

MEMORANDUM

Submission By 'The Justice League'

Rhodes University

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It is not power that corrupts but fear. Fear of losing power corrupts those who wield it and fear of the scourge of power corrupts those who are subject to it.

Aung San Suu Kyi

Corruption is neither new nor is it isolated. It is a universal phenomenon that can be traced throughout history. However, this cannot be an excuse. Corruption cannot be understood as merely a legal, or indeed a political problem. Corruption is an attitude. It is a social problem. It is an anti-system.ⁱ Just as physicians rarely treat diseases symptomatically, so corruption cannot be remedied by simply removing its symptomatic causes. Rather, a comprehensive diagnosis of the problem that traces not only its historical development, but also seeks to understand its origin and possible causes within its specific context is needed. In this paper, we therefore follow a two-pronged approach with regard to the issue of corruption: firstly, we seek to investigate the “cultural, social and psychological bases of the mentalities that make the practice of corruption possible” such that we can work to prevent it in the first instance. Unless we understand the causes of corruption within its specific context, we can scarcely hope to eliminate it.¹ Secondly, we suggest and develop a way in which to react to corruption after it has occurred through the establishment of an independent Anti-Corruption Unit. It is hoped that this approach will allow for a thorough analysis of the problem as opposed to merely focusing on symptomatic remedies.

If corruption is to be overcome within South Africa it must be done in collaboration. All stakeholders must be involved, from government to the private sector² to civil society. We need to acknowledge the agency of the ordinary and mobilise society toward a common objective. Social accountability needs to be the basis for this mobilisation. Accountability is an “essential principle for securing an enabling environment for development”.ⁱⁱ As Allan argues, everyone should have the right to “obtain justifications and explanations for the use of public resources from those entrusted with responsibility for their management”.³ Non-

¹ In our investigation into the causes of corruption within its broader social context, we hope to offer insight and analysis on the origin of corruption within South Africa. We cannot hope to reduce the phenomenon of corruption to one or two causal factors, but what we hope to do is to raise issues and offer perspectives that can open the forum for further debate, discussion and analysis. The rationale behind this is that there is no simple solution to the problem of corruption. The fight against corruption should be a social dialogue in which ideas and solutions are constantly developed and re-developed in order to overcome both current and new challenges.

² A commitment by actors in the private sphere to “ethics and a corruption-free business environment” could contribute greatly to rooting out corruption. Kpundeh suggests that “professional organisations could include a mandatory anti-corruption clause in their membership and ethics codes, with expulsion as the sanction for non-compliance”. Furthermore that “bidders on government projects and procurement contracts can band together to decide no company will pay bribes – commitments backed by sizeable bonds subject to forfeiture in the event of non-compliance.”

³ Allan suggests that social accountability should be a human right. Conceiving of social accountability in this way will not only help to eradicate poverty and attain social justice, but the increased pressure on state departments to be transparent and directly accountable may serve to prevent corruption in the first place. Unfortunately this is beyond the scope of our memorandum, but we feel that it nonetheless offers a fresh and new perspective, and may be worth further investigation. Allan designs the right as such:
Every person shall have a right to obtain justifications and explanations for the

satisfactory justifications that may point to misuse or abuse of public resources or office need to be sanctioned, and 'political solutions' to the problems, rejected.

Toward an Understanding of Corruption

The most widely accepted definition of corruption is 'the misuse of public office for private gain'. However, it is to be noted that private gain does not necessarily involve material wealth. A strictly legal definition of corruption may also prove insufficient insofar as nepotism, while not being strictly illegal, may still constitute corruption. Our understanding of corruption, therefore, does not confine itself to illegal acts in order to accumulate material wealth, but incorporates a broader interpretation that views private gain in terms of immaterial wealth as well.⁴

Historical development

"Corruption by definition bears no respect for the unique of any political system, but the forms it takes can certainly be influenced by the quality of democracy that a society's citizens are exposed to at any given time. Apartheid, understood as a policy of racial exclusion and economic oppression, seems to have carefully defined the peculiar shape and forms that corruption assumed in South Africa."

iii

There is no use, therefore, in allocating blame for corruption solely to the post-1994 state. The Apartheid state was premised on racial exclusion, and sought to advance the interests of one group above another. The

use of public goods and resources –

- a) from those involved in making decisions on the allocation of such goods and resources as may affect his or her rights;
- b) from those responsible for the management of such goods and resources as may affect his or her rights; and
- c) from those responsible for exercising oversight of the effective use of such resources as may affect his or her rights.

Such explanations and justifications should provide a clear indication of how available resources were, and are intended to be, utilised for the purposes of progressively realising human rights.

In order to achieve the realisation of this right Allan suggests that the following processes be implemented:

Process 1: Budget analysis and strategic plan evaluation – where the responsiveness (and internal coherence) of strategic plans and budget allocations are monitored

Process 2: Expenditure tracking – where financial reports are monitored relative to budget allocations

Process 3: Performance monitoring – where service delivery is monitored against expenditure and internal audit reports, and service delivery reports and financial controls are monitored

Process 4: Tracking corrective action in response to misuse/abuse of resources – where disciplinary systems and reports on the handling of cases of the misuse/abuse of resources are monitored

⁴ This includes friendship, family relationships, status in the community (etc).

Broerderbond was the most striking example of the rampant nepotism that characterised the Apartheid state. Furthermore, Hyslop^{iv} notes that after the 1970s, during the period of economic stagnation, the prevalence of corruption drastically increased. Corruption, therefore, is not particular to the post-1994 state although its shape and form may have changed.

From a culture of civil disobedience to protest unjust laws, it is difficult to achieve an overnight respect for the Rule of Law. Respect for and obedience of the law is “an attitude related to social, cultural and individual values.”^v

Perhaps the most prominent feature of post-1994 corruption has been the tendency of the ruling party to find ‘political solutions’ to instances of corruption.^{vi} This undermines both due process and respect for the Rule of Law.

Bad Legislation of the Past and the Problems it Creates

De Vos has recently pointed out the downfalls and potential unconstitutionality of sections 58 and 60 of National Road Traffic Act.⁵ These provisions effectively exclude the so-called “blue light” brigades from normal traffic laws that the normal citizen is bound by. This creates a perception that the cabinet ministers think that they are above the law. In order to create a society that upholds the Rule of Law, citizens need to view the law and the system in which it operates as being just and fair. Laws like the National Road Traffic Act do not do this and citizens as well as government officials may feel that they do not need to respect the law.

The Rule of Law dictates that laws must be of general application. If those in public office deem themselves beyond the law, then the public will surely follow suit. This is demonstrated by the moral ease with which a lot of people bribe traffic officers and police in order to avoid receiving a fine or prison sentence.

History shows us that legislation has often facilitated nepotism and corruption of or by public officials via the provision of broad discretionary powers bestowed to them in various Acts of Parliament. The State Tender Board Act⁶ (STBA) and the Preferential Procurement Policy Framework Act⁷ (PPPFA) are two examples of laws that do not comply with the Rule of Law, allowing for the exercise of broad discretionary power and opening the doors to corruption.

⁵ Act 93 of 1996.

⁶ Act 86 of 1968.

⁷ Act 5 of 2000.

S 3(5)(a)(iv) of the STBA states that the Board may decide that no offer may be considered from a tenderer if that person has acted fraudulently or in bad faith or if corruption is present. This implies that the Board may still accept the tender even if corruption is present. This is surely an untenable situation. There is no way that this discretion can be justified.

S 3(4) of the STBA states that the Board may approve *ex post facto* any action made by a Government department in relation to any powers exercised in relation to the Act. This may allow for the derogation of a member or members of the public rights so long as it is not to the detriment of the State. Laws should be structured in order to protect the public.

How to Structure Laws in order to Remove Temptation

The primary concern here is the presence of overly discretionary powers. Firmer guidelines need to be in place. A prime example is the presence of political appointees. Those in power are entitled to appoint candidates for political reasons rather than their competency because the legislation allows them to do so. There must be strict rules in place for the appointment of cabinet ministers and heads of departments. Appointments must be made on the basis of expertise, credentials and competency.

The PPPFA allows the Minister, when awarding a tender, to take into account whether the tenderer is a “previously disadvantaged person.” This allows for the situation where the better tender offer gets rejected in favour of a BEE offer. Whilst it is recognised that social reform needs to take place, it must be questioned whether this is the most appropriate method to do so. Can South Africa afford to reject the cheaper and more cost efficient tenders? This provision also allows for nepotism and favouritism. These types of virtually open ended discretionary powers must be eliminated.

It must be clear why the discretionary powers are being delegated. In our current legislative framework the executive is entitled to implement far reaching regulations. The empowering Acts do not give clear guidelines as to what may be regulated; this leaves the door open for corrupt officials to make regulations for their own ends.^{vii} Regulations should only be allowed to regulate matters such as conditions of service and the very basic day to day running of the department in question. A requirement in terms of the Rule of Law is that laws be certain. Everyone, including the executive need to be sure on what is expected of them. This certainty must come from the legislature, who is shirking its responsibilities by creating huge discretionary powers.

Understanding the causes of corruption

A serious campaign which seeks to deal with corruption must begin with tackling political corruption,⁸ as it “provides the incubating environment for other corruption”^{viii}. He explains that the political party that dominates society, its practices, internal cultures and behavioural norms will undoubtedly impact or infuse with norms and practices of the broader society.

The values which underpinned the liberation ideology, have collapsed under the “new ‘bling’ culture”^{ix}. The struggle for liberation sought universal social upliftment. However, the culture of an ‘ethic of care’ has been largely replaced by the need for a lifestyle of luxury.⁹

Added to this is a “politics of envy” that is the legacy of the colonial and Apartheid eras. Fanon’s description of the ‘colonised man’ aptly illustrates this point.^{10x}

What can be drawn from this is that there is a need to afford a ‘bling’ lifestyle which has bred and continues to promote a culture of entitlement and greed that is apparent in business, political and administrative operations. The individual, who occupies public office, seems more concerned about material contributions to the self, than making a valuable contribution in the public service for the betterment of the South African public.^{11xi} However important the Constitution is for providing a value framework for South Africa’s democracy, such values become immaterial when they are not reconciled with existing social values.^{xii}

Furthermore, the logic of entitlement - wherein those in power not only break the rules because they can get away with it, but because on an intuitive level they genuinely believe that they are entitled to take what they want - can be interpreted so that Lord Acton’s dictum that ‘power corrupts, but absolute power

⁸ One idea, which is unfortunately beyond the scope of this memorandum as it is a thesis of its own, is possible electoral reform such that citizens can vote against government officials believed to be corrupt. This would increase the individual accountability of politicians. The constitutional implications of this, however, would have to be carefully considered.

⁹ See Gumede 2011: 18 “When the new ANC leaders came to power, they inherited the trappings of state power left by the apartheid government: the state cars with bodyguards, villas, being waited on, free schooling for their children, free healthcare, free luxury travel and so on. This lifestyle became the new standard of achievement – a sign that one has made it.”

¹⁰ “The settlers’ town is a strongly built town [...]. It is a brightly lit town; the streets are covered with asphalt, and the garbage cans swallow all the leavings, unseen, unknown and hardly thought about. The settler’s feet [...] are protected by strong shoes although the streets of his town are clean and even, with no holes or stones. The settler’s town is a well-fed town, an easygoing town; its belly is always full of good things. [...].

The town belonging to the colonized people [...] is a place of ill fame [...]. They are born there, it matters little where or how; they die there, it matters not where, nor how. It is a world without spaciousness; men live there on top of each other, and their huts are built - one on top of the other. The native town is a hungry town, starved of bread, of meat, of shoes, of coal, of light. [...]The look that the native turns on the settler’s town is a look of lust, a look of envy; it expresses his dreams of possession [...]. The colonized man is an envious man. [...] [T]here is no native who does not dream at least once a day of setting himself up in the settler’s place.”

¹¹ Gumede argues that this ‘bling’ culture “corrupts the soul... [it] encourages corruption, dishonesty and builds a society based mostly on relationships of patronage”, rather than on the rights for self-determination.

corrupts absolutely' can be altered to read "power corrupts, but it corrupts only those who believe that they deserve it".^{xiii} Veterans of the apartheid struggle who defended the public against a repressive state believe on an intuitive level that they are entitled to reap the benefits of the newly constituted state. This logic of entitlement is not particular to South Africa. Arguably, liberation movements once they attain liberation, become redundant insofar as the entire organisational structure of the movement is geared toward liberation, and not toward good governance. As a show of gratitude for their work and sacrifice for the well-being and benefit of others, these individuals are "given some degree of preference in the awarding of government jobs and contracts".^{xiv}

With regard to preferential treatment, where there is an over-emphasis on moral imperatives such as the ideas of morality that govern the private realm, there can be a disjuncture between civic and private duty. If there is a higher obligation toward one's own kin, then necessarily this duty will be fulfilled before any other. Indeed, "greater importance [may] be given to duty than to law. Duty is interpreted as duty to family, oneself and one's own community. Law is then interpreted as subordinate to duty and relationships as more important than rule [which] may be bent to serve relationships."^{xv}

When a political party views itself and its members in terms of kinship and reciprocity, as a large family, such ties, sentiments and loyalties determine, or rather influence individual behaviour in the civic public¹². It is important to note that our aim is not to undermine the significance of communitarian values such as solidarity within a political party but rather to show how the disjuncture between competing values and duties may make corruption possible. For instance, should one happen to be a member of the Family¹³, he or she is nurtured, favoured and most likely, protected from being held politically accountable, and as it follows, criminally accountable for acts of corruption.^{xvi} Thus, "by viewing [party] members as part of a large family or akin to a close-knit ethnic tribe, there is a grave danger that loyalty to the party is viewed as more important than rooting out corruption or obeying the law".^{xvii} Furthermore, this paves the way for 'political solutions' for acts of wrongdoing, instead of legal solutions that adhere to the Rule of Law.

The dialectics between the demands of the nation and the demands of the Family, allow for the logic of an unwritten law that "it is legitimate to rob the civic public" in order to strengthen the relationship of the Family.^{xviii} Herein lies the paradox behind the 'unwritten law'. Government officials do not only gain materially from being a member of the Family, but it is the fact that they are employed by the state or are elected by the public in the first place, that places them in the position to benefit materially. In other words, public officials gain from the civic public but fail to demonstrate substantive loyalty by giving little to no

¹² This is a domain of politics that includes civil structures such as civil service, the police, the military, as well as constitutionalism and the human rights discourse. This public realm associated with the predominant establishment of the State and its administration, whose function is to govern society for its betterment/ fulfil national demands (Ekeh, 2001:93).

¹³ 'Family' is used to denote the extended network of loyalties to party members, whereas 'family' refers to actual relations.

material benefits back to the public that sustains them. Therefore we assert that the logic of loyalty is premised on a false or exclusionary understanding of the notion of Family. If we are to deploy the communitarian value of Familyhood into the civic public, then Family must be conceptualised to include the 'we' in 'We the People of South Africa', and not simply limited to being a member of a political party, but a member of society.

The state should function not as an instrument but as a *relationship* i.e. in relation to society, interest groups, business etc. The instrumental view of the state leaves little scope for the concept of accountability. Government cannot divorce itself from its constituency; it needs to re-orientate itself to regard voters as partners.

The state therefore needs to be directly accountable to its citizens, and this can be achieved through social negotiation and dialogue. If corruption is to be combated, an ethos of intolerance toward corrupt acts needs to be cultivated to include all of civil society, especially those at grassroots level. If we think back to the effectiveness of the UDF, problems confronting society cannot be dealt with institutionally alone. Corruption needs to be de-naturalised: when resignation replaces outrage we can have little hope of overcoming it. It is here that civil society and the watchdog role of the media are of pivotal importance. The issue of corruption needs to be at the fore of social debate. Social networking sites such as twitter and blogs can be utilised to popularise the debate. However, only a small percentage of South Africans have access to internet resources. Partnerships with civil society movements and local media need to be forged in order to promote access to information. The corruption debate should not appear only in the most established newspapers (which tend to be in either English or Afrikaans), but in all media publications, in all of South Africa's official languages. This does not apply only to the print media, but to all forms of media as well.¹⁴

Lack of political will and voter apathy will stand as hurdles toward achieving public participation in the fight against corruption. It is nonetheless important to open up channels of communication in order to effect social mobilisation. The understanding of the root causes of corruption may aid in the development of a strategy to overcome it. It is with this in mind and the need for public collaboration in the effort to combat corruption that the education arm of the Anti-Corruption Unit that we propose will be established. It is hoped that this department can serve as an intermediary between civil society, the media and grassroots social movements and the Anti-Corruption Unit in order to foster an ethos of intolerance toward corruption, and one that demands social accountability.

¹⁴ It is suggested that the model used by the Daily Dispatch in the Public and Community Dialogues be employed as a strategy to achieve these outcomes.

The Anti-Corruption Unit

In terms of the doctrine of the Rule of Law, no one is above the law and therefore everyone is subject to the jurisdiction of ordinary courts. Furthermore, the Rule of Law doctrine dictates that the discretionary powers of the executive may not be arbitrarily exercised, insofar as the executive may not deprive national subjects of their rights and freedoms.^{xix} Governmental authority therefore has to be exercised legitimately, in accordance with procedural law and the values that underlie “an open and democratic society based on human dignity, equality and freedom”¹⁵. A strict adherence to the separation of powers allows for laws to be drafted, approved and implemented in a manner that does not promote the interests of state officials, but the interests of society.^{xx} Since there is a general understanding that power corrupts, the South African citizens need to have faith in the legal system to protect their interests to include a system of checks and balances of legislative, judicial and executive power.

Any institution, therefore, that seeks to combat corruption must be premised primarily and fundamentally on upholding the Rule of Law.

The Glenister Judgment

The *Glenister* Judgment provides the backdrop for the need to establish an Anti-Corruption Unit. The applicant in this case raised a number of attacks on Chapter 6A of the South African Police Services Act¹⁶, as amended. Only one was successful but this was sufficient to convince the court that the legislation creating the Hawks was unconstitutional. The Court held that the Constitution itself places a duty on the state to establish and maintain an independent anti-corruption agency. It was noted that there was nothing wrong, in principle, with locating this unit within the SAPS but how it was done did not secure the independence of the Hawks.

The court recognised that corruption lessens effective service delivery and decreases public accountability and transparency.¹⁷ The court acknowledged that corruption offends the Rule of Law, human dignity and the advancement of human rights.¹⁸ The efficacy and transparency of the public administration also suffers as a result of corruption.¹⁹

¹⁵ S1 of the Constitution.

¹⁶ Act 68 of 1995

¹⁷ Para 169

¹⁸ Para 173 in *S v Schaik* 2007 (1) SA 240 (CC).

¹⁹ Para 176

South Africa has an international duty to create and maintain an Anti-Corruption Unit. The court held that the Constitution “appropriates that duty into itself.”²⁰ There is therefore a constitutional duty on the state to “respect, protect and promote the bill of rights” by, *inter alia*, creating and maintaining an independent Anti-Corruption Unit. The court acknowledged that it could not and would not prescribe to the state how exactly to do this.

Comparative Analysis

It is always useful to draw from the wisdom of other countries. Botswana, Malaysia and Singapore have all implemented successful anti-corruption campaigns. However, Hong Kong is widely considered to be international best practice with regard to the institution of an anti-corruption strategy.^{xxi} It is suggested that South Africa draws from the Hong Kong model, but tailors it so that is sensitive to South Africa’s specific context.

Hong Kong’s strategy is founded on three pillars: deterrence, prevention and education.^{xxii} Roughly 70% of the budget of Hong Kong’s anti-corruption institution is allocated to its deterrence department.^{xxiii} This is because it is vital that the public sees results and successful prosecutions of corrupt officials in order to garner and keep public confidence in the institution. This is the rationale for the proposed Investigative Department in the Unit.

Hong Kong has illustrated the importance of having an institution that not only investigates reports of corruption, but also monitors and reviews existing and proposed legislation and analyses current practices and procedures. Recommendations are then made to Parliament regarding weaknesses that potentially allow for corruption, in order to prevent it in the first place.

An anti-corruption strategy will not succeed unless it has the public’s confidence behind it. The public awareness of corruption and its effects (especially with regard to service delivery) as well as ways to stop or prevent it is of vital importance. There is therefore a big emphasis in Hong Kong on educating the public on all matters relating to corruption.

Establishing the Anti-Corruption Unit

It is important that the unit’s existence is guaranteed in the Constitution and is not a mere statutory body. This will prevent the unit from being disbanded if the political landscape changes. It is suggested that the

²⁰ Para 189

Unit be established as a Chapter 9 Institution. The Constitution will have to be amended to make provision for the different appointment procedures of this Unit.²¹

Chapter 9 Institutions

Chapter 9 institutions are tasked with the upholding and furthering of South Africa's democracy. They have, however, been accused of being largely ineffectual. The following have been suggested as factors that have rendered these institutions ineffective.

i. Financial Independence and Budgets

Some of the institutions' budgets are decided by government departments. They may therefore be susceptible to political manipulation. It has been suggested that all budgets should be voted on by Parliament and the National Assembly.^{xxiv} As a safeguard the Unit should be statutorily guaranteed, as a minimum budget, a certain percentage of the annual gross domestic product.

ii. Parliamentary Oversight

There is a concern that Parliament largely ignores chapter 9 institutions and does not adequately consider their recommendations included in the reports that are tabled before Parliament. The institutions are supposed to assist Parliament in its oversight role of the executive and not simply to be ignored.^{xxv}

There is allegedly a problem with the performance of the institutions themselves however, as well as the reports they table before Parliament. It is therefore proposed that performance standards are included in the conditions of service for the new independent unit. These are detailed under "Remuneration of Employees" below.

iii. Appointment Process

Candidates are recommended by the National Assembly to the President or relevant Minister. The President appoints the Public Protector, Auditor General and members of the South African Human Rights Commission, Commission for Gender Equality and the Electoral Commission.²² The ANC is the dominant party so this creates the possibility of political appointees being recommended and appointed.^{xxvi}

²¹ Alternatively, a new constitutional provision could be enacted in the same manner as section 179 which establishes the National Prosecuting Authority. This would signify government's will to effectively combat corruption. If this were to happen it would create more certainty as to how the Unit will function as it will not be labelled as "just another Chapter 9 Institution."

²² s 193(4)

To combat this, and to ensure that the unit remains independent, it is suggested that the existing chapter 9 institutions, together with the Ministers of Justice and Constitutional Development, Safety and Security, Finance, Police and Department of Trade and Industry must recommend a list of persons and put it before Parliament. In making these lists the above people and institutions must take into account nominations received from the public. The person appointed must receive a supporting vote of 75 percent of the members of the National Assembly. This high percentage will serve to minimise the effects of an effective one party democracy. The President must then appoint the person that the national assembly has recommended with a 75% vote of approval. It is important that this is not a discretionary power and that the President *must* appoint the recommended person. If the President has not officially made the appointment within 14 days, that person will be deemed to have been appointed. This is to guard against the possibility that the President does not make the appointment within a reasonable time period.

Cost of the Anti-Corruption Unit

It is submitted that the Anti-Corruption Unit should be financed as a fixed percentage of GDP, perhaps 0.01%.²³ More analysis needs to take place regarding this point but it is submitted that the benefits of reducing corruption will outweigh the costs of maintaining an Anti-Corruption Unit.

The Anti-Corruption Act

International Law

The legal framework annexed to this memorandum has been written in order to meet our international obligation to fight corruption in light of the United Nations Convention against Corruption²⁴ which was signed²⁵ and subsequently ratified²⁶ by South Africa. The State has, to an extent, upheld this obligation via the enactment of the Prevention and Combating of Corrupt Activities Act, which provides for a broad definition of corruption and the consequent penalties to convicted parties. Article 6(1) of the Convention requires States to create a body that will combat corruption. South Africa first created the Directorate of

²³ In October 2011 Willie Hofmeyr estimated that 25 to 30 billion rand is lost in government's annual procurement budget due to corruption and incompetence.²³ It is also suggested that investing in a corrupt country can be 20% more costly than investing in a country with fewer corruption problems.²³ This illustrates that not only does corruption cause the country to lose money directly, but it also discourages potential investors, thereby causing South Africa to lose capital inflows. The nature of corruption means that it is impossible to determine just how much money is lost but it is clear that the benefits of establishing an independent and effective anti-corruption unit outweigh the costs, even if those monetary costs prove to be substantial.

²⁴ (2004) 43 *ILM* 37.

²⁵ 9 December 2003.

²⁶ 22 November 2004.

Special Operations (the Scorpions) and, following its disbandment, created the 'Hawks', which are still in operation.

Article 6(2) of the Convention requires that:

“[e]ach State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.”

Thus far, the State has failed to uphold this obligation insofar that the legislation creating and empowering the Hawks, failed to provide the Unit with independence from the state. Independence, needless to say, is required to root out corruption within State institutions, thus rendering the Hawks a 'toothless tiger' when it is required to investigate allegations of corruption on the part of public officials.

Explanation of the Legislative Framework

Protection of Whistleblowers

In instances of white collar crime, fraud and corruption, it is often very difficult to obtain the requisite evidence (documents and witness' testimony) in order to institute criminal proceedings. Providing full immunity to a party who is implicated in a cartel promotes the co-operation of that party to provide the testimony and the documentary proof necessary to successfully prosecute individuals suspected of corrupt activities. The informer will only receive immunity if he or she is the first to inform the Anti-Corruption Unit of the alleged corrupt activity or activities. The provision of immunity for an informant has proven successful in its operation, as illustrated by the operation of the whistle blower provision in the Competition Act 89 of 1998.

Remuneration of Staff

The legal framework specifically provides that the National Director shall receive a salary equivalent to that of a High Court judge and each of the Provincial Directors shall receive a salary equivalent to 75% of the monetary value of the salary of a high court judge. Although this shall be costly, the high rates of

remuneration serve two purposes. Firstly, it will promote the continued high performance required of the Directors, insofar that they shall feel valued for the work they are undertaking. Second, and more importantly, the Directors will resist the temptation to accept bribes from any member outside the Unit because they are financially secure. The remuneration of the Directors is statutorily regulated to ensure that another state institution may not reduce their salaries, which may cause increased resignations as a result of job dissatisfaction or the perceived loss of employment security.

The remuneration of the members of staff shall be determined by the National Director in consultation with the Provincial Directors on an annual basis. The Directors are best informed as to what remuneration rates are required for the satisfaction, as well as the employment security of the employees. The Directors will meet on an annual basis to effect changes to the remuneration rates, provided that such changes are the increase and not the decrease of remuneration rates. Remuneration rates will be increased in accordance with the proposed consumer price index for the following year. A thirteenth pay cheque shall be provided to the employees who have met their target performance and the award of this bonus shall be determined by the Directors upon the assessment of the performance reports of each member of staff. This shall create an incentive scheme in which members of the staff shall be motivated to perform efficiently, yielding a higher performance output for the Unit as a whole.

Powers of Investigation, Search and Seizure

The Asset Forfeiture Unit, and its empowering legislation, the Prevention of Organized Crime Act, have often been criticized on the basis that it undermines the Rule of Law.^{xxvii} The Asset Forfeiture Unit is provided with extraordinary powers, including the seizure of assets of a person who is charged with an offence, yet not convicted as of yet. In order to render the Ant-Corruption Unit an adherent of the Rule of Law (so that it does not become a vigilante force unto itself) the provision of excessive power unto the Unit has been avoided. Although the “unbridled arbitrary power”^{xxviii} of the Asset Forfeiture Unit creates a strong sense of efficacy and independence, it tends to undermine the accountability of the Unit. The Anti-Corruption Unit shall be void of such unbridled powers to ensure that it remains accountable and transparent, and practically speaking, to ensure that criminal proceedings against an individual charged with corruption are not withdrawn as a result of an infringement of the individual’s right to a fair trial. The Unit may search the premise of an individual suspected of corruption only if it has obtained a search warrant to do so. Furthermore, the seizure of assets may be executed only upon the receipt of a court order to do so. In order to ensure that the assets are not concealed prior to the provision of the order, the Unit shall not be required to give notice of the seizure to said individual, if it is necessary for the expedience of the case. In addition,

the application for the order may take place in camera, in order to ensure that the suspected individual is not informed of the order prior to its issue.

Public Access of the Anti-Corruption Unit

It is fundamental that there is co-operation and correspondence between the public and the Unit, which may partially be achieved through the establishment of public access to the Unit. Public access can be attained via the use of the already existing toll-free hotline, which shall be utilized by the public to inform the Unit of any suspected corrupt activities. Funding will be required for the staff necessary to receive allegations of corruption. Monies shall furthermore be allocated to the advertisement of the toll-free hotline on radio stations (in the eleven official languages) and on the SABC.

Public Accountability of the Anti-Corruption Unit

Public confidence in the Unit is essential for the co-operation of the members of the public, which can be fostered if the public has a perceived sense of accountability and transparency of the Unit. The perception of transparency may be achieved via the publication of the Parliamentary reports submitted by the Unit, as well as the publication of any ongoing investigations (provided that said publication is not detrimental to a fair trial) and any investigations that have been concluded; as well as any investigations that the Unit has opted not to pursue. Accountability may be achieved through the publication of any concluded internal disciplinary hearing against any member of the Unit, as well as any penalty imposed.

Code of Ethics and Conduct

The Code of Ethics and Conduct attached as a schedule to The Anti-Corruption Act is designed to ensure individual accountability of the employees of the Anti-Corruption Unit, and to foster an environment of ethical conduct. To create such an environment, training programmes regarding ethical conduct and decision-making are to be introduced.²⁷ The inclusion of regular challenge meetings in the code allows for any member of staff to challenge any decision made by the Unit. In this way we hope to promote a culture of accountability and transparency. Failure to comply with the code may result in disciplinary action.

²⁷ It is suggested that the training programme adopt a two-pronged approach: 'a character development part aimed at developing dispositions, attitudes, habits--or 'virtues'--such as honesty, loyalty, fairness, benevolence, conscientiousness and more; and a reasoning ability part aimed at (1) sensitizing [employees] to moral problems, (2) improving their analytical skills, and (3) developing their ethical imaginativeness" (Garofalo, Geuras, Lynch and Lynch, 2001).

Conclusion and Suggestions for Further Research

More research needs to be done on the costs of establishing and maintaining the Unit to determine what an appropriate budget is. These calculations go beyond the scope of this memorandum. Furthermore, logistical concerns need to be addressed such as the physical location of the unit.²⁸

The Anti-Corruption Unit that we propose reflects a three-tiered strategy that involves deterrence, prevention and education. It is hoped that this approach may offer a means through which to comprehensively combat corruption, and not merely to respond to it after the fact. To the degree that the unit remains independent, it can offer a kind of institutionalised political will insofar as it demonstrates the “credible intent of political actors to attack perceived causes or effects of corruption at a systemic level” so that ‘the fight against corruption’ does not remain mere rhetoric.^{xxix}

This memorandum has served to provide an overview of the issues surrounding the problem of corruption and has suggested possible solutions. One paper alone will not solve the problem of corruption. What is needed is further debate, discussion and analysis in which new ideas are constantly brought to the fore in order to create a lasting, tenable and workable solution.

²⁸ In establishing the Unit it should be borne in mind that access by all members of society is important. It is therefore important for the Unit to be situated not only in the main city/cities of each province but also in the poorer areas of the country. In this regard it is recommended that the Unit work with already existing social groups and societies and use their infrastructure and networks. The poorest people in the country need to be involved and the Unit needs to be represented in these areas.

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- ⁱ Hoodashtian, *What is Corruption: A Political and Philosophical Approach* Central Asian Journal of Management, Economics and Social Research, Issue 3, January 2002
- ⁱⁱ UNDP, 2000, *A Human Rights-based Approach to Development Programming* in UNDP.
- ⁱⁱⁱ D.M Balia *Fighting Corruption in the South African Public Sector with Special Reference to Costs and Impact* (PhD thesis, UNISA 2005) pg 44
- ^{iv} J. Hyslop *Political Corruption: Before and after Apartheid* Journal of Southern African Studies, Vol. 31, No. 4, Fragile Stability: State and Society in Democratic South Africa (Dec., 2005), pp. 773-789
- ^v Hoodashtian, *What is Corruption: A Political and Philosophical Approach* Central Asian Journal of Management, Economics and Social Research, Issue 3, January 2002
- ^{vi} P De Vos, *Murder in the wild North West Constitutionally Speaking* Jul 25th, 2012 available at <http://constitutionallyspeaking.co.za/murder-in-the-wild-north-west/> Accessed: 2012/07/24
- ^{vii} L Louw "The Rule of Law under siege in South Africa" (2005) Free Market Foundation <http://www.freemarketfoundation.com/ShowArticle.asp?ArticleType=Publication&ArticleId=1103> (accessed 25 July 2012).
- ^{viii} William Gumede *Tackling Corruption*, in Making South Africa Work: Rules of the Game, publication: Focus. The Journal of the Helne Suzman Foundation. Issue 60: Jan 2011 pg 16
- ^{ix} William Gumede *Tackling Corruption*, in Making South Africa Work: Rules of the Game, publication: Focus. The Journal of the Helne Suzman Foundation. Issue 60: Jan 2011 pg18
- ^x F. Fanon *The Wretched of the Earth* 2001: 5
- ^{xi} William Gumede *Tackling Corruption*, in Making South Africa Work: Rules of the Game, publication: Focus. The Journal of the Helne Suzman Foundation. Issue 60: Jan 2011 pg18
- ^{xii} *Ibid* pg 17
- ^{xiii} *Power corrupts, but it corrupts only those who think they deserve it* in the Economist Jan 21st 2010 Available at <http://www.economist.com/node/15328544> Accessed: 2012/07/20
- ^{xiv} Met, T (2007) "Toward an African Moral Theory", *The Journal of Political Philosophy* 15:321-41 pg 349
- ^{xv} D.M Balia *Fighting Corruption in the South African Public Sector with Special Reference to Costs and Impact* (PhD thesis, UNISA 2005) pg 35
- ^{xvi} ^{xvi} P De Vos, *Murder in the wild North West*
- ^{xvii} *Ibid.*
- ^{xviii} Peter Ekeh *Colonialism and the Two Publics in Africa: A theoretical Statement* 1975 Cambridge University Press pg 108
- ^{xix} IM Rautenbach and EFJ Malherbe *Constitutional Law* (5th ed) 2009 LexisNexis: Durban
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- ^{xxi} CR Drielsma "Successful Anti Corruption Strategies Around the World" (2000) *A Report for Lok Satta* <http://www.fdrindia.org/publications/AntiCorruptionStartegies.pdf> at 15.
- ^{xxii} TK Man-wai "Formulating An Effective Anti-Corruption Strategy – The Experience of Hong Kong ICAC" http://www.unafei.or.jp/english/pdf/PDF_rms/no69/16_P196-201.pdf (accessed 25 July 2012) at 198.
- ^{xxiii} *Ibid* 198.
- ^{xxiv} Parliament of the Republic of South Africa (2007). Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions. A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa at 19.
- ^{xxv} *Ibid* 27.
- ^{xxvi} *Ibid* 21.
- ^{xxvii} Rule of Law Under Siege in SA?
- ^{xxviii} Rule of Law Under Siege in SA?
- ^{xxix} S J. Kpundeh, *Political Will In Fighting Corruption*, in Corruption And Integrity Improvement Initiatives In Developing Countries available at: <http://mirror.undp.org/magnet/Docs/efa/corruption/Chapter06.pdf> Accessed 2012/07/24 pg 92

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