If political connections are supposed to “open doors” to what extent does this represent corruption is these doors remain closed to ordinary, unconnected business people? – are questions now being raised.

It is also important that it is not just elites, but the public as a whole, that benefits from democracy. State/political interventions into the economy, such as BEE, which

32 “ANC campaigns are awash in cash – we don’t know whose though,” Sunday Times, 25th November 2007.
create a “get rich quick” ethos, may result in corruption problems, a warning sounded by theorists such as Rose-Ackerman, amongst others. Economic liberalization can result in new forms of corruption where transformation of the economy through state intervention such as deregulation or privatization creates new incentives and forms of corruption. For example it is clear that in the arms deal, choosing the right BEE partners was important for the main contractors to acquire sub-contracts. As Feinstein points out “pressure on the companies bidding for the main contracts compelling them to appoint favoured (BEE) sub-contractors before they would be awarded the main contracts was a crucial flaw in the procurement process.”35 This is what happened in Schabir Shaik’s case, where Jacob Zuma, as a political player, was bought into vouch for Shaik’s political and BEE credentials with the French arms company Thint, and for this service was handsomely rewarded by Shaik and an alleged bribe from the French, a case which hangs over Zuma’s head.

While political parties need money, “where the rules of the game are unclear, it is a tacit license to raise money without providing an account of it. In an environment where there is no regulation of funding to political parties anything goes and the parties are able to get away with muddying the waters.” Since the Idasa court application in 2005 the ANC has yet to draft legislation in this regard. An ANC committee has apparently been constituted to think about the impact of money on the party, including looking at “revolving door” issues and the pervasive culture of acquisitiveness.”36 Finally it seems the ruling party is acknowledging that something has to be done.

Concrete steps have yet to be taken to place a stopper or “cooling off period” in the revolving door between government employees entering private sector corporations, through the creation of post-employment restrictions. This conflict of interest problem was one the final JIT report pointed to in relation to the former minister of Defence, Joe Modise, who left public office to chair a private company that benefited from the arms deal. Recommendations were made in the JIT report that steps be taken to remedy this situation, but six years on, there has been minimal progress.

12.12 Poor Implementation of Existing Laws

While in many cases the right laws may exist to prevent abuses of power and promote accountability, for example the access to information and whistleblower protection laws, the reality is these laws are not working in practice. Rather than a question purely of the absence of the political will to institute reforms or the absence of a democratic culture to nurture them, the weakness here may touch on deeper realities such as the extreme thinness of human capacity within the South African public sector in terms of skills and resources to apply and administer such laws.

For example: In law and on paper, South Africa has a model Promotion of Access to Information Act (PAIA) with all the essential components, such as the right of appeal if a record is denied and an established institutional mechanism for citizen requests for government records. However, when one considers whether the right of access to information is effective or not, a very different story emerges. Results of the Open Society Justice Initiative comparative studies conducted by the Open Democracy Advice Center (ODAC) in 2003 and 2004 show that public bodies responded to only 13 of the 100 requests submitted and sixty-two percent of them were simply ignored. Clearly improvements are necessary in the effective implementation of the access to information law, which may require both training as well as technology (e-government) of the responsible civil servants.

Another example: In law the Protected Disclosures Act of 2000 protects civil servants and private sector employees who report a criminal offence, a failure to comply with a legal obligation, a miscarriage of justice, endangering the health or safety of an individual, damaging the environment or unfair discrimination. The Act also states how these wrongdoings should be reported, preferably within the organization and only outside the organization under certain circumstances. If the wrongdoing concerns one of the above and it is reported correctly then the act protects the whistleblower from victimization or dismissal. There is however still widespread ignorance about the “whistle-blower protection” law. In practice, most civil servants who report financial wrongdoing suffer recrimination or negative consequences. Civil servants
say that when disclosures are made against very senior civil servants, the backlash is worse because of the power and influence those civil servants wield.

In order to serve the public interest it is also necessary to have policies that regulate and sanction civil servants who don’t disclose their assets. It has also been reported that almost 50 000 civil servants have business interests outside of government (Van Vuuren 2007). *The Mercury*, a Durban-based newspaper recently reported on the Public Service Commission’s findings of a 0% compliance rate where no financial disclosures had been received from the 55 senior managers in the premier’s office in Kwa-Zulu Natal. The PSC report noted: “The office of the premier is responsible for the overall guidance and administration of the province. It cannot play such a leadership role if its own compliance rate in this respect is at 0%.” Although the national cabinet resolved that all departments should have anti-corruption strategies in place by 2004, in 2008 a formal anti-corruption forum has yet to be established in Kwa-Zulu Natal.37

12.13 Threats to Institutional Integrity

Over and above laws that prevent corruption, key institutions such as specialized anti-corruption units, the criminal justice system as a whole, and parliament, are also required to operate effectively. To be taken seriously anti-corruption institutions should be sufficiently resourced, operationally independent and have the confidence of both politicians and the public to competently carry out their mandate to fight corruption wherever it may manifest itself. Fundamentally anti-corruption agencies should be perceived to be independent, operating without fear or favour, rather than being perceived as open to abuse by leaders for short-term political ends such as scuppering an independent investigation into a suspicious arms deal that might shine a light on suspect contributions to political party coffers, or more sinister, for bringing the integrity of political rivals into question and ostensibly ending their political careers.

While the Special Investigating Unit was well-positioned to participate in the arms deal investigation, it did not have the confidence of the Mbeki government and thus the resources invested in this particular anti-corruption agency were not used. This was ultimately to the detriment of the final investigation as it failed to quash critics of the arms deal who regarded the Final JIT Report as a “white-wash”, not least by its failure to involve the SIU in the probe, the only agency that could have rescinded the contracts had wrongdoing been found.

The government’s insistence that the “rule of law” would be upheld at all costs their overall contracting position was not compromised by allegations of corruption in the arms deal, indicates that the Mbeki’s government would not entertain the idea of corruption in the arms deal, in case that meant contracts were rescinded – and with that, presumably lucrative funding to the ANC as a political party. A key reason for not including the SIU in the final investigation, other than personality conflicts between Judge Heath and the government, may have been that it was the SIU was the one body that had the legal powers to cancel such contracts.

The criminal justice system’s independent reputation was tarnished first by the president side-lining the SIU from the investigation and secondly by the questions raised regarding the National Prosecuting Authority abusing its powers in relation to its investigation and now pending prosecution of former deputy president, Jacob Zuma. Charges brought by the National Prosecuting Authority (NPA) against former deputy president Jacob Zuma and those against Yengeni, are seen by their supporters as a political conspiracy with the NPA, in particular the Directorate of Special Operations, accused of abusing its powers.

The power struggle within the ANC alliance, in particular between the Mbeki and Zuma camp, stimulated by the President’s handling of the arms deal probe, has had consequences for the anti-corruption agenda. This is demonstrated by calls to dissolve the Directorate of Special Operations, aka “the Scorpions”, a policy decision taken by the ANC when it convened its national congress in Polokwane in December 2007 and elected Jacob Zuma as the new president of the organization.
As the main institution for representing the public interest, the importance of an effectively functioning parliament cannot be stressed enough. It has been argued that the strength of the national legislature may be a – or even the – institutional key to democratization. As such the focus for democrats should be on creating a powerful legislature and in polities with weak legislatures, democrats should make constitutional reforms to strengthen the legislature a top priority. If politicians fail to establish a national legislature with far-reaching powers, the people will still find themselves in a polity where their votes do not count (or are not counted properly) and their voices are not heard. On the other hand, if a powerful legislature is established, the people will probably gain and retain their freedom and a say in how they are ruled – even in countries that embark upon regime change with inherited structural and historical advantages (Fish 2006).

The damage done by the arms deal debacle where SCOPA was effectively undermined and sidelined by the ANC and the Joint Investigation Team (JIT) from the investigation has left scars. Clearly the capacity of parliamentary committees more generally to play an oversight role needs to be bolstered. The problem with parliament as an institution is that the “rules of the game” favour accountability to one’s political party, rather than the public. This is the mistake Andrew Feinstein made when he raised questions on the arms deal, namely to think that he was doing his job to protect the public interest, whereas his real political mandate was to protect the ANC. Tony Yengeni understood his role far better than Feinstein, and to this extent survived the arms deal debacle, even after a spell in prison.

Beyond the challenges to exercising its oversight function – demonstrated starkly by the arms deal - in the past few years the integrity of parliament itself has been damaged enormously by the “Travelgate” scandal that involved widespread abuse of travel vouchers by members of parliament in collusion with travel agents.
12.14 Where Things Stand

So, as of April 2008, where do things stand?

It is clear that South Africans are becoming increasingly concerned about the corruption issue. Public opinion surveys, such as the one conducted by Markinor in late 2007, cite corruption as the main concern of 23% of South Africans, slightly ahead of crime (21%), HIV/Aids (14%), housing (11%) and unemployment (8%). Analysts such as Hennie van Vuuren from ISS relate this to the unrelenting stream of scandals around the funding of political parties, as well as the handling of the National Prosecuting Authority, where its head Vusi Pikoli, was suspended in late 2007 by the president for reasons which are still unclear, but allegedly relate to his office issuing an arrest warrant for the National Commissioner of Police, Jackie Selebi, on racketeering and corruption charges. The subsequent suspension and criminal indictment of the National Commissioner and the decision by the new ANC leadership headed by Jacob Zuma in December 2007 to call for the dissolution of the Scorpions, means that leadership and law enforcement capacity in South Africa to deal with high-profile corruption by senior political figures, is seriously under threat.

Curiously there has been continuous and disingenuous denial of there being any corruption in the arms deal, with President Thabo Mbeki reiterating this point at the World Economic Forum in Davos in 2007, and more recently the online ANC journal, ANC Today. However, the criminal trials and convictions of both Tony Yengeni, former chief whip of the ANC jailed for covering up his receipt of a large discount on a luxury vehicle from one of the bidders in the deal, and Schabir Shaik, financial advisor to former president, Jacob Zuma, sentenced to fifteen years in jail for fraud and corruption related to the arms deal, “blatantly belie this fact where it has now been proven in courts of law that there was indeed corruption in the arms deal.”

The publication of former ANC MP, now “dissident” Andrew Feinstein’s book, After the Party, in September 2007 documents persuasive evidence of the full extent and purposeful manner in which the ruling party decided to undermine any independent

investigation of the arms deal. ANC Today of 16th November 2007 would question Feinstein’s claims and facts arguing the following: that SCOPA conducted its own investigation without any hindrance by the ANC government; that BAe Hawk trainers satisfied technical requirements and were a logical choice; that the fraud/corruption of Schabir Shaik had nothing to do with primary contracts in the deal and that there was no evidence of BAe, German or French firms paying bribes to the ANC to help fund the election campaign; and finally if there was any corruption it would have come to light by now.

The Joint Investigating Team’s (JIT) investigation that included three agencies, the National Prosecuting Authority, Auditor General and Public Prosecutor concluded in November 2001 that the government was exonerated from corruption with regard to the primary contracts. Now however, with international investigations by the Serious Fraud Office in the UK raising questions about payments made by BAe to certain players, and investigations by German authorities into payments of $25million by Thyssen to similar actors such as Chippy Shaik, head of acquisitions in the SANDF at the time of the deal, alleged to have solicited and received $3million, the arms deal will not go away. Finality is required in terms of the arms deal investigation. South African anti-corruption agencies must assert themselves and cast the net wider to achieve closure on a saga that has bruised almost all our democratic institutions, and deeply divided not only the ANC but also the country.

The political culture of loyalty to the ANC as an organization (necessitated in a struggle context), as opposed to that of a broader concept of accountability, may explain some of the government’s (mis)handling of the arms deal and aversion to Feinstein’s outspokenness. Feinstein’s book consolidates criticisms of the ANC as a party having lost its way with the politics of morality and accountability being trumped by both money and political expedience. In the book Feinstein repeats the claim, increasingly accepted, that the motive for much of the arms deal expenditure was a way for the ANC as a political party to raise substantial funding for 1999 election. An ANC official at the time commented that the ANC leadership saw the arms deal as the perfect opportunity to line its own next which is why, at a time of
growing financial crisis for the organization, “even some of its leaders with the highest degree of probity, were willing to turn a blind eye.”

While some unscrupulous individuals such as the Shaik brothers, former defence minister Joe Modise and his advisor Fana Hlongwane may have benefitted illegally from unscrupulous arms companies, it was more likely the ANC as a political party and affiliated charities such as the Nelson Mandela Children’s Fund may have been the major beneficiary of bribes paid. President Mbeki may not personally have been bribed but may have played a role in soliciting funds for the ANC in return for which he distorted the procurement process to favour certain companies.

Political leadership on fighting corruption in South Africa is seriously stalled with both President Mbeki and the newly elected president of the ANC, Jacob Zuma, both tainted by the arms deal scandal. What is the way forward?

Zuma has now been formally charged by the National Prosecuting Authority on corruption charges relating to the arms deal and his case is due to be heard in August 2008. However, he has also appealed to the Constitutional Court to set aside a ruling by the Supreme Court of Appeal that upheld the search and seizure warrants undertaken by the Scorpions in August 2005 to obtain crucial documents relating to these corruption charges, arguing that his right to a fair trial were negatively affected. This matter is pending.

Feinstein is very clear about what should be done about the arms deal: the government should appoint an independent judicial inquiry able to conduct a completely unfettered inquiry with no political or other pressures brought to bear on it. “It should be able to work freely and openly with all the other international investigations into the arms deal and it should set out, once and for all, exactly what happened in that deal. It should identify whether they are alive or not – everyone who was involved in corruption in the deal – and exactly who was involved in covering it up. This should be done so that we can learn lessons from this, so that those who benefitted inappropriately can suffer the legal consequences of that and so that we can

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move on. A thorough examination of the deal would be a very good place to start, for some sort of moral regeneration."

For now, calls for a full judicial commission of inquiry into the arms deal (and possible amnesty for full disclosure) continue to echo across the political and NGO spectrum, including from the outspoken Archbishop Desmond Tutu. Should this happen, President Mbeki’s role in the deal would come under increasing scrutiny – after all he chaired the cabinet sub-committee that approved the deal. He is also alleged to have met several times with arms companies at crucial times in the procurement process, something he conveniently cannot recall.

Information emerging into the public arena from the German and British investigations into the deal, allegedly probing more than $200million and up to a billion pounds in bribes or “commissions” relating to the South African arms deal, is coming to light, with government no longer controlling the flow of information on the arms procurement. Although under pressure of closure themselves, the Scorpions have recently re-opened their inquiry into the BAe and SAAB contract, stalled by Ngcuka, an Mbeki ally, years ago. Here the procurement criteria were shamelessly altered to favour BAe, with cost taken out of the equation.

It is unlikely however, that Mbeki would appoint such a commission after resisting it for so many years. There may however be some accountability yet on the arms deal, this time coming from an unlikely source; within the ANC itself. This is the case in arms deals elsewhere (for example India) where political in-fighting among the ruling party led to crucial information being made public, years after the cover-up. Feinstein believes it is possible that the current glut of information emerging about the arms deal is simply the consequence of score-settling within the divided ruling party.

Within the new ANC leadership structure, pressure is being put on Mbeki to come clean on his role in the arms deal and a committee has been appointed to gather facts as part of an internal ANC fact-gathering process on the arms deal and allegations of corruption that, after almost ten years, have not gone away. While calls have been

41 Sue Segar, “Thabo Mbeki, the ANC and the intoxication of power” Weekend Witness, 17th November 2007.
made for these findings to be made public it remains to be seen whether the ANC will comply. With no public judicial commission of inquiry, similar to the Scott Commission of Inquiry into UK arms dealing in sight, the South African public will for now continue to be in the dark about the R50 Billion arms deal, whose rising cost has indirectly impacted the cost of power and electricity regeneration, literally ensuring that South Africans across the country are in the dark due to ever frequent load-shedding and power cuts.

12.15 A Crisis of Integrity

Unfortunately, fourteen years into our democracy and almost a decade since the allegations of corruption in the Strategic Defense Procurement Package first materialized, the depressing legacy of the arms deal can be summed up as resulting in a “crisis of integrity”. Citizens have lost faith in both the institutions of state that govern them, the individuals who lead them, and the political process as a whole – to do what it says it is going to do. The political system has lost its integrity – it has been corrupted.

From the Public Protector, to the Auditor General, to the National Prosecuting Authority, to Parliament – each of these institutions and the individuals leading them, have in some way failed the test of integrity. The voices of a few brave individuals such as ANC MP Andrew Feinstein and former SCOPA Chair Gavin Woods were partially silenced by their respective resignations from parliament, but in Feinstein’s case have found powerful outlet in a political memoir. Opposition political parties continue to put pressure on the ruling party to establish a judicial commission of inquiry into the arms deal, but will they be heard?

Externally, the ongoing international criminal investigations into commissions and bribes paid by British and German arms companies in the South African arms deal will hopefully ensure the investigation is not over yet, albeit that in November 2001 the JIT report was so eager to assure South Africans all was well. External peer pressure and international monitoring, be it through NEPAD and the Africa Peer Review Mechanism or governance scorecards conducted by international NGOs such
as Global Integrity or Transparency International, play an incentive for countries to keep democratic anti-corruption reform efforts on track. South Africa’s hosting of the 2010 Soccer World Cup will guarantee ongoing international interest in these reforms.

The tragedy for President Mbeki’s legacy is that although responsible for instigating many of the policies, laws and strategies on corruption reform, including the establishment of the Scorpions, and for hosting the major global, international, and African anti-corruption conferences in South Africa during his two terms in office, corruption in South Africa appears more prevalent than before. There is a tangible disconnect between what exists in law, and what happens in practice, what government says, and what it does – a veritable “crisis of integrity” that will be hard for any future government to overcome.

Ironically, it may be that the arms deal scandal, from 1999 onwards, not only stimulated a bitter succession debate within the ANC tri-partite alliance, but also played a critical role in profiling anti-corruption reforms. It certainly put Mbeki’s presidency on the spot and fully engaged and tested the key institutions of democratic accountability, from the press to parliament, prosecuting authorities to the Auditor General. In a positive way it kept the issue of corruption firmly on the policy agenda and may have stimulated specific reforms in areas such as the tightening of procurement and conflict of interest regulations and the range of corruption offences stipulated in the new Prevention and Combating of Corrupt Activities Act.

12.16 Conclusion

To conclude: In thinking about initial hopes and aspirations for evaluating the success of South Africa’s transition to democracy with respect to not only preventing abuses of power such as corruption, but more broadly, the following statements, both general and specific, provide a thought experiment in the form of a set of ideals against which to evaluate this country and other new democracies42:

42 This section draws from an unpublished paper on “Anti-corruption reform efforts in democratic South Africa” given at the “After Apartheid” Conference, Yale, New Haven, April 2007.
1. South Africa post 1994, would be a qualitatively different moral society compared to the venal values that characterized the apartheid regime and that the constitutional values of openness, transparency and accountability would infuse all government institutions and interactions between citizens and their state.

2. Ethical leadership characterizing the struggle against apartheid would continue to inspire those committed to the hard work of governing and that South Africa would provide a leadership role, particularly in Africa, to fight corruption and promote good governance.

3. South Africa, because of its special circumstances (for example, its level of development) would not become a typical African economy, largely dependent on the state, characterized by patronage and dominated by ethnic interests.

4. Systems set up by the apartheid state to further its illegitimate racist ends would be truly ruptured and under a new system of democratic governance all South Africans would tangibly experience the gains of the struggle for freedom and democracy, leading to true equality.

5. Race would not play a corrupting influence in both the state and the economy, and while legitimate interventions to address inequality and “the legacy of apartheid” would be undertaken, these would not occur at the expense of professionalism and efficiency.

6. The new state would establish an impartial professional civil service committed to creating “a better life for all” and that delivery of basic services such as security, housing, water, electricity, education, infrastructure would not be undermined by maladministration, inefficiency and corruption.

7. There would be a multi-party democracy and a strong opposition that would be vigilant in demanding accountability from the ruling party. A strong distinction between the ruling party and the state would ensure that state resources would not be abused for political ends.
8. Parliament would exercise effective oversight over the executive, particularly in relation to public funds, to ensure that the public interest was served by responsible and rational public expenditures.

9. The media would be independent, fair and vigilant and journalists would be safe and responsible in exposing corruption wherever it emerged.

10. Organizations in civil society would play an active role as a partner in holding the state accountable and facilitating access to information for citizens in order to exercise and uphold their rights.

11. Citizens would be equally protected before the law and those who spoke out against unfair or corrupt practices within the public or private sector would be protected and rewarded.

12. Where maladministration and corrupt practices were reported or exposed, appropriate measures would be taken by dedicated and specialized anti-corruption resources to investigate, prosecute and convict both corruptor and corruptee and that the criminal justice system, in particular the judiciary and the national prosecuting authority, would be independent, respected and impervious to manipulation for political ends.

The ideals, hopes and aspirations expressed in the above statements provide a checklist for the kind of society South Africans deserve to live in. Our constitution provides the foundational values for this vision. It is hoped that this thesis, through its detailed workings of a particular case study of high-profile corruption, has gone some way towards understanding the challenges to some of these ideals on which the future success of South Africa’s democracy hangs.

The final chapter relooks at the theoretical chapters of the thesis and discusses how relevant these theories are in the light of the South African case study. The thesis concludes with “lessons” learnt for an effective fight against corruption.
Chapter Thirteen: Conclusion

13.1 Background

This thesis discussed both the existence and the effectiveness of anti-corruption and accountability systems operating in democratic South Africa. It focused primarily on assessing the South African government’s policy reforms to deal with public sector corruption and the handling of corruption allegations in the arms deal, following the largely peaceful transition to democracy in April 1994.

Since corruption contributes to the de-legitimisation of the political, economic and institutional systems in which it takes root, it is rightly a central focus of concern in contemporary democracies. The study of anti-corruption reforms in South Africa and the assessment of their effectiveness as well as limitations, contribute towards our understanding of good governance initiatives in general. This, at least, is my argument.

Several distinct propositions provided an analytical framework for the inquiry into the South African arms deal case study in particular, and the institutions that support democracy as well as anti-corruption reforms in general. To recall these were:

First, and most basic, formal institutions in a democracy, structure power arrangements so as to express certain standards, norms and the “rules of the game.”

Second, to prevent abuses of power and promote democratic accountability, formal institutions such as a multi-party parliament and functioning criminal justice system, including specialized anti-corruption agencies, must be complemented by a vibrant civil society and independent media to both check and balance power.

Third, to ensure that they fulfil their mandate to protect the public interest, these institutional and administrative mechanisms require adequate capacity,
independence and resources, not only through their formal existence “in law”, but also their effective functioning “in practice”.

Fourth, politics is important. Formal institutions and mechanisms do not emerge in a political vacuum but rather exist and function within a distinctive political culture more or less broadly commensurate with the set of norms associated with the institutions of democratic accountability.

Fifth, political interference and intervention in the legitimate functioning of democratic institutions may occur and serve to undermine their effectiveness and integrity.

Sixth, because of the multiple institutions, interests and centres of power that exist in a democracy (as opposed to a closed political system) corruption and abuses of power will be mitigated and eventually come to light.

Three key questions were posed upfront:

1. Does democratic South Africa have the systems in place to address corruption effectively?

2. Do these anti-corruption systems (laws, institutions, policies, strategies) work in practice?

3. Does the necessary political will exist in South Africa to address corruption effectively?

What follows is a brief summary of each of the four parts and twelve chapters preceding this concluding chapter. I then relook at the theoretical chapters (2-4) and discuss how relevant these theories are in the light of the South African case study. The thesis concludes with some “lessons” learned for an effective fight against corruption.

13.2 Summary of Thesis Chapters

13.2.1 Part One

In Part One, *Theories of Corruption and Control*, (Chapters 2-4), the general theory of corruption and its control were set out by examining the relevant international
literature on conceptions, causes and consequences of corruption, including theories that underpin and inform current policies and strategies to address corruption. Arguably, the “new” South Africa benefitted from these ideas as its transition from an abusive, authoritarian regime to an accountable, democratic society, coincided with unprecedented international scholarship and focus on the ideas of promoting good governance to prevent corruption.

Chapter Two, “Definitions and Conceptions of Corruption,” examined various types and definitions of corruption, adopting a working definition useful for the remainder of the thesis, namely corruption as “the abuse of entrusted power for private gain”. LeVine’s theoretical model of political corruption was examined closely with regard to its relevance for the South African context. His analysis of the various elements in the core and extended processes of political corruption and his argument that an alternative informal polity with different rules to those of a democracy may be the end result of a particular political culture resonated with the proposition that formal institutions and mechanisms do not emerge in a political vacuum but rather exist and function within a distinctive political culture.

The effectiveness of anti-corruption strategies are determined by the social, cultural, economic and political environments that create conditions conducive to both the incidence and severity of corruption. Chapter Three, “Conditions and Consequences of Corruption,” discussed specific conditions that encourage and give rise to corruption, particularly in Africa. The negative consequences of corruption internationally were noted to underpin the urgency of devising ways to prevent it, from international conventions to civic action. The compelling case citing empirical evidence of these negative consequences supports the idea that comprehensive anti-corruption interventions are required at a variety of levels by a number of institutional actors.

Chapter Four, “Theories of Corruption Control and Evaluation,” assessed various theoretical approaches to controlling and preventing corruption, such as those developed by Klitgaard (on monopoly, discretion and accountability); Rose-Ackerman (on reducing incentives and creating risks); Mbaku (on institutions, incentives and the rules of the game) and Johnston (on democratic consolidation and social empowerment). This chapter will revisit these theories and consider their
relevance for the South African case. The Global Integrity Index methodology was also described as a new tool to assess the existence, effectiveness and sustainability of anti-corruption efforts. The chapter stressed that there is no blueprint for controlling corruption and that to have legitimacy, anti-corruption reforms are required to be home-grown with both culture and history important when designing effective strategies. In this regard actual case studies, such as this thesis, are crucial to discern the interplay between formal institutions and political culture and the incentives that may operate to influence the effective functioning of institutions and reforms.

Most of the theorists focused on institutional mechanisms to prevent corruption. Institutional safeguards alone are not sufficient to turn the tide on endemic corruption. Rather efforts to promote good governance need to be planned and implemented in a wide, systemic and multi-dimensional perspective. Since corruption is a symptom of problems at the intersection of the public and the private sectors, it needs to be combated through a multi-sectoral strategy, including preventive, administrative, investigative and legislative measures. Ultimately public resentment towards corruption is the key to the success of reform initiatives and thus what is ultimately needed is a change in the attitudes and behaviour of the public as unethical conduct in government is largely shaped and conditioned by such behaviour in society. Here Johnston’s emphasis on social empowerment is crucial.

13.2.2 Part Two

Part Two, Corruption and Reform in South Africa, (Chapters 5-7), examined the context of corruption in South Africa both before and after transition to democracy in 1994. In particular, dedicated reform efforts taken by the government since 1997 to address corruption, including institutions, laws, policies and strategies, were looked at. The purpose of this section was to emphasize the political will needed to seriously combat corruption as a social problem by putting in place the necessary systems and institutions to address it. Allegations of corruption in the arms deal would severely test the integrity of these institutions and reform efforts.

Chapter Five, “The Nature and Extent of Corruption in South Africa”, asked several questions: How much corruption is there? Is it worse now than it was under apartheid? Relative to other problems, how important is corruption as a problem to
citizens? What empirical data do we have to answer these questions? Did the new South Africa inherit a public administration that was endemically corrupt? Was corruption a parallel system or was it localized and isolated and confined to certain spheres? Was it primarily routine venality or something more grandiose?

By looking at the available data, Chapter Five found that corruption in South Africa is neither a new nor a declining phenomenon. Public opinion surveys and media analysis reveal that corruption in democratic South Africa is mostly petty and opportunistic, occurring at local level and in specific sectors. The arms deal case study however, reveals political corruption of a grand type, not picked up by survey data. This type of corruption has a far more damaging impact on the integrity of public life and the institutions that support democracy. The chapter touched on new risk areas for stimulating corrupt activity such as state intervention in the economy through for instance Black Economic Empowerment and affirmative action policies linked to the drive for representivity. The data shows that public tolerance for corruption is decreasing as local and international expectations for clean government grow and it remains an important concern of citizens around the world.

Chapter Six, “Anti-Corruption Reforms in Democratic South Africa,” looked at the politics of anti-corruption reforms, identifying factors that need to be taken into account if reforms are to be regarded as both credible and feasible. It traced the constitutional and institutional framework that set the stage for anti-corruption debates and initiatives that took place after 1994 to promote public sector accountability. The various conferences and summits convened by the government from 1998 - 2005 to devise a comprehensive anti-corruption strategy for South Africa are documented. The chapter included a section on the debate around the rationalization of specialised anti-corruption agencies.

Chapter Seven, “Designing a National Anti-corruption Strategy and Law” takes a more detailed look at South Africa’s national anti-corruption strategy. Based on consultation and partnership with numerous stakeholders, the resultant strategy is a participatory one and praised by anti-corruption activists around the world. The comprehensive Prevention and Combating of Corrupt Activities Act that came into force on 27th April 2004, the 10th anniversary of South Africa’s transition to democracy is examined. It is clear that the drafting of this law was influenced by the
backdrop of the criminal investigations and cases that emanated from the Joint Investigation Team and its final report into the arms deal as well as the international legal context of anti-corruption conventions that occurred around this time. The new law’s failure to include specific provisions relating to the regulation of the private contributions and sources that fund political parties, a lacuna in the anti-corruption architecture that seriously questions the political will to address the corrupting influence of money in politics, is covered.

13.2.3 Part Three

Having addressed both the theory of corruption and its control (Part One) and the policy landscape with regards to anti-corruption measures in South Africa (Part Two), Part Three, *The Arms Deal*, (Chapters 8-9), examined a specific case study, namely allegations of corruption around the multi-billion rand arms deal. Since allegations of corruption first surfaced in 1999 involving senior cabinet figures and the presidency, no other issue has so dominated the political landscape nor so acutely tested the effectiveness and integrity of legislative, policy and institutional mechanisms in place in democratic South Africa to prevent abuses of power. *The arms deal case demonstrates the limits of the institutions, laws and practices currently in place to prevent abuses of power in South Africa and points to the importance of taking other factors into account such as political will, political rivalries, political culture and context as factors that play a role in influencing the effectiveness of anti-corruption agencies and credibility of anti-corruption reforms.*

Chapter Eight, “Anatomy of an Arms Deal” described the actual composition of the final Strategic Defence Procurement Package. Numerous problems characterised the deal from the start such as in-built irregularities in the procurement process, the rising costs of the deal that government was warned about and yet chose not to disclose to the public, and arguments around “off-sets” that would allegedly create several thousand jobs. In particular, the role of parliament and its committees in exercising oversight over the executive branch of government was examined focusing on the ANC’s extraordinary attempts to prevent a truly independent parliamentary investigation into the deal through intimidating members on parliament’s Standing Committee on Public Accounts (SCOPA), particularly those calling for the inclusion
of the Special Investigating Unit (SIU) as part of the Joint Investigation Team (JIT) probe.

Chapter Nine, “The Case for Excluding the SIU” looked at the sophisticated justification on the part of the government, drawing strongly on a constitutional judgment, to exclude the Special Investigating Unit - regarded by the public as the most effective anti-corruption agency in the country – as part of Joint Investigation Team into the arms deal. The SIU’s exclusion would continue to raise questions as to the independence, integrity and credibility of the JIT’s investigation into the arms deal, and calls for an independent judicial commission of inquiry persist today. This chapter also examined the intervention of the Speaker in December 2000 questioning the interpretation of SCOPA’s 14th report to include the SIU as part of the JIT, the Cabinet press conference to defend the integrity of the deal, and finally the personal intervention of President Mbeki in January 2001 who announced that the SIU would not be given a proclamation to proceed with the investigation.

These reactions on the part of the government to prevent an independent investigation into the arms deal would raise suspicions as to the oft-stated commitment to fight corruption. The justifications to exclude the SIU, couched in the language of respecting constitutionality and upholding the rule of law, would prove even more sinister, and point to a possible cover-up by the ruling party. The case study starkly demonstrates how the politicization of the fight against corruption was damaging for the long-term integrity of South Africa’s various democratic institutions, in particular parliament.

13.2.4 Part Four

Part Four, *Arms and Accountability*, (Chapters 10 – 12), further examined the challenges faced particularly by parliament and individual MPs to fulfil their oversight functions and hold the executive accountable. The cases of two ANC MPs, Andrew Feinstein and Tony Yengeni, and their respective roles in the arms deal case leading to both of their resignations from parliament, albeit for very different reasons, were closely examined in Chapters Ten and Eleven respectively. Both the Feinstein and Yengeni case illustrate the central point in the thesis, namely the need for a political culture that is willing to use, and not abuse, the independent institutions of
accountability and oversight to fight corruption wherever it might appear, and where the commitment to do the right thing in the public interest trumps loyalty and solidarity to one’s former comrades or narrow partisan or political interests. Chapter Twelve documented the outcome of the Joint Investigation Team's report, reactions to it and the principled resignation of Dr Gavin Woods as chair of SCOPA, for parliament having failed in its duty to exercise oversight of the executive.

Chapter Ten, “Parliamentary Oversight under Pressure,” documented the increasing pressure placed on members of the Standing Committee on Public Accounts (SCOPA) from the executive. This included the highly critical letter signed by the Leader of Government Business, Jacob Zuma, to the chair of SCOPA, questioning SCOPA’s authority and oversight role, the Speaker’s questionable role in defending parliament vis-à-vis the executive and the increased “side-lining” of the Committee from the investigation. For asking awkward questions, ANC MP Andrew Feinstein would be removed from SCOPA and subsequently resign from parliament in September 2001 citing his party’s handling of the arms deal as the reason for his departure. His highly critical memoir, After the Party published six years later, would document damning evidence of the ANC’s conscientious attempt to preclude an independent parliamentary investigation into the arms deal.

Chapter Eleven, “The case of Tony Yengeni,” examined the case of another ANC MP involved in the arms deal, namely the Chief Whip and former chair of the Parliamentary Defence Committee, Tony Yengeni. Following the exposure in the independent media for having accepted a 47% discount on a luxury Mercedes 4x4 from a company tendering for part of the arms deal, Yengeni would reluctantly resign from parliament in October 2001. A lengthy criminal process that found him guilty of defrauding parliament for not declaring the discount would result in a briefly served jail sentence in 2006. Yengeni would never accept responsibility for his actions, rather accusing the National Prosecuting Authority of abusing its powers and acting as part of a political conspiracy to target certain individuals. The handling of the Yengeni case is illustrative in that once again a parliamentary committee, this time the Ethics Committee, was prevented from exercising its constitutionally mandated oversight role and conducting an independent parliamentary investigation. Instead the ongoing JIT investigation into allegations of corruption into the arms deal - an
investigation controlled by the executive - would take precedence so that what should have been a relatively simple parliamentary investigation conducted by the non-partisan ethics committee was essentially hijacked by the executive. A consequence of this intervention was a drawn out criminal investigation and multi-year jail sentence for Yengeni, for what was essentially a breach of the parliamentary code.

Chapter Twelve, “The JIT Report as a Test of Political Will”, discussed the final stages in parliament’s interaction around the arms deal investigation resulting in the release of the JIT report in November 2001. Compiled by the three investigative agencies comprising JIT, namely the Auditor-General, Public Protector and National Prosecuting Authority, it would exonerate the executive and government from any wrongdoing with regards to corruption in the arms deal. The findings and recommendations contained in the report, as well as public reaction to it, are discussed in some detail. The Chapter discusses the principled resignation of SCOPA Chair, Dr Gavin Woods in February 2002 on the grounds that SCOPA had failed in its duty to hold the executive accountable. It concludes with some further reflections on the arms deal and corruption in South Africa, including a section on where things currently stand with the investigation and a thought experiment consisting of twelve statements or ideals against which a truly independent and accountable South African state could be assessed.

13.3 Applying anti-corruption theory to the South African case study

So what does this thesis - looking at South Africa’s anti-corruption reforms over the past ten years, and a detailed case study of a high-profile case of political corruption - tell us about the relevance, or not, of contemporary conceptions of corruption, so far as concerns its causes and consequences, as well as various theories of corruption control as articulated in earlier chapters (2, 3 and 4)? Looking at the broad theoretical implications of the study what do we learn from South Africa about how we can prevent corruption? Is there a need to revise any existing theory? Which theory (Le Vine, Klitgaard, Rose Ackerman, Mbaku and Johnston) is especially relevant to the thesis findings? Are there any aspects of these current theories of corruption control that appear questionable and in need of revision?
The first point to be made is the following: in surveying the literature on both understanding and controlling political corruption in the African context, the main theorists that were selected (Le Vine, Klitgaard, Rose Ackerman, Mbaku and Johnston) resonated on some level with the South African experience. As such my reading of these theories is likely to have focused on ideas that had some application to my understanding of the South African situation as I interpreted it at the time. In the light of the case study and subsequent research, aspects of these theories certainly remain relevant, in some cases more than others.

In what follows, I try and distil from the body of research covered in this thesis some key “lessons” for an effective corruption control strategy in a new democracy. I see how these lessons are supported, or not, by the theory which has been covered. First I revisit the theories discussed upfront on conceptions, causes and particularly the control of corruption.

13.3.1 Conceptions of corruption

Defining what counts as corruption is an important first step towards developing both theoretical and policy responses to effectively identify, understand and control it. Different forms of corruption require a varied response. In South Africa policy makers have adopted a broad definition of corruption - “the abuse of entrusted power for private gain” - and created a wide array of tools to address it. The anti-corruption debate in South Africa has however focused primarily on addressing petty bureaucratic corruption, and yet as Hennie van Vuuren from the Institute for Security Studies argues convincingly, “low level, petty corruption is kept largely in check in South Africa (with the exception of a few sectors)” and that “there is much to suggest that political corruption is in fact one of the greatest challenges we face and is therefore central to the debate on what can be done to improve the functioning of the national integrity system”.¹

Chapter Two of the thesis discussed political corruption as a form of grand corruption. The arms deal case study, involving bribery, a large-scale deal, high

placed officials, greed as a motivator, undue influence as well as “violations of procedure” and “distortions in due process,” clearly counts as a case of what the literature (Doig and Theobold) define as grand political corruption.

LeVine’s theory on the dynamics of political corruption can be seen to be of relevance to this South African case study. According to LeVine’s “extended process” of political corruption, a “culture of political corruption” exists if politically corrupt transactions become pervasive, commonplace and the norm. This sounds very much like systemic corruption. According to Johnston, corruption is *systemic*, when it is open and “routinely used”, when systems depend on corruption for their survival, when there are few practical alternatives, when their workings constitute a parallel set of procedures and where wrongdoing is the norm and is regularised and institutionalised. In my judgment this is not at present the case in South Africa.

An “informal polity” is constituted when informal political networks (such as those of former struggle comrades) become so well established within the political system that their activities and influence begin to parallel that of government structures. As LeVine (1975:8) puts it “In the absence of a culture of political corruption, an informal polity cannot develop. However, a culture of political corruption can exist without an informal polity.” Thus an “informal polity” depends on a culture of political corruption in order to thrive.

It remains true that struggle connections in South Africa are valued and that relationships formed pre-liberation hold great sway, even to the extent of defending one’s comrades (even when they may have engaged in criminal activities, as evidenced in, for example, Carl Niehaus’ recent fall from grace and the ANC’s defence of him). What this means according to theories of political corruption such as LeVine’s, is that if the “informal polity” exists, as it appears to in the South African context, then it is even more important to ensure that “a culture of political corruption” does not take root, for this could lead to corruption becoming systemic and thus the norm.

Despite being under threat, as we have seen in the case study, the values of the constitution and the rule of law are in South African political society, still upheld as the norm, against which corrupt activity is pitted as a transgression. Criminal
investigations into alleged corruption by high-profile politicians, including Jacob Zuma are still ongoing and for now, the law is such that any public official, including a sitting president, must be accountable for their actions and face the full force of the law. Although subject to various legal challenges, including threats to the independence of the National Prosecuting Authority and the closure of the highly effective Scorpions, the fact that these investigations continue, shows some political will, if not resilience on the part of independent institutions such as the NPA, to continue to fight corruption. Pressure from opposition political parties and the independent media, as well as civil society, has also been instrumental in ensuring the arms deal investigation is not swept under the carpet.

13.3.2 **Conditions and causes of corruption**

With that broad background, we can now consider the question, how applicable are the various theories of the conditions and causes of corruption to the South African case study? In the literature the causes of corruption are complex and varied. Whether ideological, institutional, cultural or economic, some of these factors are more relevant to the South African situation than others. Five causes of corruption that appear in the theory and are relevant to the South African case are looked at here, namely colonialism or the “legacy of apartheid”; poverty and inequality caused by low and uneven growth; absence of political competition; poor governance and the absence of institutions to deal with corruption; and a weak civil society.

Understanding the causes of corruption links closely to suggested control measures, discussed later.

According to one theory the prevalence of corruption is caused by *colonialism*. In South Africa this translates into the rather nebulous concept of “the legacy of apartheid”. This factor was discussed in some length in Chapter Five and provides some reasons for mistrust in state institutions and a general lack of respect for the rule of law. It is clear that corruption is neither a problem that emerged nor disappeared overnight with South Africa’s transition to democracy. By its very nature and operation the apartheid state and its multiple systems of retaining power were corrupt. Apartheid as an abusive regime benefiting a minority at the expense of a majority was inherently corrupt. The “legacy of apartheid” thus refers to a range of inherited problems, including corruption. It does however, tend to wear rather thin when the
main abusers of power disregard the new regime’s systems of checks and balances that have come into being post 1994. It will take years for the new governance system to both right the wrongs of the past, as well prevent future malpractices. While abuses of power are more likely to come to light in democracies because of institutions such as a free media and values such as openness, accountability and transparency, developed democracies are not entirely sheltered from corruption. Here however, corruption manifests itself in more entrenched, subtle and sophisticated ways to protect various “special” interests.

The legacy of apartheid argument includes a much-cited factor for the prevalence of widespread corruption, namely *poverty and inequality*. This theory may explain the prevalence of petty corruption such as social grant and housing fraud, where poverty, patronage and poor control systems, allow for citizens and civil servants who are not eligible, to abuse the system, cases of grand political corruption such as alleged in the arms deal case study cannot be sufficiently explained by this theory.

In South Africa, as opposed to many African countries, the state is not the main force in the economy. In countries with few economic opportunities, political office is seen as the most direct route to personal wealth (often through corrupt means). In South Africa it does appear that being in politics and then going into the private sector gives one an advantage as political contacts bear fruit in the form of state contracts. The fact that there is no “cooling off” period for political office bearers plays a definite role in this “revolving door” phenomenon.

In his political memoir, leader of the parliamentary opposition, Tony Leon notes (2008:628) “These existential conditions on the ground were made worse by a form of parasitic capitalism, which soon enough collapsed the distinction between the bureaucracy and business. A revolving door had begun to operate with displaced ministers and top officials straying into the fields of business over which previously, often just months before, they had held regulatory sway…senior officials, including ministers, were directly ‘advising’ companies as to whom their ‘empowerment partners’ should be. Such BEE credentials were necessary for compliance with the state-sanctioned licenses – from mining rights to cell-phone networks – depended.”
To overcome the “legacy of apartheid”, new institutions and laws are required. To address poverty and inequality empowerment policies to democratize the economy through state interventions such as BEE, are clearly important in overcoming this legacy. However, these have also opened up new opportunities for corruption and given rise to accusations of there being a small elite who are benefiting from such interventions.

Absence of competition is another cause cited of corruption. This seems to hold true for South Africa. In the past where the national party government dominated the formal political landscape in South Africa, and more recently with the hegemony of the ruling ANC, there is an absence of political competition, which inevitably leads to a decline in accountability, and potentially a spread of corruption. The ANC’s dominance as a political party has meant it has a monopoly on control of power, and is therefore susceptible to abusing institutions and failing to remain accountable to the public interest.

Closely linked to this particular cause of corruption is the theory that the nature of the political system has a role to play. In South Africa the centralized party list system currently utilized to appoint MPs - rather than a system of constituency representation - operates in a way that places enormous power in the hands of political party bosses ensuring that elected representatives are largely accountable to them and not the electorate. Van Vuuren (2008:11) argues “this undermines parliament’s independence and means that MPs may very well be reluctant to tackle political corruption where it leads back to the small group of individuals at whose mercy they serve.”

Corruption is the result of poor governance and the absence of laws, regulations and institutions to deal with abuses of power. This understanding of the cause of corruption is particularly persuasive in the South African context. The absence of certain regulations, for example laws governing disclosure of private contributions to political parties, or the weak implementation of conflict of interest provisions due to human resource capacity, amongst other causes, and poor financial administration and management skills, is another factor. Poor governance results in poor decision-making over the allocation of public goods and systems don’t function to promote the public interest.
Finally a weak civil society is mentioned as a cause of corruption. When this sector is weak it is not able to hold the powers that be to account. This was seen in the arms deal case study where civil society’s opposition to the scope and scale of deal – in the light of other more pressing socio-economic issues - in the first instance was unsuccessful, and its subsequent engagement in trying to ensure a thorough independent parliamentary investigation, failed. Civil society’s participation in the National Anti-Corruption Forum is however, seen as part of the success of anti-corruption efforts, where there is a conscious commitment on the part of government to engage actively with civil society as part of the solution. This will be discussed more under anti-corruption theory.

One other cause of corruption relevant in the South African context can be mentioned namely the culture of entitlement, which is linked to a rampant materialism that analysts such as Mamphele Ramphele warn of. She notes, “The temptations of materialism are everywhere. Success is defined not by what one accomplishes, but by what one owns. Many young people know no other motivation for developing their talents than to be able to make money. The use of state resources to feed this materialism is worrying. The National Party government used “state capture” to enrich their constituency at the expense of the rest of the population. Post-Apartheid South Africa cannot afford to allow “state capture” by the new elites. It would undermine everything we yearn for in a free, democratic society.”

The sense that it is “payback time” following the harsh deprivation of the struggle for liberation that many political leaders have endured, must factor itself into the self-deceptive calculations of those for whom public office is not about serving the public interest, but rather themselves. The infamous remark by ANC spokesperson Smuts Ngonyama “I did not struggle to be poor”, is telling. Theories of the causes and conditions of corruption thus need to add reference to the culture of materialism and entitlement as an important factor that may stimulate corrupt behaviour.

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13.3.3 Consequences of corruption

Mainstream theories of corruption cite its largely negative economic and political consequences and the South African case study supports this. Some of these consequences relevant to the thesis topic include the fact that corruption undermines public trust (Klitgaard), reduces political participation because of growing cynicism (Johnston) and undermines development by distorting priorities (Rose-Ackerman). As Klitgaard notes, the winners are few and well connected.

The economic consequences are such that where corruption is high, economic performance is poor. This is because corruption reduces investment, distorts the size and nature of government expenditure and weakens the financial and tax system. It is the poor who suffer most as corruption undermines the social safety net and may deter the poor from seeking basic entitlements and other services.

In the South African case it is difficult to link poor investment in the country directly to perceived corruption, when there are multiple other contributing factors. Gumede (2005:100) mentions some of these: “Foreign investment – one of the bedrocks of economic policy since 1996 – has remained a trickle, much of it in the form of short-term flows. Investment as a percentage of GDP has averaged around 16 to 17 percent, low by the standards of successful developing countries. Relatively little of the paltry investment received has gone into major new projects or plants. Government often blames the country’s skills base, volatility of the exchange and interest rates, the cost of inputs, such as transport and telecommunications, lack of competition in the domestic market, and poor perceptions of Africa as a whole and the southern region in particular for sluggish investment….If neither government nor local investors show confidence in the economy, how can foreign investors be expected to pour money into the country.”

It is true however, that government expenditure has been distorted by the arms deal and the choice to spend billions of Rands on arms purchases as opposed to other more pressing social needs. As Gumede (2005:111) notes again, “…it is impossible to calculate the final cost to taxpayers. The deal has been widely and justifiably criticised. South Africa should hardly be spending billions on sophisticated military hardware instead of on poverty alleviation and social upliftment.”
According to general corruption theory, the political consequences of corruption are such that it undermines trust, creating instability and potential disengagement of citizens from the formal political process. Johnston notes the importance of trust for an open, responsive and effective political process, where citizens abide by the rule of law. The issue of trust in government and the mistrust caused by corruption is real in the South African case. Indeed new political parties, such as Congress of the People (COPE) have fighting corruption as a key theme in their 2009 election manifesto, calling for an independent inquiry into the arms deal. Trust is also linked to quality of leadership, and when the leaders of the ruling party are under a cloud of suspicion and facing charges of corruption, money laundering and racketeering, this can only cause disillusionment, if not disengagement from the political process.

13.4 Theories of corruption control

Let us re-look at the theories of controlling corruption that we discussed earlier and see, in the light of what we have learned in the case study, what relevance, if any, they hold for South Africa.

There are various theoretical approaches to the control of corruption. Many of them promote good governance reforms that rest on democratization and economic and political reform. For instance, the pluralist approach focuses on the nature of the state as being limited, legitimate, honest and transparent. The systems approach to fighting corruption as articulated by Robert Klitgaard focuses on the management systems of organizations. An approach focused on economic liberalization and redefining the relationship between the market and the state through deregulation and privatization, is articulated by Susan Rose-Ackerman. We can take each of them in turn.

13.4.1. Klitgaard

Twenty years ago, anti-corruption theorist Robert Klitgaard concluded his book, *Controlling Corruption*, with the following statement arguing that attempts to control

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3 The Afrobarometer (Working Paper No. 102, October 2008, Corruption and Trust in Political Institutions in sub-Saharan Africa) empirically assessed the relationship between trust and corruption in 18 African countries including South Africa and found that corruption never produces trust-enhancing effects regardless of the evaluation of public service quality and that perceived and experienced corruption impact negatively, but differently, on citizens’ trust in political institutions.
corruption, whilst difficult, were not useless: “Something is wrong in societies where corruption takes over. And just so, something is wrong when great wealth coexists with squalor, when human rights are quashed, or when racism denies our common humanity. We should not lose this sense of moral violation. But as we reflect on questions of why, we should also do our best on questions of how. We should not yield to the temptation to escape from the hardest and most ethically loaded problems on the grounds that there is nothing we can do about them…(w)ith regard to corruption, policymakers and citizens are not helpless. There are things we can do about even this most difficult of problems. At least this practical and normative assumption should drive more of our work on the problems of the poorer nations” (Klitgaard 1988:210).

In terms of things to be done to control corruption, Klitgaard’s theory to explain corruption (Corruption = Monopoly + Discretion - Accountability) is based on neo-liberal economics. Control of corruption would therefore imply limiting monopoly, through competition, limiting discretion, through a more rules-based approach, and increasing accountability and transparency, through a more active civil society and media.

In South Africa the focus on anti-corruption reforms has been on improving accountability and transparency measures by creating democratic systems and institutions that embody these values. In this regard Klitgaard’s approach has been very influential in the South African policy context where anti-corruption reforms have focused on creating and re-engineering systems to promote good governance.

A more rules-based approach implies that the rules, or laws, are at the least understood and accepted, whether or not adhered to. Klitgaard’s theory clearly depends on their being rules in place, there being consensus on the rules, and in having the human and institutional capacity in place to monitor such indiscretions, should they occur. This cannot be assumed in the South African context. For instance, conflict of interest regulations are a case in point where formal rules might exist, but they are not adhered to in the spirit of the law, as was the case with Chippy Shaik and the arms deal. It is also questionable how effective the code of ethics for members of parliament is when there is no real enforcement by parliament’s Register of Members Interests and where the system largely relies on the integrity of individual members.
The weakness of Klitgaard’s approach is therefore that it relies on rules that firstly need to be in place, and that second there needs to be consensus on. Discretion requires some level of education and experience to apply the rules judiciously, and this also cannot be assumed. Thirdly in terms of limiting monopolies and promoting more accountability, this relies on there being a culture of accountability which functions in practice, and this cannot be assumed in the South African context where the ruling party has a powerful hegemony on various organizations of state, such as parliament.

In a functioning democracy civil society and the media should play an important role in promoting transparency and holding the government to account. These have been weakened in South Africa for a number of reasons, including accusations of racism, which have encouraged self-censorship on the part of the media, as well as the limited capacity of media houses to pursue investigative journalism strategies. The Mail and Guardian newspaper is an exception in this regard. Johnston’s theory of controlling corruption through social empowerment strategies, including strengthening civil society, is referred to later in this chapter.

13.4.2. Rose-Ackerman

According to Rose-Ackerman, the basic structure of the public and private sectors is what produces or suppresses corruption. As such, effective anti-corruption reforms require changes in both the constitutional structures and underlying relationship between the market and the state. She argues that fighting corruption can not be done just through focusing on improving integrity systems, but rather in the actual way that government does business i.e. the underlying incentives to either pay or receive bribes, and the risks of getting caught, have to be changed.

In South Africa political liberalization has focused on dismantling the apartheid state and institution building. State interference in the economy, such as BEE, has been necessary to address inequalities, but this as we have seen, has its own challenges.

Rose-Ackerman warns that economic liberalization can result in new forms of corruption where transformation of the economy through state intervention such as deregulation or privatization creates new incentives and forms of corruption. State/political interventions into the economy, such as BEE, may result in corruption
problems. According to Gumede (2005:223) the way that the government promoted BEE created a negative perception to start with. “Damningly, BEE has since come to be associated with a small and elite group out to make as much money as they can at the expense of broad black society. The actions of the new breed of black entrepreneurs reinforce the notion that, instead of benefiting the previously disadvantage black community, BEE has become a means of self-enrichment for the few where BEE deals typically involve the same handful of people, over and over. ‘The same people with political connections are always getting the contracts. It is not evenly spread,’ complained one struggling black entrepreneur.”

Rose-Ackerman points out that the way to fight corruption and create a state that is efficient, fair and legitimate is to reduce incentives and to increase the risks. Something is wrong if state institutions are used for personal enrichment or to provide special benefits to groups. She is correct in saying that it is not just an integrity systems approach that is required to fight corruption, but that the way in which government conducts its business, plays a role. Thinking about the structure of incentives in South Africa, it is increasingly clear that BEE is creating perverse incentives where political contacts are important for a company receiving contracts. Rather than merit and track record, skin colour and political affiliations are more significant. This undeniably has some impact on corruption levels in the country.

In South Africa the law on corruption has been tightened and the criminal justice system is being re-engineered to make it more effective in terms of actually increasing the risks for would be criminals in terms of actually getting caught. If, as appears to be the case in South Africa, political connections are a factor in securing government contracts, then it makes sense for those wanting to get state contracts to ingratiate themselves with the individuals and political party that is in power and makes these decisions. This can be done through gift giving, lavish entertainment of public officials, or even private donations to political parties. There are some worrying suggestions that gift-giving to public officials making such decisions is not being effectively monitored and usually happens before the contracts, particularly at local and provincial government level, are awarded. And it is still the case that contributions to political parties from the private sector are unregulated and need not be disclosed, so the “conspiracy of silence” between the business sector and
government and the perverse incentive where one has to “pay to play” is not being challenged.

13.4.3 Mbaku

Mbaku’s contribution to the theory on corruption control is his observation, similar to that of Rose-Ackerman, that corruption is often related to government regulation and the state’s role in the economy. Since corruption occurs when there is state intervention in the economy coupled with opportunistic civil servants, limiting corrupt practices requires limiting state intervention in private exchange. His solution is to call for comprehensive institutional reform in both government and economy. In addition, institutions need to embody particular values, which are greater than individual self-interest, and set the rules of the game as well as structure incentives for behaviour. He argues that corruption control requires modifications of the incentive structure through changes in the existing rules. Institutional reform is required, and effective reform efforts need to have studied the rules that regulate socio-political interaction. From Mbaku’s perspective the first step in preventing corruption is thus to determine the rules of the game, i.e. the legitimate scope of behaviour for members of the government.

Mbaku’s approach throws light on one aspect of corruption control in South Africa. In this country constitutional values have played an important role in setting the scope of behaviour and “rules of the game” for the public service. However, where there is no “cooling off period” for government employees who wish to enter the private sector, and no disclosure requirement for private contributions to political parties, these gaps in the anti-corruption framework create incentives for abuses to occur. Unless the rules of the game change, and these loopholes are filled, then corruption will occur in these areas and there is nothing “illegal” about them, as there are no laws or rules regulating this behaviour. And in South Africa the moment for putting in place such regulations may have passed. Calls for more transparency with regard to political party funding have been completely ignored by the ruling party, which does not believe it to be in its interests to make such information public.
13.4.4 Johnston

For Johnston, hope for the control of corruption lies in democratic consolidation and social empowerment. Having identified various syndromes and degrees of corruption, he notes that corruption in a society often reflects the deeper challenges caused by imbalances between economic and political forces. According to him it is clear that weak political institutions and poorly institutionalized markets enable a variety of illicit connections to flourish. Thus anti-corruption efforts cannot just detect, discourage and punish corrupt offenders, but actually need to address the deeper imbalances if they are going to succeed.

Social empowerment is the long-term social foundation that is required over and above institutional reform in the state and economy. This is especially in cases where corruption is systemic and trust in institutions is low. Where social empowerment is effective, institutional reforms can converge with social values and thus grow in legitimacy and effectiveness. Johnston highlights the important role of civil society of balancing the state in corruption reform efforts. He notes that the cultivation of civil society is not a substitute for institution building and that the two must work together; “Without a strong civil society to energize them, even a full set of formally-democratic institutions will not produce accountability…. Where civil society is weak…vital social support for limits on corruption is lost” (Johnston 1998:94).

Johnston’s theory of social empowerment as a focus for anti-corruption reforms is particularly persuasive in the South African context. South Africa has a strong history of social and civic organizations to draw on and there needs to be a new social movement focused on fighting corruption, just as the struggle movement was characterized as a broad coalition of interest groups fighting against the abuses of the apartheid state. The state has created the space for civil society to flourish and this space needs to be taken advantage of in a more strategic way by new leadership from civil society, so that reform can occur from the bottom upwards. There are some signs that this is happening as in recent months new organizations such as the seemingly broad based Social Justice Coalition have taken to the streets outside parliament to demand that government is held accountable to and call for a Commission of Inquiry into the arms deal, a call that won’t go away.
In a democracy, independent civil society organizations, such as Idasa and the Institute for Security Studies, and independent media sources, such as the *Sunday Times* and the *Mail and Guardian*, can continue to put pressure on the government to be accountable, by shaming if necessary. Thomas Jefferson reminds us “the price of freedom is eternal vigilance”. This is even more so in a country that is transitioning from both a struggle and laager mentality into an open, accountable and transparent society. In this new space there are multiple interests and centres of power, including institutions to check and balance this power. These include an active and free press that cannot be suppressed, constantly reminding those in power that they are ultimately accountable to the citizens that entrust them with that power.

Johnston’s theory of corruption syndromes reminds us to take into account the specifics of each country when fighting corruption and how corruption is often symptomatic of the deeper challenges to democratic consolidation, and the balance between economic and political forces. Reforms are only truly sustainable and legitimate if they rest on a social foundation, and citizens need to be empowered to be change agents and participate actively in promoting good governance and public accountability.

The National Anti-Corruption Forum in South Africa is a start, although more communication and education needs to occur to encourage greater civic awareness and participation in fighting corruption. Ultimately this is about creating trust and responsibility with citizens speaking out whether through civil society, the media, or political organizations, to make sure the rules of the democratic game are being upheld. It is clear that the National Anti-Corruption Forum’s agenda is broader than purely to improve the criminal justice capacity to control corruption. Resolutions taken at National Anti-Corruption Summits over the past several years also focus on preventing corruption, empowering civil society, stimulating a moral regeneration movement etc.

In summary, theories of corruption control argue for fundamental institutional changes in the state and market in order to change incentives and the rules of the game. These changes need to be systemic in a way that limits monopoly over power, limits discretion, and increases transparency and accountability. The importance of civil society in this regard is what Johnston brings to the table, arguing for a
sustainable citizen-based approach to fighting corruption where the local manifestation of the problem of corruption is tackled as a symptom of deeper economic and political imbalances. Democratic consolidation, where democracy is deepened through citizen participation and commitment, is what is required in Johnston’s model and resonates deeply with the South African experience.

The above theories are important and useful insofar as they inform anti-corruption strategies on the ground. To conclude, the final section focuses on three crucial elements that need to be in place in order to effectively fight corruption. These include credible information to inform and monitor policy reforms; sustainable institutions to promote accountability and the public interest; and ethical leadership and political will.

13.5 Lessons Learnt

Our case study focused on post-Apartheid South Africa, a new democracy, where anti-corruption efforts have been primarily directed at creating functioning governance systems and institutions that promote the public interest and service the broader public needs, as opposed to the narrow partisan interests that characterized the apartheid system.

Democracy involves certain limits and constraints on the behaviour of both citizens and the public officials that represent them. For example, the “rule of law” is one such idea, where the “rules of the game” take place in a consistent and lawful manner, as opposed to ad hoc, arbitrary, opaque and secretive practices, which do not apply to all citizens. It is clear however, that while the value of democracy is necessary in order to uphold ideals such as openness, transparency and accountability, it is not sufficient to prevent corruption – as seen by the scandals that dominate even developed democratic societies - and therefore additional measures, over and above a commitment to democracy, are necessary to strengthen anti-corruption reforms.

The core question underlying this thesis was: How can corruption be effectively countered? Drawing on the theory of corruption control and the case study of South Africa, I conclude that a number of conditions are required to ensure that anti-corruption reforms in any context are effective, sustainable and not easily subverted. These conditions include having the necessary data to inform and monitor policy and strategy; comprehensive legal and institutional safeguards to prevent corruption and protect the public interest; and, the most difficult to secure, the necessary political leadership and will to tackle corruption credibly and put in place long-term reforms.

Lessons learnt over the past decade indicate that controlling corruption requires a comprehensive, dedicated, sequenced and sustained approach premised on a long-term political commitment to building appropriate and effective institutions to serve the public interest. There is no easy fix, silver bullet or blueprint. When safeguards such as an independent media, engaged citizenry and functioning oversight institutions like parliament do not exist, corruption in its many forms will continue to flourish and undermine democratic gains. To be effective, sustainable reforms require credible information, functioning institutions and an active and engaged civil society. To be taken seriously they need to be embarked on by ethical leaders who scrupulously observe the rule of law in tackling the problem, wherever it may manifest itself.

There is no universal blueprint for fighting corruption: each country’s unique experience will affect the policy options that can be employed to address it. As we have seen, corruption manifests itself in different ways and intensities; it requires differentiated responses. To retain credibility for anti-corruption efforts, institutions and systems must be strengthened and reformed to entrench transparency, accountability and above all fairness. Fighting corruption also requires dedicated financial and human resources. It is clear that to be effective, national anti-corruption/integrity systems require more than a single agency approach. Rather, they need to be supported by an institutional matrix of legal and oversight systems to ensure effective prosecution of offenders. While reform-minded governments should take the lead, a partnership approach involving stakeholders from business, civil society and labour will deepen and legitimise the effort.
Democratic institutions that protect the public interest include an ombudsman or public protector, auditor-general, parliament, the judiciary, revenue service, and public service, and should be supported by comprehensive anti-corruption laws. These institutions mediate the relationship between citizens and the state. In a democracy they ensure oversight and accountability, and check state powers to prevent abuse. An independent media, vigilant civil society and trustworthy criminal justice system are particularly vital. While government is necessarily the key player when it comes to reforming public sector institutions, civil society organisations play a vital role along with independent media in keeping a watch on power.

Fortunately in South Africa there are strong entrenched safeguards that protect our democracy. As Gumede (2005:237) notes, “Power is not wholly concentrated in the state, since an established business sector wields enormous influence, not necessarily in favour of the ANC. The press is free…civil society and pressure groups are energetic, gutsy and bold. The trade union movement is formidable…and the judiciary is fiercely independent.” He quotes Archbishop Desmond Tutu who says South Africa’s political system is robust enough to make descent into authoritarianism rather difficult: “If it were to be the case that the governing party oversteps the mark, we have the Constitutional Court, we have the Human Rights Commission, we have the Public Protector, and I think that more than anything else, we also have a lively civic society.”

It is clear that establishing effective anti-corruption institutions and instituting credible policy reforms based on accurate data needs high-level political support. However, even if determination is strong, it often diminishes as the realities of office, the vested interests in the status quo and the pressure of more immediate tasks bear down. Corruption scandals – such as the South African arms deal that has been marred by allegations of bribery for almost a decade – can stimulate or retard anti-corruption reforms, depending on the way they are handled and the lessons government learns. The credibility of the JIT investigation was compromised in a number of ways – for instance by excluding the SIU – that have left lingering

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5SAPA 13th April 2004
More than public statements and conferences, political will relates to the commitment of political leaders to institute specific action and to ensure that the necessary elements for success have been catered for. Anti-corruption measures will simply not succeed without political support for resources, powers, independence and accountability mechanisms. Reformers will lose public trust if they fail to deliver on promises to net the ‘big fish.’ It is highly fashionable for politicians, both in power and opposition, to proclaim their commitment to fighting corruption when running for office. This rhetoric predictably and quickly gets exposed for what it is when the hard work of governing kicks in. While calls for reform have translated into a change of political leadership, fighting corruption is hard work and requires dedicated resources, capacities and commitments. It needs to be tackled comprehensively by leaders with political courage and long-term vision. Hard policy choices will need to be taken by leaders as they choose where and how to introduce reforms. Certain areas (for example criminal justice) may be higher on the reform agenda than others (for example anticorruption education).

Ethical leadership is required and it is crucial that those leading the anti-corruption crusade cannot be tainted, and must set an example. Ethical leaders have a crucial role in translating electoral promises into tangible laws and policies. The success of any anti-corruption campaign will therefore depend on the example set by senior societal leaders. In South Africa the ANC as the ruling party has a particular example to set. Gumede (2005:304) notes: “Having made the transition from an authoritarian apartheid state to a democracy, South Africa now needs to consolidate its political system. For this to happen, the institutions of state and the political parties have to reflect, practice and embody democratic values, such as accountability, transparency and active engagement with the people. The internal dynamics of the ANC will have a major impact on defining the future and roles of all the other political institutions. Undemocratic tendencies in the ANC endanger the consolidation of South Africa’s democracy and will leave footprints on the country’s infant political system as a whole.”

The independent media play a crucial role in uncovering and reporting on cases of
corruption, as well as following up on how agencies of state deal with the issues. And research-based NGOs such as the Open Democracy Advice Centre (ODAC), Institute for Security Studies (ISS) and Institute for Democracy in South Africa (Idasa) also play an important role in advocating for legal and policy changes – for instance, in corruption legislation, access to information, and budgetary monitoring of public bodies where money is exchanged for services. An engaged citizenry, organised into NGOs that demand more accountable and responsive government, is part of an effective fight against corruption. Of course it is crucial that these NGOs uphold at least the same levels of accountability and probity that they demand from the institutions they monitor.

Finally, the successful prosecution of high-profile corruption offenders works wonders to build public trust and confidence, and its absence feeds cynicism and resignation. Bringing down the corrupt serves to counter both the sense of impunity on the part of the offender, and public disillusionment over any suggestion of a lack of political will. However, it is not without its dangers; due process and fairness need to be followed at all time so that institutions of criminal justice are themselves not corrupted while cracking down on abuses of power. It is not uncommon for allegations of a political conspiracy to underlie corruption crackdowns (for instance the investigations into ANC President Jacob Zuma by the National Prosecuting Authority), especially in contested political environments or where the incumbent has come to power on an anti-corruption platform.

13.6 Conclusion

To respond to the three original questions posed upfront in this thesis:

1) Yes, South Africa has most of the systems in place to fight corruption effectively, besides the obvious lacuna, “Achilles heel”, relating to the lack of regulation when it comes to political party funding.

2) But, when it comes to addressing corruption in practice, these anti-corruption systems are not always effective, have limited capacity and rely on political will and resources.
3) Finally, it is unclear whether the necessary political will exists in South Africa to address corruption effectively. While cases of petty corruption are mostly followed up on when they come to light either through the media, internal investigations or audits, the government’s sensitivity, defensiveness and mishandling of high-profile allegations of “grand” corruption in cases such as the arms deal that involve enormous and often overlapping political and business interests, prevents one from answering this question decisively.

The necessary political will to address corruption in South Africa today is under threat, if not highly questionable and has been severely damaged by the way in which the government handled allegations of corruption into the arms deal.

In a democracy citizens have rights and well as responsibilities, one of these being to use democratic means to hold to account those entrusted with the power to make decisions that affect their lives. As such, political will is not just the preserve of politicians. Citizens themselves need to demand more of their social and political space. Through active engagement in civil society and by exercising their often hard won right to vote at the ballot box, citizens can impact the rules of the game, and thus affect the outcome. In South Africa they can choose to elect ethically competent leaders who can credibly commit themselves to the ongoing fight against corruption.
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Appendix 1: Chronology of Anti-Corruption Reforms

April 1994 – ANC wins a landslide victory in South Africa’s first democratic election
May 1996 – Parliamentary Code of Conduct with regard to Financial Interests
March 1997 – National Crime Prevention Strategy released
March 1997 – Special Investigating Unit Units and Special Tribunals Act enacted
June 1997 – Code of Conduct for the Public Service
December 1997 – Thabo Mbeki becomes President of the African National Congress
September 1998 – Cabinet approves a National Campaign Against Corruption
October 1998 – A Moral Summit is held in Johannesburg
November 1998 – Public Sector Anti-Corruption Conference in parliament
April 1999 – First National Anti-Corruption Summit in parliament
June 1999 – Thabo Mbeki becomes President of South Africa
September 1999 – The Strategic Defence Procurement Package (SDPP) is announced
September 1999 – PAC MP Patricia de Lille blows the whistle on corruption
October 1999 – 9th International Anti-Corruption Conference (IACC) in Durban
March 2000 – The Promotion of Access to Information Act comes into effect
July 2000 – The Executive Members Ethics Code comes into effect
September 2000 – Auditor General’s Special Review of the SDPP finds irregularities
October 2000 – SCOPA releases its 14th Report calling for an investigation
January 2001 – President Mbeki announces the exclusion of the SIU from JIT
February 2001 – The Protected Disclosure Acts no 26 of 2001 comes into effect
June 2001 – Launch of the National Anti-Corruption Forum in Cape Town
July 2001 – President Mbeki announces anti-corruption measures
August 2001 - SADC Protocol Against Corruption signed by South Africa
November 2001 – Final JIT Report released exonerating government
January 2002 – Public Service Anti-Corruption Strategy adopted by Cabinet
April 2003 – UN/DPSA Country Corruption Assessment Report released
March 2004 – SA signs AU Convention on Preventing and Combating of Corruption
April 2004 – The Prevention and Combating of Corrupt Activities Act 12
November 2004 – South African ratifies the UN Convention against Corruption
March 2005 – Second National Anti-Corruption Summit in Tshwane
March 2007 – South Africa hosts the Africa Forum on Fighting Corruption
April 2007 – South Africa hosts the Global Forum V on Fighting Corruption
December 2007 – Jacob Zuma elected president of the ANC
## Appendix 2: Benchmarking Anti-Corruption Reforms

<table>
<thead>
<tr>
<th>April 1999</th>
<th>January 2002¹</th>
<th>April 2003²</th>
<th>March 2005³</th>
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</thead>
<tbody>
<tr>
<td><strong>Combating Corruption</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A review and revision of legislation.</td>
<td>Justice has started the review of the Corruption Act</td>
<td>New Prevention of Corruption Bill has been developed.</td>
<td>Prevention and Combating of Corrupt Activities Act, 2004</td>
</tr>
<tr>
<td><strong>Establishment of a whistle-blowing mechanisms</strong></td>
<td>Protected Disclosures Act commenced on 16 February 2001, but guidelines for practical implementation do not exist</td>
<td>Protected Disclosures Act promulgated on 16 February 2001, but guidelines for practical implementation do not exist.</td>
<td>Protected Disclosure Act commenced on 16 February 2001</td>
</tr>
<tr>
<td><strong>Establishment of special courts to adjudicate on corruption cases</strong></td>
<td>Responsibility of the Department of Justice and Constitutional Development. Courts not functioning as yet.</td>
<td>A specialised commercial crimes court and prosecuting unit was established as a pilot in Pretoria in 2000, and a second pilot site was established in Johannesburg in 2002.</td>
<td>A specialised commercial crimes court and prosecuting unit was established as a pilot in Pretoria in 2000, and has been rolled out.</td>
</tr>
<tr>
<td><strong>Establishment of Sectoral Coordinating Structures (broadly classified as Public Sector, Civil Society and Business)</strong></td>
<td>Establishment in early conceptual phase.</td>
<td>Anti-Corruption Coordinating Committee established for the Public Sector in 2002.</td>
<td>Anti-Corruption Coordinating Committee established for the Public Sector in 2002.</td>
</tr>
</tbody>
</table>

³ Progress report on implementation of the resolutions of the first national anti-corruption summit, 23 March 2005.
<table>
<thead>
<tr>
<th>Preventing Corruption</th>
<th>January 2002</th>
<th>April 2003</th>
<th>March 2005</th>
</tr>
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<tbody>
<tr>
<td>Blacklisting of individuals, business and organisations who are proven to be involved in corruption</td>
<td>Mechanisms currently in conceptual phase. National Treasury considering central database of corrupt and under-performing service providers. Some departments have established own blacklists.</td>
<td>A central database of corrupt businesses has been established and departments cannot utilise businesses that appear on the blacklist. The blacklist is accessible on the National Treasury’s Web site.</td>
<td>Arranged in the Prevention and Combating of Corrupt Activities Act, 2004. Government has in principle approved that corrupt employees are blacklisted from employment in the public service: and this system will be implemented once the legal issues have been resolved.</td>
</tr>
<tr>
<td>Establishment of Anti-Corruption Hotline</td>
<td>Established in all nine Provinces</td>
<td>Established in all nine Provinces.</td>
<td>National Public service Anti-Corruption Hotline System established in 2004 (0800 701 701)</td>
</tr>
<tr>
<td>Establishment of Sectoral and other Hotlines</td>
<td>Established</td>
<td>Established for specific industries in the Business Sector.</td>
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</tr>
<tr>
<td>Disciplinary action against corrupt persons</td>
<td>Disciplinary codes revised. Efficacy of application still to be measured. PSC completed report on the investigation into dismissals as a result of misconduct (1999)</td>
<td>Disciplinary codes for public service to be revised. Efficacy of application still to be measured.</td>
<td>Disciplinary codes revised and being applied.</td>
</tr>
<tr>
<td>Consistent monitoring and reporting on corruption</td>
<td>To a limited extent done by Transparency International and political parties, NGO and media. No Public Service mechanism established yet.</td>
<td>To a limited extent done by political parties, NGO and media. No Public Service mechanisms established yet.</td>
<td>Country Corruption Assessment report published in 2003. Budget Vote of Department of Public Service and Administration contains Sub-programme: Anti-corruption Monitoring and evaluation April 2006.</td>
</tr>
<tr>
<td>Promotion of and implementation of sound ethical, financial and related management practices.</td>
<td>New Public Service Regulations and Public Finance Management Act 1999 contain elements. Honesty and Integrity is a defined competency for SMS. Ethics and Fair Dealing is one of five pillars in newly established Procurement Guidelines.</td>
<td>New Public Service Regulations and Public Finance Management Act of 1999 contain elements. Honesty and integrity is a defined competency identified for the Senior Management Service (SMS) of the public service. Ethics and Fair Dealing is one of 5 pillars (procurement)</td>
<td>New Public Service Regulations and Public Finance Management Act of 1999 contain elements. Honesty and integrity is a defined competency identified for the Senior Management Service (SMS) of the public service. New Supply Chain Management Framework issues with strong anti-corruption measures. Training programmes to support implementation have been launched.</td>
</tr>
<tr>
<td>Building Integrity and raising Awareness</td>
<td>January 2002</td>
<td>April 2003</td>
<td>March 2005</td>
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<tr>
<td>Promotion and pursuance of social research and analysis and policy advocacy to analyse causes, effects and growth of corruption</td>
<td>No substantial studies/research done. UNODCCP sponsored project to do country assessment will take effect soon.</td>
<td>First step is the completion of the Corruption Country Assessment.</td>
<td>Country Corruption Assessment Report is first step. Impact assessment of national policies budgeted for in 2007/07 financial year (contained in Estimate of National Expenditure).</td>
</tr>
<tr>
<td>Enforcement of Code of Conduct and Disciplinary Codes in each sector</td>
<td>Public Service Code of Conduct, new Disciplinary Code and practical guideline on the Code of Conduct are in place.</td>
<td>Public Service Code of Conduct, new Disciplinary Code and practical guideline on the Code of Conduct are in place.</td>
<td>Public Service Code of Conduct, new Disciplinary Code and practical guidelines on the Code of Conduct are in place. Codes on Corporate Governance are in place for SOEs</td>
</tr>
<tr>
<td>Inspiring the youth, workers and employers towards intolerance for corruption</td>
<td>No particular strategy in place as yet.</td>
<td>No particular strategy in place as yet.</td>
<td>No particular strategy in place as yet.</td>
</tr>
<tr>
<td>Promotion of training and education in ethics</td>
<td>No T &amp; E programme in place. Provincial workshops on Code of Conduct and anti-corruption were conducted by PSC in all provinces. Risk management workshops were also conducted.</td>
<td>Workshops on the Code of Conduct were conducted by the PSC in all provinces. Ethics incorporated in public service training offered by the South African Management Development Institute</td>
<td>Workshops on the Code of Conduct were conducted by the PSC in all provinces. Ethics incorporated in public service training offered by the South African Management Development Institute</td>
</tr>
</tbody>
</table>
Appendix 3: Institutions and Individuals in the Arms Deal Case Study

Constitutional Bodies:
Auditor-General, Shauket Fakie
Public Protector, Selby Baqwa

The Executive:
The Presidency
President, Thabo Mbeki
Deputy President, Jacob Zuma
Director General in the Presidency, Frank Chikane
Former Presidential Legal Advisor, Fink Haysom

Cabinet
Minister in the Presidency, Essop Pahad
Minister of Justice, Penuell Maduna,
Minister of Trade and Industry, Alec Erwin
Minister of Finance, Trevor Manuel
Minister of Defence, Joe Modise

The Legislature:
Speaker, Dr Frene Ginwale
IFP SCOPA Chair, Dr Gavin Woods
ANC Chief Whip, Tony Yengeni
ANC MP, Andrew Feinstein
PAC MP, Patricia de Lille
UDM Leader, Bantu Holomisa
DA MPs, Raenette Taljaard

Parliamentary Committees:
Standing Committee on Public Accounts (SCOPA)
Joint Committee on Members Ethics
Justice and Constitutional Development

The Judiciary:
Constitutional Court
Pretoria High Court

Prosecutorial and Investigative Units:
National Director of Public Prosecutions, Bulelani Ngcuka
Special Investigating Unit, Judge Willem Heath (replaced by Willie Hofmeyr)
Directorate of Special Operations (DSO aka “The Scorpions”)

Department of Defence and Arms Industry
DoD Chief procurement officer, Shamin “Chippy” Shaik
Director of ADS/Thomson and Zuma’s financial advisor, Schabir Shaik
Unsuccessful bidder for an arms contract, Richard Young of C¹C²
BAe.Saab
EADS, Michael Woerfel,
Thomson Thales, Alain Thetard
The Media:
  Business Day
  The Mail and Guardian
  The South African Broadcasting Corporation
  The Star
  The Sunday Times

Civil Society:
  COSATU, Congress of South African Trade Unions
  Ecaar, Economists Allied Against Arms Reduction
  Idasa, Institute for Democracy in South Africa
  ISS, Institute for Security Studies
  ODAC, Open Democracy Advice Center
  PSAM, Public Service Accountability Monitor
Appendix 4: Joint Investigation Team (JIT) Scope of Investigation

The table below lists the final areas of responsibility and inter-relationship between the three investigating bodies that eventually took part in the arms deal investigation.

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<tr>
<td>Public Phase of the investigation in terms of section 7 of Act no 23 of 1994</td>
<td>Actual process followed compared to the approved process</td>
<td>Criminal aspects of the joint investigation</td>
</tr>
<tr>
<td>Liaison with other investigating agencies</td>
<td>The roles played by various committees and individuals</td>
<td>Preparatory investigation</td>
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<tr>
<td></td>
<td>Identify possible risk areas in the process followed</td>
<td>Investigation</td>
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<td></td>
<td>Conflict of interest</td>
<td>Company Structures</td>
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<tr>
<td>Public Phase of the investigation</td>
<td>Documentation Interviews</td>
<td>Documentation Interviews</td>
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<td>(in compliance with section 41 of Act No 32 of 1998)</td>
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<td>REPORTING</td>
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<td>joint report</td>
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Appendix 5: JIT Statement on Arms Deal Report

JOINT STATEMENT BY AUDITOR GENERAL, NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND PUBLIC PROTECTOR: 15 NOVEMBER 2001

JOINT INVESTIGATION REPORT INTO THE STRATEGIC DEFENCE PROCUREMENT PACKAGES

Today the joint investigation team headed by myself, Shauket Fakie, Auditor-General, Selby Baqwa, Public Protector and Bulelani Ngcuka, National Director of Public Prosecutions, presented our report into the largest investigation of its kind ever undertaken in South Africa, to Parliament.

BACKGROUND

On 15 September 2000, I, as the Auditor-General, issued the Special Review Report on the Strategic Defence Procurement Packages.

The Special Review was the subject of hearings and deliberations of the Parliamentary Standing Committee on Public Accounts (SCOPA). It was subsequently decided to conduct a joint investigation into the Strategic Defence Procurement Packages.

The investigation agencies received numerous allegations, many of which were of a criminal nature, some relating to mal-administration and others to financial irregularities.

A three-phase approach was adopted:
· The Public Protector conducted public hearings;
· The Office of the Auditor-General conducted the forensic investigation; and
· The National Prosecution Authority (NPA) conducted a criminal investigation.

As the different parts of the joint investigation involved many of the same role players and key issues, considerable care was taken to ensure that one part of the investigation did not have a negative impact on any of the other parts.

The joint investigation was unique in that the three organs of State, for the first time, conducted an investigation into alleged irregularities and criminal conduct simultaneously. This was by no means an easy task as all three agencies had to pioneer their way through uncharted and, at times, difficult territory.

The joint investigation was conducted in accordance with internationally recognised due process procedures and practices. This included gathering, studying, analysing and interpreting information. One of the many challenges, was to control and manage documents in excess of 700 000 pages, which were obtained from, inter alia, DoD.

We furnished our draft report to the relevant and affected government agencies, offering the opportunity to make inputs/comment on the factual accuracy of the report before it was finalised and tabled in Parliament.
However, given the complexity of the criminal investigation it will still be continuing for some time. Thus far, 102 summonses to interview witnesses in the criminal investigation have been issued more than 57 statements have been taken and statutory records of 193 entities and numerous documents have been obtained. Various premises in France, Mauritius and South Africa have been searched and documents seized. In order to avoid disclosure of information sensitive to these investigations it has been decided not to make the details public.

Some of our key findings are as follows:

· No evidence was found of any improper or unlawful conduct by the Government. The irregularities and improprieties referred to in our report, point to the conduct of certain officials of the government departments involved and cannot, in our view, be ascribed to the President or the Ministers involved in their capacity as members of the Ministers' Committee or Cabinet. There are therefore no grounds to suggest that the Government's contracting position is flawed.

· The decision that the evaluation criteria in respect of the Lead-In Fighter Trainer (Hawk) had to be expanded to include a non-costed option and which eventually resulted in a different bidder being selected, was taken by the Ministers' Committee, a subcommittee of Cabinet. This decision was neither unlawful, nor irregular in terms of the procurement process as it evolved during the SDP acquisition. As the ultimate decision-maker, Cabinet was entitled to select the preferred bidder, taking into account the recommendations of the evaluating bodies as well as other factors, such as strategic considerations.

· The Affordability Team and International Offers Negotiation Team took adequate measures under the circumstances to present to the Government a scientifically based and realistic view on these matters. The Ministers' Committee was put in a position by the Affordability Team to apply their minds properly to the financial impact of the procurement.

· There was a conflict of interest with regard to the position held and role played by the Chief of Acquisitions of Department of Defence, Mr S Shaik, by virtue of his brother’s interests in the Thomson Group and ADS, which he held through Nkobi Holdings. Mr Shaik his capacity as Chief of Acquisitions, declared this conflict of interest in December 1998 to the Project Control Board, but continued to participate in the process that led ultimately to the award of contracts to the said companies. He did not recuse himself properly.

Amongst the recommendations in our report are the following:

· We recommend that the policy document, developed during the Strategic Defence Packages Procurement process be further refined with specific reference to the lessons learnt from the acquisition process under investigation as reflected in this report. The staff of the Department of Defence and Armscor involved in procurement should be properly trained to ensure that they assimilate and fully understand the policy with a view to its effective implementation.

· The Department of Defence and Armscor should develop specific rules and guidelines to address conflict of interest issues and to ensure that personnel are properly informed in this regard. These rules and guidelines should be developed,
taking into account the principles contained in the Code of Conduct of the State Tender Board and the King Report on Corporate Governance, 1994, regarding improved ethics and probity as well as international norms in this regard. Steps should also be taken to ensure that a particular individual, irrespective of his/her position is not tasked with incompatible functions in multifaceted procurements. This will prevent a conflict or perceived conflict of interest, which could have a detrimental effect on the overall acquisition process.

Parliament should consider taking urgent steps to ensure that high ranking officials and office bearers, such as Ministers and Deputy Ministers, are not allowed to be involved, whether personally or as part of private enterprise, for a reasonable period of time after they leave public office, in contracts that are concluded with the State.

In conclusion, I would like to say that the investigation was initially viewed with a certain amount of skepticism, which was not conducive to an enabling environment. However, as it progressed, confidence grew in the credibility of the process and role players and witnesses cooperated freely.

We thank all the government agencies, individuals, other role players and foreign governments who assisted us with search applications in various countries.