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**Anti-corruption Reform Efforts in Democratic South Africa**  
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**Preface**

This paper draws from a larger research project, namely my PhD thesis on Corruption and Reform in Democratic South Africa. During 2006 (Jan – April) I was fortunate to spend a semester at Yale as a Research Fellow of the African Studies Council at the Yale Center for International and Areas Studies (YCIAS), now the MacMillan Center, working on my thesis. The archival material used in my PhD research has, in collaboration with Yale Library and the Center for Research Libraries, been catalogued and made available for others working in this field.<sup>2</sup>

My thesis discusses the effectiveness of anti-corruption and accountability systems in democratic South Africa.<sup>3</sup> The ideal of a truly effective system of democratic institutions was formulated by means of several distinct propositions, providing a framework for my inquiry into the impact of the South African arms deal case study on the institutions that support democracy as well as anti-corruption reforms in general.

**Introduction**

In my thesis the following key questions were posed:

- 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?

To address these questions the thesis was divided into four parts:

Part One, *Theories of Corruption and Control*, (Chapters 1-4), set out the general theory of corruption and its control by examining relevant international and theoretical literature on conceptions, causes and consequences of corruption including theories that underpin and inform current policies and strategies to address corruption.

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<sup>2</sup> <http://www.crl.edu/areastudies/camp/collections/corruption.htm>

<sup>3</sup> See Appendix 1 for Chronology of corruption related events

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, specifically identifying causes of corruption flowing from the inherited "legacy of apartheid". Dedicated reform efforts the government has made since 1994 to address corruption, including institutions, policies and strategies, were also discussed.

Following a case study approach, Part Three, *The Arms Deal*, (Chapters 8-11), looked at the way in which allegations of high-level corruption in the Strategic Defence Procurement Package, aka "the arms deal" were handled by the government, including the controversial decision to exclude the Special Investigating Unit from the Joint Investigation Team and the unprecedented executive intervention, hindering parliament's Standing Committee on Public Accounts (SCOPA) from performing its key oversight function.

Finally, *Arms and Accountability*, Part Four, (Chapters 12 – 14), examined the challenges faced by parliament and individual MPs to fulfill their oversight functions and hold the executive accountable. It focused on the case of two ANC MPs, Andrew Feinstein and Tony Yengeni, and their respective roles in the arms deal as well as the outcome of the Joint Investigation Team's report that exonerated the government from any wrong doing.

### **Thesis Propositions**

Seven general propositions were formulated, providing a framing mechanism in order to analyze the foundational ideal of a system of effectively functioning democratic institutions that underpin and support anti-corruption reforms. These propositions were tested by examining the case of democratic South Africa, looking specifically at the way in which allegations of high-level corruption in the Strategic Defence Procurement Package, aka "the arms deal" were handled by the various institutions in South Africa that support democratic accountability.

The propositions were:

First, in a democracy, formal institutions structure power arrangements thereby creating certain standards, norms and the "rules of the game" to serve and promote the public interest and prevent abuses of public power or resources by particular interests or groups.

Second, the existence of these formal institutions, for example, a vibrant civil society, independent media, multi-party parliament, and functioning criminal justice system, including specialized anti-corruption agencies, act together as both checks and balances to prevent abuses of power and promote democratic accountability.

Third, what is important is not only their formal existence "in law", but also the effective functioning, through adequate capacity and resources, of these institutional and administrative mechanisms "in practice", to ensure that they fulfill their mandate to protect the public interest.

Fourth, politics is important. Formal institutions and mechanisms do not emerge in a political vacuum but rather exist and function within a particular informal political culture, often the result of a particular political history, struggle, compromise and context.

Fifth, the past practices and values of any existing political culture may be either more or less broadly commensurate with the set of norms associated with the institutions of democratic accountability, either bolstering or potentially undermining their effective functioning and ability to serve the public interest

Sixth, while ostensibly framed as reinforcing and supporting constitutional democracy and the rule of law, political interference and intervention in the legitimate functioning of democratic institutions may occur and serve to undermine their existence and integrity.

Seventh, because of the multiple institutions, interests and centers of power that exist in a functioning democracy, undue political interventions into the legitimate functioning of democratic institutions that undermine accountability, can be mitigated and abuses of power prevented.

In this updated paper for the *After Apartheid* conference I have been asked to address the following questions with respect to the way in which corruption, more generally understood as “the abuse of entrusted power”, has been handled and dealt with in South Africa since 1994:

1. What were the initial hopes?
2. Were these hopes fulfilled?
3. If not, why not?
4. What aspirations still exist for the next ten years?
5. What will contribute to the success or failure of fulfilling these aspirations?

I will attempt to answer some of these questions by articulating the initial hopes in a series of statements. Whether these hopes were fulfilled, or not, is addressed by looking at the strengths and weaknesses of South Africa’s anti-corruption framework using the Global Integrity Index as the initial assessment framework to highlight several outstanding challenges.

### **What were the initial hopes?**

First it is recognized that the social upheaval that characterizes transitions from largely authoritarian to more liberal and open systems of government often lends itself to widespread social upheaval. Corruption is not a problem that emerged overnight with South Africa’s transition to democracy. None would deny that apartheid South Africa by its very nature and operation was rife with corruption. If corruption is defined as the abuse of power, the apartheid regime benefiting a minority at the expense of a majority must be said to have been systematically corrupt.

Furthermore, while abuses of power are more likely to come to light in democracies, developed democracies are themselves not sheltered from the scourge of corruption. Here abuses of power may manifest themselves in more entrenched, subtle and sophisticated systems that protect various special interests. This means the emergence of democracy is a necessary but not a sufficient condition for addressing corruption.

In thinking about initial hopes for the “new” South Africa with respect to confronting corruption, the following statements, both general and specific, capture some of these aspirations. It has to be borne in mind that these are ideals.

#### **A. General Ideals**

1. That 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.
2. That the moral courage and ethical leadership characterizing the struggle against apartheid would continue to ennoble and underpin those committed to the unglamorous and hard work of governing and South Africa would provide a leadership role, particularly in Africa, in the commitment to fight corruption and promote good governance.
3. That South Africa, because of its special circumstances (for example, its level of development) would *not* become a typically corrupt African “banana republic”, characterized by patronage and dominated by ethnic interests.
4. That the systems set up and abused by the apartheid state to further its illegitimate racist ends would be truly ruptured and that 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. That race would no longer not play a corrupting influence in the state and the economy, and that legitimate interventions to address inequality and “the legacy of apartheid” be undertaken, but not be at the expense of professionalism and efficiency.
6. That economic wealth generated would be more fairly distributed in a way that served to address the pressing needs of the most disadvantaged sectors of society.

#### **B: Specific Ideals**

7. That the new state would set up and maintain 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.
8. That there would be a strong distinction between the ruling party and the state and that state resources would not be abused for party political ends.

9. That there would be a multi-party democracy and a strong opposition that would be vigilant in demanding accountability from the ruling party and that parliament would exercise effective oversight over the executive, particularly in relation to public funds, to ensure that the public interest was served by responsible public expenditures.
10. That every attempt would be made to ensure that, in contrast to the previous status quo the media would be independent, fair and vigilant and that journalists would be safe and responsible in exposing corruption wherever it emerged.
11. That civil society, especially institutions forged in the struggle against apartheid, 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.
12. That citizens would be equally protected before the law and those who blew the whistle and spoke out against unfair or corrupt practices within the public or private sector would be protected and rewarded.
13. That where maladministration and corrupt practices were reported or exposed, appropriate measures would be taken by dedicated and specialized anti-corruption resources to thoroughly and independently investigate, prosecute and convict both corruptor and corruptee and that the criminal justice system, in particular the judiciary, would be independent, respected and impervious to manipulation for political ends and potential abuses of power.

## **Analysis**

In the light of these (admittedly high) ideals, let us now turn to the actual performance of the ANC government over the past thirteen years when it comes to fighting corruption. On what basis can the articulated hopes be assessed in terms of whether they have been realized? What are the strengths and weaknesses of the anti-corruption/public integrity system in place in South Africa to curb abuses of power, and more importantly, is it functioning in practice?

In what follows I draw on data generated by Global Integrity ([www.globalintegrity.org](http://www.globalintegrity.org)), the international NGO of which I am the co-founder and international. The most recent report, published in January 2007, monitors the performance of 43 countries, including South Africa.

First however, it is important to note that since 1997 when the corruption issue was placed firmly on the table - not least because of a number of high-profile local scandals but also the impetus of the international community in this regard, culminating in the UN Convention Against Corruption - numerous policy statements, laws have been introduced and institutions set up to control corruption as well as develop a comprehensive national anti-corruption strategy 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 systematic and sequenced. The three key objectives that were set at the First

National Anti-Corruption Summit in April 1999 and have largely been realized by specific programs and policies.<sup>4</sup> These 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, 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.

The 2006 African Peer Review Mechanism's (APRM) Country Self Assessment Report for South Africa notes that the government's anti-corruption efforts culminated in the adoption of a comprehensive Public Service Anti-Corruption Strategy in 2002, 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 "corner stone" of South Africa's anti-corruption efforts, noted by the APRM report, is the development of 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 tripartite National Anti-Corruption Forum in 2001.

Additionally the APRM report regards anti-corruption legislative and regulatory measures adopted since 1994, as "strong and in keeping with international practices". These 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 The Prevention and Combating of Corrupt Activities Act (No 12 of 2004). The Prevention and Combating of Corrupt Activities Act that came into force on 27<sup>th</sup> April 2004, the 10<sup>th</sup> anniversary of South Africa's transition to democracy is a particularly

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<sup>4</sup> See Appendix 2 for a Benchmark of Policy Reforms

comprehensive law 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.

The APRM 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.<sup>5</sup>

Indeed, South Africa's anti-corruption arsenal, developed systematically since 1994, is impressive. From an active civil society, a free media, to an independent judiciary, a Public Protector to an effectively functioning Auditor General, whistleblower protection and access to information laws, South Africa appears to have in place, at the national level, most of the key institutions and laws cited in the good governance and anti-corruption literature as important to expose and prevent abuses of power.

The Global Integrity Index provides a useful snapshot to capture the national governance picture at this moment in time and potentially to benchmark and monitor trends in coming years.

### **The Global Integrity Index**

The Global Integrity Index - an independent international anti-corruption rating of 43 diverse countries that assesses over 290 indicators capturing the existence (in law) and effectiveness (in practice) of mechanisms in place in a country to promote public integrity - was developed to operationalize a critical evaluation and assessment of anti-corruption reforms at the national governance level.<sup>6</sup> The Index is preferable to perception-based surveys that assess levels of corruption, as it is able to provide more objective and actionable indicators for reform.

The Index consists of six main categories and 23 sub-categories that assess the existence and effectiveness of anti-corruption institutions at the national level. These are not dissimilar to the various institutions of democratic accountability:

The six dimensions and 23 sub-categories of the Index are:

1. Civil Society, Media and Public Information: civil society organizations; media; public access to information
2. Elections: voter and citizen participation; election integrity; political financing
3. Government Accountability: executive accountability; legislative accountability; judicial accountability; budget processes
4. Administration and Civil Service: civil service regulations; whistle-blowing measures; procurement; privatization

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<sup>5</sup> Country Self Assessment Report, APRM, 9 June 2006.

<sup>6</sup> For a full description of the Public Integrity Index, see Camerer, M. 2006. "Measuring Public Integrity" Journal of Democracy, Volume 16 January.

5. Oversight and Regulation: national ombudsman; supreme audit institution; taxes and customs; financial sector regulation; business licensing and regulation
6. Anti-Corruption and Rule of Law: anti-corruption law; anti-corruption agency; rule of law; law enforcement

## SOUTH AFRICA INTEGRITY SCORECARD 2006

The full country report for South Africa is available on the Global Integrity website, [www.globalintegrity.org](http://www.globalintegrity.org)

<b>Category I</b>	<b>Civil Society, Public Information and Media</b>	<b>86</b>	<b>Strong</b>
I-1	<u>Civil Society Organizations</u>	98	Very Strong
I-2	<u>Media</u>	94	Very Strong
I-3	<u>Public Access to Information</u>	65	Weak
<b>Category II</b>	<b>Elections</b>	<b>72</b>	<b>Moderate</b>
II-1	<u>Voting &amp; Citizen Participation</u>	98	Very Strong
II-2	<u>Election Integrity</u>	99	Very Strong
II-3	<u>Political Financing</u>	19	Very Weak
<b>Category III</b>	<b>Government Accountability</b>	<b>81</b>	<b>Strong</b>
III-1	<u>Executive Accountability</u>	73	Moderate
III-2	<u>Legislative Accountability</u>	86	Strong
III-3	<u>Judicial Accountability</u>	96	Very Strong
III-4	<u>Budget Processes</u>	68	Weak
<b>Category IV</b>	<b>Administration and Civil Service</b>	<b>71</b>	<b>Moderate</b>
IV-1	<u>Civil Service Regulations</u>	48	Very Weak
IV-2	<u>Whistle-blowing Measures</u>	63	Weak
IV-3	<u>Procurement</u>	98	Very Strong
IV-4	<u>Privatization</u>	76	Moderate
<b>Category V</b>	<b>Oversight and Regulation</b>	<b>94</b>	<b>Very Strong</b>
V-1	<u>National Ombudsman</u>	91	Very Strong
V-2	<u>Supreme Audit Institution</u>	99	Very Strong
V-3	<u>Taxes and Customs</u>	100	Very Strong
V-4	<u>Financial Sector Regulation</u>	100	Very Strong
V-5	<u>Business Licensing and Regulation</u>	81	Strong
<b>Category VI</b>	<b>Anti-Corruption and Rule of Law</b>	<b>84</b>	<b>Strong</b>
VI-1	<u>Anti-Corruption Law</u>	100	Very Strong
VI-2	<u>Anti-Corruption Agency</u>	81	Strong
VI-3	<u>Rule of Law</u>	85	Strong
VI-4	<u>Law Enforcement</u>	71	Moderate

### A balanced scorecard: Strengths and Weaknesses

Unsurprisingly, given the efforts undertaken by the ANC government to create a new society and institutions based on sound democratic principles, South Africa ranked “strong” overall in the 2006 Global Integrity Index, with certain weak areas which will be discussed.

The Index it must be stressed, does not measure levels of corruption - which South Africa clearly has and is perceived by citizens to be a growing problem in terms of

national priorities (after unemployment, housing, poverty, HIV/Aids and crime)<sup>7</sup> – but rather assesses the existence and effectiveness of systems in place to prevent abuses of power. In this way it is an index of political will to enact accountability mechanisms and provides pointers to answer the original three questions posed in my thesis.

- 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?

The Global Integrity Index notes that most of the systems are in place to prevent abuses of power. However, certain key regulations and laws, such as regulation between the interface of the public and private sector and in the area of regulation around the funding of political parties, are absent. There is also much work to be done to ensure that particular laws, such as those dealing with corruption, access to information and whistleblower protection, work in practice. When it comes to whether the necessary political will exists to confront and pursue corruption wherever it appears, this is tricky and the mixed messages from the government's handling of the arms deal, is a case in point. In my thesis I argue however, that the backdrop of the arms deal certainly kept the issues of corruption on the policy agenda and in certain respects stimulated anti-corruption reforms in areas such as tightening of procurement regulations and the need to address conflicts of interest, including moves to regulate post public sector employment.

## **Challenges**

The weaknesses in South Africa's national integrity system that the Global Integrity Index highlights relate to the absence of certain key laws and regulations and the questionable effectiveness of certain laws, such as access to information and whistleblower protection. While it is impossible to give a complete analysis and overview of the governance and accountability challenges that continue to confront South Africa there are four key challenges that stand out that as we look to the future:

- The Arms deal scandal that won't go away
- Opaqueness around money and politics
- Uneven implementation of existing laws
- Parliamentary oversight and integrity

## **The Arms Deal scandal that won't go away**

Earlier this month, as part of South Africa's demonstrable global leadership in the fight against corruption, South Africa hosted Global Forum V, an inter-governmental forum on fighting corruption, attended by over 1000 delegates. The editorial in the *Mail and Guardian* newspaper of that week was scathing. Entitled "Corruption doublespeak" it challenged the credibility gap between the president's sincere

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7 Afrobarometer Briefings June 2006: The Public Agenda: Change and Stability in South Africans' Ratings of National Priorities

commitment to fight corruption because of graft being a “barrier to the objective of liberating billions of human beings from the scourge of poverty” and his call to crucially involve global cooperation with the fact that Mbeki’s government had “ignored, frustrated and side-stepped crucial international investigations into the arms deal, aimed precisely at discovering who in Europe corrupted a new government in the developing world, and at punishing those who damaged its institutions and its poor.”<sup>8</sup>

Curiously there has been continuous and disingenuous denial of there being any corruption in the arms deal, with President Thabo Mbeki most recently reiterating this point at the World Economic Forum in Davos. 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 been proven in courts of law that there was indeed corruption in the arms deal.<sup>9</sup>

The comprehensive JIT investigation that included three agencies, the National Prosecuting Authority, Auditor General and Public Prosecutor (but excluded the Special Investigations Unit, then headed by Judge Willem Heath) 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. As ousted ANC MP Andrew Feinstein has pointed out “pressure on the companies bidding for the main contracts compelling them to appoint favored (BEE) sub-contractors before they would be awarded the main contracts was a crucial flaw in the procurement process.”<sup>10</sup>

What is required is finality in terms of the arms deal investigation. As leading analysts at the Institute for Security Studies have stressed, 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. Requests for Mutual Legal Assistance by countries investigating the deal must be prioritized if South Africa is to credibly contribute to international efforts to deal with corruption in the arms industry.<sup>11</sup>

Whether the National Prosecuting Authority will instigate charges, once again, against Jacob Zuma, remains to be seen. As the succession debate for the president of the ANC, and ultimately president of the country rages, no doubt any action taken in this regard will be seen as a political conspiracy by the Zuma camp. The use of corruption charges as a way to potentially exclude presidential candidates, such as

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<sup>8</sup> Mail and Guardian, Editorial 4 April 2007.

<sup>9</sup> Mail and Guardian, Comment “Arms deal returns to haunt ANC” Andrew Feinstein. 11 February 2007.

<sup>10</sup> Mail and Guardian, Comment “Arms deal returns to haunt ANC” Andrew Feinstein. 11 February 2007.

<sup>11</sup> Van Vuuren, H. February 2007. “Priorities for South Africa’s anti-corruption agenda in 2007.” Institute for Security Studies.

happened recently in Nigeria, is a warning about the potential for abuses of power that anti-corruption agencies have, something the NPA has already been accused of with regards to its treatment of Zuma.

### **Opaqueness around money and politics**

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 remedying. 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.

South Africa 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.

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. If corruption occurs where money and power intersect then those serious about transparency and accountability need to push for disclosure on the money that flows into the political process. Money lubricates access to those with influence and the quid pro quo that inevitably results from the exchange of it needs to be regulated and placed in the public domain for ordinary citizens to see who the paymasters are of their democracy. 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.

Equally important is the fact that no concrete steps have been 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. 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 and strictly regulate the almost 50 000 civil servants who have business interests outside of government.<sup>12</sup>

### **Uneven Implementation of Existing Laws**

It appears that while in many cases the right laws are on the books, for example access to information and whistleblower protection laws, these are not working in practice. Rather than a question purely of the absence of the political will to institute reforms, the weakness here may touch on deeper realities such as the extreme thinness

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<sup>12</sup> Van Vuuren, H. February 2007. “Priorities for South Africa’s anti-corruption agenda in 2007.” Institute for Security Studies.

of human capacity within the public sector in terms of skills and resources to apply and administer such laws.

Access to Information: In law (strong), in practice (weak)

In law and on paper, South Africa has a model Access to Information Act 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.

In terms of Section 25 of the PAIA, the information officer of a public body must respond in as reasonable a time as possible and within 30 days of the request being received, notify the requester of his/her decision to either grant or refuse the requests for information. This rarely happens in practice as is evidenced by the results of the Open Society Justice Initiative comparative studies conducted by the ODAC in 2003 and 2004 that show many public bodies simply do not respond to requests made in terms of the PAIA. Many requests are simply left unanswered or, rarely, are responded to by the public bodies after the prescribed period of 30 days, sometimes as late as eight months after the requests were filed. The majority of internal appeals are not responded to within the set time limit and ultimately end up at the higher courts, which can turn into a lengthy process that requires the requestor to brief both an attorney and an advocate to assist in the appeal. This process can take as long as three to four years in different courts. The government rarely responds; it merely ignores the requests. According to the ODAC Justice Initiative comparative reports of 2003 and 2004 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), if not political will on the part of the responsible civil servants. The emergence of “national security” considerations as a reason given for denying the release of government records is a worrying trend both in SA and internationally.

Whistle-blowing protection: In law (strong), in practice (weak)

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, the endangering health or safety of an individual, the damaging of 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. The employee who feels that he or she has been unfairly treated after blowing the whistle can institute legal action against his/her employer. The remedy for this could be re-instatement, removal of the discrimination or two years salary as compensation. There is widespread ignorance about the law which clearly needs beefing up as whistleblower's confidentiality is not protected. It also does not deal with defamation charges that are brought against a whistleblower. Maximum compensation that can be claimed is 24 month's salary, which is very low.

In practice, most civil servants who report financial wrongdoing suffer recrimination or negative consequences. ODAC reports that 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. Some government departments, like the Department of Home Affairs, have established confidential hotlines. They are new, so it is too early to comment on their effectiveness.

### **Parliamentary Oversight and Integrity**

How does one make sense of the political interventions of the ANC executive into the operations of parliament as demonstrated so starkly by the arms deal case study? In this political climate of a dominant party democracy can parliament function to both serve and protect the public interest? For example, are parliamentary committees such as Scopa and the ethics committee superfluous to exercising oversight of the public purse or public representatives when their proposed investigations are cast aside by an investigation, admittedly ordered by parliament, but seemingly controlled by the executive and the ruling party? These are some of the questions raised in my thesis.

While the Constitution provides for the passing of legislation conferring budget amendment power on the legislature such legislation is still being considered, but has yet to be passed. The perception exists that parliamentary capacity to engage with the budget would have to be strengthened before assuming amendment powers. The absence of budget amendment legislation has generated a highly executive-driven budget process in which parliament retains a primarily "rubber-stamp" function. Most parliamentarians lack the skills to engage substantively with the budget, and resources going to the parliamentary research office remain limited. The "approval" of the Strategic Defence Procurement Package by parliament is a case in point. While parliament may have approved the vision provided by the Defence Review process, executive decisions, namely a political decision, determined the size and scale of the final Defence package. It appears that 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 clearly left scars. In terms of capacity Scopa cannot follow up every possible financial irregularity and relies significantly on reports from the Auditor-General. Concern was noted in the 2006 Global Integrity Report that Scopa would be hesitant to initiate investigations that go expressly against the wishes of the executive. The capacity of parliamentary committees more generally to play an oversight role needs to be bolstered, possibly through technology.

Beyond the challenges to exercising its oversight function, the integrity of parliament has been damaged enormously in the past few years by the Travelgate scandal which has still be to be resolved and involved widespread abuse of travel vouchers by members of parliament in collusion with travel agents.

As the main institution for representing the public interest, the importance of an effectively functioning parliament cannot be stressed enough. It has been argued (Fish 2006) that the strength of the national legislature may be a – or even the – institutional key to democratization. Stronger legislatures serve as a weightier check

on presidents and are thus a more reliable guarantor of horizontal accountability than did weaker legislatures. They also provide a stronger stimulus to party building and where legislatures are more powerful, people invest more in parties. Stronger parties are better at linking people and elected officials, i.e promoting vertical accountability. As such the focus for democrats should be on creating a powerful legislature. 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.<sup>13</sup>

### **In Conclusion**

While “the cost of liberty is less than the price of repression” (W.E.B. DuBios), “the price of freedom is eternal vigilance” (Thomas Jefferson)... even more so in a society that is transitioning from a struggle mentality into an open and accountable society where there are multiple interests and centers of power, including an active and free press that cannot be controlled and where those in power are ultimately accountable to the public.

External peer pressure and international monitoring, be it through NEPAD and the Africa Peer Review Mechanism or governance scorecards received by international NGOs such Global Integrity, are important tools for incentivizing countries to keep democratic reform efforts on track.

Corruption scandals do not materialize out of nowhere. They are rooted in the absence of key regulatory mechanisms and their effective implementation. In a democracy citizens are entrusted with rights and well as responsibilities, one of these being to use democratic means to hold those entrusted with the power to make decisions that affect their lives, accountable.

Political will is not just the preserve of politicians. Citizens need to demand more of their social and political space and ensure that the rules of the democratic game are practiced and played. More than an empty stadium, an umpire, players and a ball, the crowds are required to signal their support not just for the game, but the manner in which it is played. Citizens have the right and responsibility to ensure that the body politic is more than just bones, but has real substance and integrity and that what it purports to do – in law, namely to uphold and protect the public interest – is also supported in practice.

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<sup>13</sup> M.Steven Fish, “Stronger Legislatures, Stronger Democracies” Journal of Democracy Volume 17, Number 1, January 2006.

## Appendix 1: Chronology of key corruption-related events

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
July 1996 – President Mandela fires ANC MP Bantu Holomisa for blowing the whistle
March 1997 – National Crime Prevention Strategy released
March 1997 – Special Investigating Unit Units and Special Tribunals Act comes into effect
June 1997 – Code of Conduct for the Public Service
December 1997 – Thabo Mbeki becomes President of the African National Congress
April 1998 – The Defence Review setting out a new force design is “approved” by parliament
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, Jacob Zuma his Deputy
September 1999 – The Strategic Defence Procurement Package (SDPP) is announced
September 1999 – PAC MP Patricia de Lille blows the whistle on corruption in the arms deal
October 1999 – 9th International Anti-Corruption Conference (IACC) hosted by South Africa
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 SDDPP finds irregularities
October 2000 – SCOPA’s 14th Report on the arms deal calls for a multi-agency investigation
November 2000 – Constitutional Court ruling on SAPIL v Heath and Others
January 2001 – President Mbeki announces exclusion of Special Investigating Unit from probe
January 2001 – ANC MP Andrew Feinstein is replaced as study leader of SCOPA
February 2001 – The Protected Disclosure Acts no 26 of 2001 comes into effect
March 2001 – Sunday Times reports on ANC Chief Whip Tony Yengeni’s discounted Mercedes
June 2001 – Launch of the National Anti-Corruption Forum in Cape Town
July 2001 – Post Cabinet Lekgotla anti-corruption measures announced
August 2001 - SADC Protocol Against Corruption signed by South Africa
September 2001 – ANC MP Andrew Feinstein resigns from Parliament
October 2001 – ANC chief whip Tony Yengeni arrested and charged with fraud and corruption
November 2001 – Release of the final JIT Report in Parliament exonerating government from corruption in the arms deal
January 2002 – Public Service Anti-Corruption Strategy adopted by Cabinet
February 2002 – IFF MP Dr Gavin Woods resigns as chair of SCOPA
April 2003 – UN/DPSA Country Corruption Assessment Report released
July 2003 – AU assembly adopts the Convention on Preventing and Combating Corruption
August 2003 - NPA decision not to prosecute Zuma on corruption charges; Schabir Shaik is charged with corruption, fraud, theft of company assets, tax evasion and reckless trading related to the arm deal
March 2004 – South African signs the AU Convention on Preventing and Combating of Corruption
April 2004 – The Prevention and Combating of Corrupt Activities Act 12 of 2004 is enacted

November 2004 – South African ratifies the UN Convention against Corruption
March 2005 – Second National Anti-Corruption Summit in Tshwane
May 2005 – Judge Squires finds Shaik guilty on charges of fraud and corruption
June 2005 – President Mbeki fires Jacob Zuma as deputy President of South Africa
January – 2007 Tony Yengeni is released after serving an 8 month prison sentence
March 2007 – South Africa hosts the Africa Forum on Fighting Corruption
April 2007 – South Africa hosts the Global Forum V on Fighting Corruption

## Appendix 2: Benchmarking Anti-Corruption Reforms

November 1999	January 2002 <sup>14</sup>	April 2003 <sup>15</sup>
<b>Combating Corruption</b>		
<b>A review and revision of legislation.</b>	Justice has started the review of the Corruption Act	New Prevention of Corruption Bill has been developed.
<b>Establishment of a whistle-blowing mechanisms</b>	Protected Disclosures Act commenced on 16 February 2001, but guidelines for practical implementation do not exist	Protected Disclosures Act promulgated on 16 February 2001, but guidelines for practical implementation do not exist.
<b>Speedy enactment of the Open Democracy Bill</b>	Promotion of Access to Information Act, 2000 assented to on 3.3.2000. Privacy element of Open Democracy Bill currently with SA Law Commission	Promotion of Access to Information Act, 2000 assented to on 3 February 2000. Privacy element of Open Democracy Bill currently with SA Law Commission.
<b>Establishment of special courts to adjudicate on corruption cases</b>	Responsibility of the Department of Justice and Constitutional Development. Courts not functioning as yet.	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.
<b>Establishment of Sectoral Coordinating Structures (broadly classified as Public Sector, Civil Society and Business)</b>	Establishment in early conceptual phase.	Anti-Corruption Coordinating Committee established for the Public Sector in 2002.
<b>Establishment of a National Coordinating Structure to lead, coordinate, monitor and manage the National Anti-Corruption Programme</b>	Memorandum of Understanding for establishment of National Anti-Corruption Forum in place	National Anti-Corruption Forum was established in June 2001.
<b>Preventing Corruption</b>		

<sup>14</sup> National Anti-Corruption Strategy: Public Service Anti-Corruption Strategy. Department of Public Service and Administration. January 2002.

<sup>15</sup> Progress Report on Implementation of Summit Resolutions. Country Corruption Assessment Report. April 2003.

<sup>16</sup> Progress report on implementation of the resolutions of the first national anti-corruption summit, 23 March 2005

<b>Blacklisting of individuals, business and organisations who are proven to be involved in corruption</b>	Mechanisms currently in conceptual phase. National Treasury considering central database of corrupt and under-performing service providers. Some departments have established own blacklists.	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.	2 ( 2 ε t P i t
		Government has in principle approved that corrupt employees are blacklisted from employment in the public service: this system will be implemented once the legal issues have been resolved.	
<b>Establishment of Anti-Corruption Hotline</b>	Established in all nine Provinces	Established in all nine Provinces.	1 1 (
<b>Establishment of Sectoral and other Hotlines</b>	Established	Established for specific industries in the Business Sector.	
<b>Disciplinary action against corrupt persons</b>	Disciplinary codes revised. Efficacy of application still to be measured. PSC completed report on the investigation into dismissals as a result of misconduct (1999)	Disciplinary codes for public service to be revised. Efficacy of application still to be measured.	1 ε
<b>Consistent monitoring and reporting on corruption</b>	To a limited extent done by Transparency International and political parties, NGO and media. No Public Service mechanism established yet.	To a limited extent done by political parties, NGO and media. No Public Service mechanisms established yet.	( P 1 2 2 ε
<b>Promotion of and implementation of sound ethical, financial and related management practices.</b>	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.	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 five pillars in newly established Procurement Guidelines.	1 1 c i S t 1 ε P 1
<b>Building Integrity and raising Awareness</b>			

<b>Promotion and pursuance of social research and analysis and policy advocacy to analyse causes, effects and growth of corruption</b>	No substantial studies/research done. UNODCCP sponsored project to do country assessment will take effect soon.	First step is the completion of the Corruption Country Assessment.	( i r f l
<b>Enforcement of Code of Conduct and Disciplinary Codes in each sector</b>	Public Service Code of Conduct, new Disciplinary Code and practical guideline on the Code of Conduct are in place.	Public Service Code of Conduct, new Disciplinary Code and practical guideline on the Code of Conduct are in place.	l l g f z
<b>Inspiring the youth, workers and employers towards intolerance for corruption</b>	No particular strategy in place as yet.	No particular strategy in place as yet.	l y c c
<b>Promotion of training and education in ethics</b>	No T & 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.	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	v c l t l
<b>Sustained media campaigns to highlight aspects of the strategies</b>	No visible Government media campaign. Some media houses are very visible in reporting on corruption. GCIS prepared Draft Communication Plan for a National Integrity Strategy and the Introduction of National Anti-Corruption Forum.	Limited Government media campaign is visible	(