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1. INTRODUCTION

In recent years, several investigative reporters, scholars and academic researchers have written books on corruption in South Africa. The revelations regarding corruption have been immensely and profoundly concerning. Today, these “discoveries” of corruption continue and more books, journal articles and reports continue to be written. More revelations of different types of corruption that have permeated every sector of the society .

Africa and indeed South African society, are familiar corruption scandals similar to what we see in Western democracies. ¹ We have been exposed to corruption scandals in multiple sectors including the defence arms ², policing sector³, government sector⁴, cash-in-transit robberies⁵, academic sector corruption⁶, private sector⁷, and of course presidential

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1 Woodiwiss, M. (2005). *Gangster capitalism: The United states and the global rise of organised crime*. Constable, London.

2 Van Vuuren, H. (2017). *Apartheid guns and money: A tale of profit*. Jacana Media.

3 Grobler, L.(2013). *Crossing the line: When cops become criminals*, Jacana Media; Dolley, C. (2021). *To the wolves: How traitor cops crafted South Africa’s underworld*, Maverick 451.; Shaw, M. (2021). *Give us more guns: How South Africa’s gangs were armed*, Jonathan Ball publishers, Johannesburg.; Wiener, M. (2018). *Ministry of crime: An underworld explored*. Pan Macmillan, Johannesburg.

4 Van Vuuren, H. (2017). *Apartheid guns and money: A tale of profit*. Jacana Media.

5 Irish-Qhobosheane, J. (2007). *Gentlemen or villains, thugs or heroes: The social economy of organised crime in South Africa*, South African Institute of International Affairs.

6 Benatar, D. (2021). *The fall of the University of Cape Town: Africa’s leading university in decline*, Politicsweb Publishing.; Jansen, J. (2023). *Corrupted: A study of chronic dysfunction in South African universities*, Wits University Press.

7 Marchant, M., Mosiana, M, Pather, R., & Van Vuuren, H. (2022). *The Unaccountables: The Powerful politicians and corporations who profit from impunity*, Jacana Media.

corruption⁸ (Pauw, 2017; Zondo Commission of Inquiry, 2022). These are only a smattering of some of the more classical investigative reports emanating from investigative agencies, commissions of inquiry and government and private sector reports on corruption. Famously some of the mega-scandals involving corruption has drawn our attention away from the now typical descriptions of the South African (and indeed African) criminal that has seduced criminologists, sociologists, and lawyers for decades;: A criminal who is poor⁹, black¹⁰, male¹¹ and violent.¹²

If anything, this designation, and typology of ‘the criminal’ have ensured that South African society has created its own narrative as to what constitutes ‘true crime’ in South African and ignored the crisis of corruption and the resultant impact on the poor.

But who are the real criminals? I want to suggest to this conference that we as lawyers, police officers, criminologist, sociologists, parole officers, financial crimes investigators, forensic investigators and indeed judges, have been looking in the wrong places for far too long. We have acted like the proverbial ostrich with our heads stuck in the sand. It is time that we move our binoculars. As we shift our gaze, it is becoming apparent from events in our more recent past that the label of the ‘usual suspects’ no longer apply.

The revelations of the Judicial Commission of Inquiry into State Capture (Zondo Commission) have broken that traditional gaze of criminologists and has forced all of us to shift our gaze to the more organised criminals. By virtue of their access and proximity to power, those who govern appear to be living up to the words of Jack London when he wrote about the decaying moral authority of the captains of industry and government and how the

8 Pauw, J.(2017). *The President’s Keepers: Those keeping Zuma in power and out of prison*, Tafelberg.; Zondo, R. (2022). *Report of the Judicial Commission of Inquiry into State Capture*, Chief Justice, (Zondo Commission).

9 Altbeker, A. (2007). *A country at war with itself*, Jonathan Ball Publishers, Cape Town.

10 Irish-Qhobosheane, J. (2007). *Gentlemen or villains, thugs or heroes: The social economy of organised crime in South Africa*, South African Institute of International Affairs.; Shaw, M (2002). *Crime and policing in post- apartheid South Africa: Transforming under fire*, David Phillip, Cape Town.

11 Ratele, K.(2013). *Subordinate Black South African Men without Fear*, *Cahiers d’études africaines*, 209-210 | 2013, 247-268. available at: <https://journals.openedition.org/etudesafricaines/4455>, accessed 5 September 2023, <https://doi.org/10.4000/etudesafricaines.17320>.

12 Gould, C. (2009). *Criminal (in)justice in South Africa : A civil society perspective*, ISS Pretoria.

powerful view the power they wield: 'We are in power. Nobody will deny it. By virtue of that power, we shall remain in power.'¹³

They do not need to hide their power in our society and is in fact far more visible than invisible. They are clearly not afraid of hiding from the spotlight of law enforcement. They act with impunity and more often emerges as the 'leaders of society.' And sometimes, as we see in South Africa, they are part of law enforcement.

Today, I want to speak to you about corruption and crimes of the powerful. To do this, I want to use the police and policing as a lens through which to examine the crimes of the powerful.

Corruption in any society cannot take place without those who have their hands on the levers of power in all sectors of society. Long ago, it was Klitgaard who defined the formula that *Corruption = Monopoly + discretion – Transparency (C=m+d-t)*.¹⁴ Where there is little accountability, corruption thrives. As UN reporters, Alfaro and Mordt (2022) suggest:¹⁵

Corruption is a systemic phenomenon. It is at the same time a failure of governance and development. And to tackle it rigorously, we need to understand how the rule of law works and how incentives in enforcing rules and procedures can be changed.

The powerful in this respect includes that organised section of society, the propertied classes of society, government officials and politicians, auditors, editors, members of the clergy, business leaders, merchants, lawyers and officers of the court, police officers and leaders, and organised criminals.

In South Africa, as academics, we have to be sure that we are not complicit in the justification of corrupt practices by staying quiet when those in power continue with their corrupt practices. Today, I want to turn to corruption and its antecedents in democratic South Africa by looking at three areas of corruption and societal and government's responses before making some recommendations. But first, I need to provide a brief overview of South Africa's

13 London, J. (1974). *The Iron Heel*, Journeyman Press, London, 63.

14 Klitgaard, R. (1998). *Controlling corruption*, University of California Press, Berkeley and Los Angeles, California, 75.

15 Alfaro, J., and Mordt, M. (2022). *The Anti-Corruption formula*, UNDP blog, accessed on 5 September 2023, available at <https://www.undp.org/latin-america/blog/anti-corruption-formula>.

anti-corruption architecture and gather its propensity (at least on a policy level) in order to enhance public accountability.

2. AN OVERVIEW OF ANTI-CORRUPTION PROVISIONS IN SOUTH AFRICA

South Africa, unlike our counterparts in some other African countries, has strong anti-corruption legislative provisions and public structures to tackle corruption. There are institutions dedicated to fight corruption in any form they present. The South African Constitution provides for institutions of law enforcement such as the police and justice department. In turn, each of these departments have specific legislative and various oversight mechanisms that provides for policy, legislation, and regulations to deal with corruption.

Section 55(2)(b) of the Constitution provides for parliamentary oversight over the executive and any organ of state. This section is emphatic and in the public mind, creates the belief that Parliament has oversight over the executive.

Other institutions meant to investigate corruption include the Special Investigative Unit (SIU)¹⁶ established in 1996 to investigate serious allegations of corruption, maladministration, and malpractice in state institutions and to recover monies from officials who become involved in corrupt activities. The state has also established the Investigative Directorate in the National Prosecutions Authority to investigate the state capture cases brought before the Zondo Commission.¹⁷

There are other institutions such as the Financial Intelligence Centre¹⁸ that monitors and investigate illicit financial flows, assists in identifying the proceeds of crime, combating money laundering, the financing of terrorism and the proliferation of weapons of mass destruction. There are other oversight agencies too such as the Judicial Inspectorate for Correctional Services whose mandate is to oversee correctional centres across the country to ensure the humane treatment of inmates.

16 The Special Investigating Units and Special Tribunals Act, Act No. 74 of 1996, as amended.

17 Established the Investigating Directorate (ID) in terms of a proclamation by government gazette in Proc. 20 GG 42383 of 4 April 2019 and section 7(1)the National Prosecutions Authority Act, 1998 (Act 'No.32 of 1998).

18 Established in terms of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001).

There are also enabling policies, strategies¹⁹ and legislation that guide these institutions and departments in fulfilling their mandates. Legislation include the Prevention and Combatting of Corrupt Activities Act 12 of 2009 and the Prevention of Organised Crime Act 121 of 1998.

When it comes to the way in which Parliament exercises that power of oversight, then you cannot help thinking that that clause should read: *“Parliament will exercise oversight over the executive **when it is expedient to do so, not when it is required to do so!**”*

My motivation for saying this, is that it is clear how Parliament that is supposed to play an oversight role, sometimes routinely lead the assault on institutions of democracy and through this, on the democracy itself. Allow me to explain what I mean.

3. PARLIAMENT, THE MINISTER AND IPID OVERSIGHT

In terms of section 28(2) of the Independent Police Investigative Directorate Act 1 of 1991 the Independent Police Investigative Directorate (IPID)²⁰ is to investigate matters of systemic corruption within the police. This is a wide-ranging power, which when it had been applied under the leadership of Robert McBride, the IPID investigation and leadership were systematically dealt with by the Minister and the SAPS. Robert McBride was subsequently fired by Parliament, the investigators were moved to different provinces and charged with different malicious offences.

Parliament in this case, led the charge against IPID and completed its investigation by getting rid of the IPID leadership. The members of the 5th Parliament were complicit in this regard. The Constitutional Court had to remedy the defects in the IPID legislation in respect of the independence of the IPID and it set aside the ability of the Minister to suspend the Executive Director of IPID.²¹ The IPID Act had a clear oversight role for Parliament with the appointment of the Executive Director (ED).

19 South African Government, National Anti-Corruption Strategy (2020-2030), available at:https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf, accessed 2 September 2023.

20 Independent Police Investigative Directorate Act, 1 of 2011, as amended.

21 *McBride v Minister of Police and Another* [2016] ZACC 30.

A new IPID Bill on strengthening the independence of the IPID was tabled in Parliament in December 2022. The most recent version of the IPID Bill²² was tabled by the Minister of Police in Parliament and during the briefing with the Portfolio Committee on Police on 30 August 2023, the State Law Advisors refused to certify the Bill because they deemed it to be unconstitutional. In fact, the Content Adviser to the Portfolio Committee had the following opinion on the Bill:²³

Between the draft version of the Amendment Bill and the version introduced in Parliament, clause 4 changed from a panel-based appointment process to the appointment of the ED made by the Minister of Police in consultation with Cabinet, thus removing all avenues for a transparent appointment process. **In fact, the removal of Parliamentary involvement already rendered the Draft Amendment Bill unconstitutional as the Constitutional Court in the McBride judgement pronounced itself on the importance of Parliamentary oversight over both the appointment and removal of the ED. (original emphasis).**

Here is an example of how the Minister of Police who with the support of the Parliament's Portfolio Committee on Police decided to ignore the Constitutional Court. This is the start of a new fight that will cause the morale of IPID to deflate and create an enabling environment for the police to ignore IPID because the Minister clearly wants to weaken the institution. The motion of desirability of the IPID Bill was passed on 6 September 2023 only with a casting vote of the committee chairperson.

The recent killing of 18 people by the SAPS who were labelled cash-in transit robbers²⁴ by the police, require an investigation by IPID. We should all watch this space because with the advent of this Bill, the conditions of oversight over the police by IPID will continue to shrink and this will inevitably give rise to police corruption. Nobody spoke out against the killings as it is the duty of the police (especially where they have prior intelligence) to arrest people, not kill all of them.

22 Independent Police Investigative Directorate (IPID) Amendment Bill, 2023 [B21-2023].

23 Van Zyl Gous, N.(2023). Constitutionality of the IPID Amendment Bill and public submissions received by the Civilian Secretariat for Police Service, Committee Section, Parliament of the Republic of South Africa.

24 Charles, M.(2023). 18 people killed during shootout with police in Limpopo, available at: <https://www.news24.com/news24/southafrica/news/just-in-18-people-killed-during-shootout-with-police-in-limpopo-20230901> , accessed 6 September 2023.

4. THE THULARE JUDGMENT

In a judgment handed down in October 2022, in the Western Cape High Court, Judge Daniel Thulare held the following regarding collusion between police officers and gangsters:²⁵

[70] The evidence suggests not only a capture of some lower ranking officers in the SAPS. The evidence suggests that the senior management of the SAPS in the province has been penetrated to the extent that the 28 gang has access to the table where the Provincial Commissioner of the SAPS in the Western Cape sits with his senior managers and lead them in the study of crime, develop crime prevention strategies and decide on tactics and approach to the safety and security of inhabitants of the Western cape. This includes penetration of and access to the sanctity of the reports by specialized units like the Anti-Gang Unit and Crime Intelligence, to the Provincial Commissioner. The evidence further shows that the 28 gang and the Mobsters in particular are breathing heavily on the necks of public prosecutors who guide the investigation of organized crime and institute criminal proceedings against its members. Such prosecutors are under a constant and permanent threat to their lives and that of their close families. The evidence also shows that the Mobsters have now moved gear upwards and are interfering with the decorum of the courts and the independence of judicial officers, and testing the judicial oath of office, especially the words “without fear.”

This is the first time a judge has found evidence of collusion between police and gangsters and it is alarming, but not implausible to imagine that the police are complicit with gangsters. This is the height of corrupt practices. The Premier of the Western Cape Province instructed the Police Ombudsman to investigate and verify the findings contained in the judgement. In December 2022, the Police Ombudsman substantiated the findings of Judge Thulare to the Premier of the Western Cape.²⁶

What remains to be seen is what is to be done to deal with corrupt police officers across the country as a result of this Thulare judgment and Ombudsman report. It is a well-known fact that the level of public confidence in the police is at an all-time low. The level of public trust in the police have degenerated significantly to 27% according to Roberts and Gordon (2022). An Afro-barometer Survey²⁷ in 2021 showed that public trust in the institutions

25 *Adams and Another v S* (A135/2022; CC47/2021) [2022] ZAWCHC 201 (17 October 2022).

26 Charles, M. (2023). Probe substantiates links between gangsters, cops in Western Cape, available at: <https://www.news24.com/news24/southafrica/news/just-in-probe-substantiates-links-between-gangsters-cops-in-western-cape-20221205>, accessed 6 September 2023.

27 Moosa, M., & Hofmeyer, J.(2021). Afrobarometer, Dispatch No. 474, August 2021,

of the criminal justice system showed low levels of public trust in the courts (43%), police (26%) and local councils (24%).

This declining public trust in the police is hugely concerning when one links the actions of Colonel Prinsloo (who sold over 2000 guns to gangsters) and the comments of Judge Thulare. We are left with the conclusion that we cannot trust the police and if the Zondo Commission findings are considered, then we are in even greater trouble and deep water.

5. ZONDO COMMISSION AND THE CAPACITY OF THE CRIMINAL JUSTICE SYSTEM

On one level it appears that on paper, we have marvellous legislation and institutions to fight corruption. In reality however, we are losing the war on corruption and the government leadership does not appear to have the wherewithal or moral legitimacy to propel South Africa forward in the fight against corruption.

I want to mention two examples of areas where there appears to be official lethargy when it comes to corruption. Firstly, let me raise the spectre of the Steinhoff Investigation and ask why it has taken so long to even begin to investigate the Steinhoff matter and arrest Markus Jooste? From the time that the scandal broke, until today, what can the state with all its legislative and policy instruments show the investors who lost money, the employees who lost their jobs and the children who had to go hungry as a result of his actions?

One can only conclude that we just do not have the investigative capacity to proceed to take the necessary actions because the expertise to investigate these financial types of crime sits in the private sector and is the preserve of the captains of industry.

It cannot be that the state is not ready to deal with this massive case of fraud which involves over R200 billion and its agencies have not shown any real progress since the scandal broke in 2017.²⁸ It appears that it is now left to the German Courts to make the matter go away from our embarrassed prosecutors.

28 Institute of Justice and Reconciliation.
Scorpio (2023). Ex-Steinhoff CEO Markus Jooste's asset billions attached by SA Reserve Bank, available at: <https://www.dailymaverick.co.za/article/2022-10-18-steinhoff-ceo-markus-joostes-asset-billions-attached-by-sa-reserve-bank>, accessed 6 September 2023.

The second area that I think lead us away from taking responsibility in investigating the State Capture cases is the fact that the prosecutions team in the Investigative Directorate appear to be struggling. The fact that we are none the wiser as to where the Gupta brothers are and South Africa does not have the means of finding them, monitoring the trail in the United Arab Emirates, and dropping the ball on the matter is embarrassing. Our leadership in the NPA has to take responsibility for the sordid state of affairs. We just did not prepare properly to engage the law and take custody of the brothers. They got away.

It is no wonder that the former Head of the Independent Directorate, Hermione Cronje has so clearly stated her misgivings about prosecuting the powerful at this very forum in her keynote address last year:²⁹ A bigger problem as we in South Africa, and in the rest of Africa know, is that the prospect of seeing these corporations and powerful political figures in the dock and having a prosecution commence, is a pipe dream.

If we cannot stand ready to enhance and strengthen accountability of all organs of state through the management and exposure of all corruption scandals, then we will never succeed in breaking the hold that corruption has over the country. It threatens the stability, safety, security, and territorial integrity of the country. As a law-based society, we are duty bound to bring like-minded people together to strengthen the resolve of the agencies with mentalities, capacities, technologies, knowledge, and methodologies to fight corruption.

I would like to make the following recommendations for enhancing integrity and policing accountability at local level:

6. RECOMMENDATIONS

In order to fight corruption effectively, there has to be consequences for all police officers who involve themselves in petty and serious corruption, irrespective of rank. We require local public integrity testing of all provincial leaders of the SAPS, Metro Police, and other law enforcement agencies (private and public). The private sector must play its role and support the initiatives to conduct such integrity testing through building models which can be taken on board by the public sector institutions in the criminal justice system. All station

29 Cronje, H.(2022). Corruption and human rights conference, keynote address to the fourth annual conference of the Department of Criminal Justice and Procedure and the journal of anti-corruption law, available at: <https://www.epubs.ac.za/index.php/jacl/article/view/1344/947>.

commanders, Metro police commanders must be subjected to the process. The public must have a role in the process through a toll-free line when the process commences. The policing agencies must be responsive to the results and politicians must be kept out of the process. The Public Integrity testing must be seen as a confidence building measure to rebuilding the policing instruments, models, and relationship with the public.

7. CONCLUSION

Ladies and gentlemen, I can say much more, but I will subject myself to this conference and the truly clear ideas by the members of the illustrious audience here today.

We cannot let the words of Mahan and O'Neil be the last on corruption:³⁰

Organised crime really consists of a coalition of politicians, law enforcement people, businesspeople, labour leaders, and (in some way least of all), gangsters. There is an inherent tendency of business, law enforcement, and politics to engage in systematic criminal behaviour. This is not so because there are too many laws, but rather criminal behaviour is good business, makes sense and is by far the best, most efficient and profitable way to organise the operations of political officers, business, law enforcement agencies and trade unions in a democracy.

Corruption cannot be governing methodology of the state. We cannot allow the state to function like the mafia influenced states in Columbia, Italy, and the Eastern Balkans. We have much to fight for in this country. Freedom, in our case is forever, we can never go back to where we were.

30 Mahan.S & K O'Neil, K.(1988). Beyond the Mafia: Organized crime in the Americas, Sage, California, 1998, Px.