

The Politics of Anti-Corruption Enforcement in South Africa

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Abstract

The criminalisation of corruption recognises that the misuse of official office for personal gain exacts a detrimental and distorting effect on a country's social and economic development. This is especially acute in countries undergoing rapid political system transitions. In an effort to combat corruption, formal state interventions have tended towards increasing monitoring and oversight of public institutions which in practice transposes strategic intent to fight corruption onto an increasingly stringent set of intra and inter-institutional measures. In South Africa, the evidence clearly shows that concrete and incremental steps have been introduced since the country's democratic transition to try to regulate malfeasance in the public sector through heightened monitoring, prevention, investigation and prosecution measures. This reflects a law enforcement/organisational control approach to combating corruption. Despite these measures, intra and inter-institutional analysis of anti-corruption enforcement indicates that the integrity of this approach, informed by principal-agent notions of accountability, can be compromised or sidelined by collective action efforts that can deflect, curb or undermine the force and effect of formal anti-corruption mechanisms. This paper employs the contrasting agency-collective action frameworks to illustrate the politics of South Africa's anti-corruption enforcement.

Key words: anti-corruption, anti-corruption South Africa, public sector corruption, corruption enforcement or monitoring, anti-corruption agencies

Introduction

South Africa's political transition to a non-racial democracy has been blemished by frequent incidents and allegations of government corruption, involving both elected officials and public servants. Although these incidents remain variable in their presence and scale across the country's state institutions, the consistency with which they appear seem to be slowly but assuredly eroding public confidence in entities that have had to fundamentally rebuild their image since the country's 1994 democratic transition. Despite an increasingly probative anti-corruption enforcement and sanctions regime, robust institutional responses appear to be hamstrung by intra and inter-institutional manoeuvring which deflects as well as subverts the integrity of efforts to control and regulate anti-corruption enforcement. I argue that weaknesses

in South Africa's anti-corruption enforcement can be explained through contrasting the assumptions of agency and collective action theories, and can specifically be attributed to collective action pressures.

Anti-corruption and government administration

The perennial problem of government corruption suggests that examples of improper, unethical and immoral conduct or behaviour by politicians and public servants is a constant feature and an intrinsic risk in the public sector. This is evident in the foundational literature in public administration, where classical notions of the structure and functioning of government associated with the writing of Woodrow Wilson (late nineteenth century) and Max Weber (early twentieth century) were strongly influenced by a need to insulate and regulate administrative work to prevent the corrupting influence of partisan politics; as well as abuse of public office by political leaders and officials for personal/private gain. As Gilman (1996: 46), an official with the US Office of Government Ethics glibly put it, 'corruption made bureaucracy necessary'. The refashioning of public administration also coincided with an increasing appreciation of the proper role of the state and its administration in democratic polities; requiring sensitivity to public opinion and subjection to public recourse and scrutiny. The generalised problem of corruption, rooted in classical notions of proper and ethical administrative structure and conduct based on impersonal legal frameworks continues to endure to tackle more specific and multifarious types of corrupt activities.

Anechiarico and Jacobs (1994) have usefully periodised anti-corruption enforcement measures by tracing these back to the classical roots of public administration. They collectively refer to enforcement as the 'ideology, laws, regulations, and administrative strategies and inter- and intra-organisational checks, balances, and institutions aimed at defining, identifying, preventing, and punishing official corruption' (Anechiarico, Jacobs 1994: 465). Of particular interest is the authors' identification of distinct yet interrelated periods of anti-corruption in the United States, from Wilson's time in the 1870s to the present. The first two periods were marked by reforms which, roughly between 1870 and 1930, sought to minimise the influence of partisan political influence/patronage in the appointment of officials (e.g. the Civil Service Act of 1883, or the Pendleton Act; Northcote/ Trevelyan report in the United Kingdom) as well as instilling professional norms of administrative conduct. More recent periods (1930 – present) have seen a shift to intra and extra-institutional reforms to achieve more effective control and monitoring of official conduct (initially inspired by scientific management thinking), followed by measures to enforce (through investigation and prosecution) more widespread and stringent legal instruments that target corruption. Elements of recent periods in American public administration, generally defined by Anechiarico and Jacobs as organisational control and law enforcement approaches, have been especially visible in the South African public sector since the country's 1994 democratic transition.

South Africa's anti-corruption enforcement framework

South Africa's anti-corruption framework can be characterised as a law enforcement/organisational control approach because the period during which its

political transition took place (mid 1990s) exposed the country to a potent mixture of domestic and global exigencies. These were informed by a need to attract large scale international investment to offset high inherited debt levels; to promote economic development in a context of high levels of inherited social inequalities and poverty; and to significantly restructure and transform historically discredited political and administration institutions. Moreover, it was also evident that South Africa's 1994 democratic transition was immediately confronted with the destabilising effects of corruption. This was exposed through the complex process of institutional restructuring and reform of personnel and financial management systems linked to a legacy of institutional fragmentation based on race. Lodge (2002: 407-408) and others (e.g. Picard 2005) have observed that South Africa's first democratic government had inherited an institutional legacy of corruption, noting in particular that by the 1980s there was 'plenty of evidence...to suggest that...political corruption...was quite common in certain government departments as well as in homeland administrations^b'. Van Vuuren's (2006: 85) account of corruption under apartheid concurred, concluding that conditions of secrecy, oppression and authoritarian rule 'created a climate in which corrupt activity was stimulated.'

South Africa's 1994 democratic transition bequeathed favourable conditions for the continuation of corrupt activities. Lodge (2002: 412-414) cites many examples of actual and alleged corruption in the ensuing years of African National Congress rule, including amongst political and administrative officials of South Africa's new provincial governments which were created by the amalgamation of defunct provincial and homeland institutions. Referring to many examples of corruption in the latter entities dating back to their creation in the late 1970s, Lodge (2002: 411) suggested that '[T]he incorporation into [9] regional administrations of homeland civil services may merely have transferred the bureaucratic location of corrupt behaviour and made regional governments vulnerable ...' His concerns were also reflected in the ensuing years of democratic rule, with a Presidential Review Commission (1998: 189) on South Africa's transition recommending that priority be given in the short to medium-term to 'reforming the fundamentals of finance administration ...' in the new provincial administrations. This included systems for financial and payroll controls, cash management, and asset and liability management given the risks these posed for corrupt activities.

In response to heightened domestic and international pressures to respond decisively to the threats posed by continued corruption, the Mandela presidency presided over the immediate introduction of monitoring, oversight and law-enforcement measures. A government White Paper on Reconstruction and Development (1994) explicitly noted that the government would act against corruption, singling out fraud in entitlement programmes under the state's social welfare system (Section 3.12.4). The document also explained that legislation was being prepared to introduce a Public Protector, '... to give the public recourse to deal with corruption and maladministration'. South Africa's Constitution (Number 108 of 1996) would subsequently create an office of the Public Protector as an independent ombudsman-like body. Finally, a Special Investigating Units and Special Tribunals Act (Number 74) was passed in 1996, mandating the President to establish structures to investigate and adjudicate civil cases involving serious malpractice or maladministration (including corruption) in state institutions. The Act, which enabled the ad hoc creation of 'special investigating units' later led to the creation of a

permanent entity known as the 'Heath Special Investigating Unit', after the Unit's first Head Judge Willem Heath.

In the space of over two years, South Africa had assigned ministerial responsibility to devise a government-wide strategy to address corruption; incorporated a code of ethical conduct within regulations governing employment conditions of public servants; and hosted high profile domestic and international conferences/summits on the issue. The 1999 Anti-corruption Summit was a turning point for taking stock of previous efforts to prevent and combat corruption, and for assessing the shape of future measures to strengthen these efforts. The inaugural National Anti-Corruption Summit was followed by a Second Summit in March, 2005, with a Third Summit taking place in August, 2008.

The momentum created between 1997 and 1999 was maintained with the launch of a National Anti-Corruption Forum in June 2001, and the adoption of a Public Service Anti-Corruption Strategy in January 2002 (UNODC, DPSA 2003). The PSACS contained several proposals which dovetailed with resolutions taken at the Summit three years earlier, and was joined in 2005/6 by a Local Government Anti-Corruption Strategy. These instruments referred to 'dimensions of corruption' described as the 'various forms in which corruption manifests itself in the Public Service and elsewhere ...' This included 'embezzlement' (theft of resources by persons entrusted with authority and control of resources); 'fraud', which relates to deceitful or dishonest actions by public officials which derives a personal and therefore undue benefit; and 'conflict of interest', which essentially relates to a public servant's public duties being employed to benefit him/her privately (PSACS 2002: 7-8). These activities have legal roots in other regulations stemming from South Africa's Public Finance Management Act (Number 1 of 1999) and its accompanying Regulations, which specifically cites the misuse of public funds through unauthorised, irregular-including with respect to tendering procedures, fruitless and wasteful expenditure, and the prevention of fraud (Government Gazette 2001a).

Statutory reforms to combat corruption have been spearheaded by the passage of a Prevention and Combating of Corrupt Activities Act (Number 12 of 2004), which replaced the apartheid-period Corruption Act (Number 94 of 1992). The former outlined a relatively extensive legal definition of corruption applying to both the public and private sectors. It also distinguished "general" from more activity-specific instances where corruption was alleged to have taken place, including through contractual as well as procurement/tendering instruments. Anti-corruption legislation has also been accompanied by regulations governing the organisation and functioning of South Africa's public service, which includes anti-corruption provisions. Regulations to the Public Service Act, published in 1997 (Government Gazette) have included a Code of Conduct which, reminiscent of Potts' (1998) description, stipulate conduct that officials are barred from engaging in (e.g. relating to corruption and misuse of official office for private ends), as well encouraging more acceptable behaviour in the performance of their duties. This latter set is consistent with conduct which Patrick has (1999: 132) described as 'guideline[s] for ethical conduct' to promote 'professionalism'. The Regulations were later amended (Government Gazette: 2001b) to include provisions requiring the disclosure of financial interests by specific categories of public servants (heads of department and senior managers), and rules governing the acceptance of gifts.

Other measures to combat corruption have included the expansion of earlier attempts in the late 1990s to co-ordinate anti-corruption efforts at a Cabinet level, by

reconstituting a larger inter-ministerial Anti-corruption Co-ordinating Committee (ACCC). The ACCC, intended to be the driver of the PSACS, constitutes twenty national departments and agencies as well as representatives of all nine provincial governments (DPSA, Not dated). Its primary objective is to strengthen organisational control to prevent and manage corruption by enhancing co-ordination and information sharing amongst government departments. Finally, the publication of 'minimum anti-corruption capacity requirements' (MACC) for government institutions in 2006 again displayed an emphasis on intra-organisational control through strengthening structural and human resource arrangements to combat corruption. The MACC requirements include recommendations on how institutions should develop anti-corruption strategies, and what they should specifically do to prevent, detect, investigate, and resolve cases of corruption (DPSA 2006).

Theoretical outline

Critiquing South Africa's law and order/organisational control approach to anti-corruption enforcement was guided by aspects of regulatory theory. Batory's (2010) comparative analysis of specialist anti-corruption agencies in Eastern Europe was for instance premised on intra-state regulation in an effort to probe the underlying factors attending the creation, configuration, as well as political risks and fortunes facing these bodies. Despite a focus on specialist anti-corruption institutions, her more general point of departure acknowledged that the anti-corruption function within government was essentially an act of regulation, although distinguishable from other regulatory bodies charged with inspecting the economic activities of the private sector or state intervention in the economy (Batory 2010: 2; 8) This was further framed and critiqued in a principal-agent accountability framework by distinguishing what Batory (2010: 8) described as typically involving '... one bureaucracy, in possession of an official mandate, overseeing and seeking to shape the activities of another and organisational separation between regulator and regulatee ...'

Relating the regulatory authority assumed by specialist anti-corruption entities to a principal-agent arrangement was given wider critical rendition by Persson, Rothstein and Teorell (2010). The authors' aim was to try to explain the variable success of anti-corruption enforcement globally; and specifically poor political enabling environments and will in regions such as Africa in which enforcement measures gain little traction. They do so by arguing that this could be explained by defective assumptions attending anti-corruption enforcement built upon a principle-agent model in which regulatory accountability is clearly distinguishable and enforced through various 'control instruments' to minimise the discretionary space of agents performing delegated tasks, and in particular the risk that the latter will engage in corrupt behaviour (Persson, Rothstein and Teorell 2010: 4-5). This arrangement of actors refers both within and without public institutions, which in the latter case encapsulates Batory's description of specialist anti-corruption entities delegated the agency task of anti-corruption regulation by political principals. The authors' primary criticism of this model relates to the integrity of its accountability relationship which distinguishes the motives of a principal willing to enforce anti-corruption control measures, with that of an agent who is inclined to engage in venality. Indeed the very existence of organisational control and law enforcement measures is premised on such a distinction holding true.

In critiquing the efficacy of anti-corruption control measures, Persson, Rothstein and Teorell (2010: 5) contest its most basic assumption: that the problem of corruption lies exclusively with the agent, and instead, building on Ostrom's (1998) earlier work, argue that weak enforcement can be more realistically ascribed to a problem of 'collective action', in which 'all actors – i.e. rulers, bureaucrats and citizens alike – are maximizers of their own self-interest'. Recalling the notion of bounded rationality, they argue that the rational behaviour of these actors is collectively regulated and constrained, subject to 'interactive' and 'reciprocal' exchanges and shared expectations (*ibid*). Moreover, these exchanges are said to generate incentives which essentially act as behavioural stimuli influencing the willingness of actors to act in accordance with formal enforcement measures, or not as the case may be, or in the extreme to 'play along with the corrupt game'. The authors encapsulate this in the following question: what are the costs of challenging the status quo? (Persson, Rothstein, Teorell 2010: 6; 12; 13). This logic clearly poses a substantive problem for the integrity of an accountability relationship, and an enforcement regime grafted onto this, which pits one set of actors against the other through distinguishing behavioural motives. To what extent can this collective action problem explain weaknesses in South Africa's anti-corruption enforcement measures?

The politics of anti-corruption regulation

A key concern in South Africa's efforts to combat corruption has been the effectiveness of regulatory instruments intended to minimise and neutralise conflicts of interest. Whilst one aspect of this concern relates to the challenge of obtaining full compliance by senior public servants with instruments requiring the disclosure of personal financial interests, more serious questions linger about whether the application of such instruments have resulted in effective institutional mitigation of corruption. For instance, although financial disclosure requirements apply only to heads of departments and senior managers, with the latter constituting less than 1% of total public service employment in 2006ⁱⁱ, the Public Service Commission (2007: 24) has specifically noted the relatively larger number of financial misconduct cases recorded at levels below senior management. Acknowledging that such cases typically involved employees entrusted with the handling of monies and the procurement of goods, which has become more widely stigmatised in South Africa through the notion of 'tenderpreneurship', or abuse of contracting procedures, a number of reasons were mooted to explain this occurrence. Amongst these reasons was 'potential influence from supervisor/senior official' and 'some employees believ[ing] that they can get away with it'. Such reasons suggest, along with other explanations that could be more clearly ascribed to weaknesses in a principal-agent frameworkⁱⁱⁱ, that there is either a threat or risk of collective action pressures and incentives being applied.

Although the Second National Anti-Corruption Summit (2005) resolved to extend financial disclosure regulations to more categories of officials (i.e. those below senior management with procurement functions), a reform which has since been included in a revised conflict of interest framework tabled in Cabinet in 2009^{iv}, merely extending the compliance umbrella would commensurately have to ensure that existing instruments designed to police conflict of interest amongst senior officials are effective. This relates to findings by the PSC (2009: vii-viii, 27) showing an increase

in the percentage of senior managers found guilty of financial misconduct between 2006/7 to 2007/8, where this was 'substantially above the percentage^v of SMS members employed ...' Despite this, the same report expressed seemingly contradictory explanations concerning the reasons behind the misconduct. On the one hand, the PSC suggested that this 'gives the impression that SMS members show a greater propensity to commit financial misconduct'; whilst on the other hand, viewing this as being 'in line with [other] research by the PSC which shows that 58% of SMS members have identified the need for training in Financial Management as a Core Management Criteria,' (PSC 2009: viii; 45). This confusingly enjoins two distinct sets of behavioural motives: a will to commit financial misconduct which, if partially linked to financial misconduct amongst lower level officials (above), would signal a collective action motive; and a case of negligence due to an absence of sufficient skills to effectively enforce financial management, which exposes a principal-agent weakness that could be exploited through information asymmetries favouring the latter.

Whilst it is not possible to explain this confusion based on the available data, there are other reasons to pursue a collective action explanation to critique the effectiveness of South Africa's conflict of interest framework. During Parliamentary hearings with the country's Auditor-General, the topic of financial interest declaration as well as the right to undertake remunerative work outside the public service was discussed. A transcript of the meeting indicated that definitional problems pertaining to the 'legal definition of remuneration', in addition to financial disclosure forms not requiring or allowing for 'full disclosure of all interests' was cited for adversely affecting levels of compliance.^{vi} (PMG 2009a) This clearly exposes an agency problem. The transcript elsewhere revealed however that cases of non-disclosure and outright refusal by senior managers to disclose were eliciting no institutional sanction, including from political principals, which does reflect collective action motives that in this instance undermines the integrity of compliance.

The politics of anti-corruption reporting and disclosure

The passage of the *Protected Disclosures Act* (Number 26 of 2000) was an important legal step towards fostering a more conducive environment for reporting corruption in private and public sector institutions in South Africa. The act of anti-corruption disclosure also assumes a kind of inversion of the classic principal-agent relationship within an institutional setting, in which the consequences of disclosure from below to those higher-up in the hierarchy, may implicate all actors regardless of the formal roles they are meant to adopt in relation to each other. This alters the behavioural dividing line between principal enforcers of anti-corruption and agent transgressors, which potentially exposes this kind of enforcement measure to collective action problems.

Despite the passage of the Act, and notwithstanding the legal protection it was meant to give whistle-blowers from 'occupational detriment', the impetus to report on corruption has been frustrated by an unwillingness or reluctance amongst public servants to make disclosures. A report by the Public Service Commission (2006: 2) for instance revealed that in response to the question 'Most public servants will report fraud, corruption, nepotism or any other offence to the appropriate authorities', only a marginal difference between those who 'agreed' (25%) and those who 'disagreed' (26%) was found, which in any event counted slightly more

respondents who disagreed (PSC 2006: 23). A more revealing observation was contained in a PSC (2003: 4-5) report on whistle-blowing in the public service. The Commission noted that a series of country-wide workshops had made observations such as the following:

When workshop participants were asked to give practical examples of white-collar crime in the public service they readily gave examples of fraud and corruption occurring in the workplace. When asked however, whether they would 'blow the whistle' on such criminal acts, baring one or two employees who had done so in the past to their detriment, nobody was prepared to

The report added that officials cited fear of victimisation for blowing the whistle as a reason for their inaction. This included harassment, dismissal and other forms of what would legally constitute an unfair labour practice. Of particular interest was not just the minority of respondents who were prepared to report on corrupt activities, but that the few who had previously done so had apparently suffered some form of harm. The apparent consequences of reporting as well as a reluctance to report was observed elsewhere in the PSC's analysis relating to the creation of a whistle-blowing mechanism. The Commission observed that the 'main concern [of employees] with such a mechanism was: firstly its confidentiality, and secondly, their protection' (PSC 2003: 1). Despite recent amendments which explicitly cite 'duty of confidentiality of the employer' and 'the identity of the person to whom disclosure is made' as factors to be taken into account by would-be whistleblowers (RSA 2011d), lingering concerns about the potentially harmful consequences encountered in the process of disclosing information about corruption would appear to be an influential predictor of the reporting behaviour of public servants.

These observations reveal the institutional sensitivity around disclosure, where it could be surmised that the PDA has, in part, not been communicated to public servants in a manner that is consistent with its aim to foster a more conducive institutional environment for disclosure. This in fact recalls resolutions taken at previous anti-corruption summits, which included the need to promote awareness about and encourage compliance with corruption disclosure. It could also be argued however that the protections stipulated in the PDA might be deflected by institutional arrangements that are un-conducive and even hostile to disclosure, despite its creation in law and Code of Conduct regulations (C.4.10) elsewhere compelling public servants to report corruption (RSA 2010). This was evident in a PSC (2001a) report which expressed concern that the structure of anti-corruption enforcement within departments may not be conducive for encouraging disclosure, observing that '[t]hese units are often managed by Directors who may in certain instances be required to investigate their seniors.' (PSC 2001a: 24). A related and potentially more serious concern was expressed by the then Chairperson of the Public Service Commission:

The ongoing involvement of senior government officials in incidents of mismanagement and unethical behaviour remains cause for concern. These senior officials continue to ignore, or fail to adhere to rules and regulations. They also abuse the authority vested in them by intimidating and threatening junior officials when the latter wish to report irregularities (Sangweni 2005)

These observations indicate that the behavioural dividing line between principal enforcers and agent transgressors can be altered, and indeed, enabled by a subversion of classic administrative hierarchical lines of accountability, be employed to stifle anti-corruption reporting and disclosure and subject this to collective incentives for inaction.

The institutional politics of anti-corruption enforcement

Arguably no aspect of South Africa's anti-corruption efforts has coveted as much political controversy than the country's specialised institutional responses. This stems from highly critical depictions of intra-party collective action pressures being brought to bear on a multi-agency investigation into a major armaments procurement contract, popularly known as the 'arms deal' (Taljaard 2012; Feinstein 2008; Holden and Van Vuuren 2011); and the repercussions surrounding the closure of an elite organised crime fighting agency known as the Directorate of Special Operations, or 'Scorpions'. These events have spawned a sustained debate about the future of South Africa's anti-corruption institutional architecture, which contrasts the efficacy of multiple versus single agency responses. This was displayed in the divergent recommendations made by a government ministry responsible for long-term national planning: the National Planning Commission (NPC), and a citizens' lobby group concerned with defending South Africa's Constitution (CASAC). In its eagerly anticipated National Development Plan, the NPC (RSA 2011b) adopted a conservative approach by rejecting a single agency option in favour of strengthening the country's existing multi-agency anti-corruption framework. In contrast, the Council for the Advancement of the South African Constitution (2011: 12, 13) argued that South Africa's existing multi-agency anti-corruption system risked both a 'piecemeal' approach to combating corruption as well as the potential risk of overlapping mandates undermining effective co-ordination. It more boldly advocated for the creation of a new, distinct and functionally-strong anti-corruption agency to supplement the country's existing institutions.

The contrasting institutional proposals advocated by the NPC and the CASAC evoke a familiar debate in the anti-corruption literature concerning institutional form and configuration. Institutional mechanisms to combat corruption have usually been framed in terms of specialised agency responses, referring to the activities of distinct bodies charged with a mixture of investigating, preventing, regulating, monitoring and prosecuting corruption in the public and private sectors. A central question attending the specialised agency model concerns whether the existence of multiple bodies, each with some degree of responsibility for anti-corruption, have collectively improved or hindered the ability of the state to effectively police corruption within its ranks. Conversely, has consolidating a variety of anti-corruption functions into a single powerful agency also improved or undermined the state's ability to enforce anti-corruption?

The anti-corruption agency^{vii} literature has critiqued this distinction as well as the complexity of the single powerful agency form (Heilbrunn 2004; Meagher 2005; OECD 2007). There is a consensus that distinguishing a single versus multiple institutional framework is something of a false dichotomy, reflecting a functional-power description of institutional efforts to combat corruption rather than an existential condition. In short, the existence of a single powerful agency does not preclude the continued functioning of other specialised bodies whose mandates

require their involvement in probing corruption-related offences. Meagher's (2005: 72, 81) description of the single agency model resembles something akin to an institutional *primus inter pares* in the anti-corruption field, or a distinct entity with a core responsibility for anti-corruption in multiple areas that primarily includes investigations but may also cover a mixture of prevention, awareness, monitoring, and limited prosecution. The OECD's (2007) research on specialised anti-corruption entities concurs, emphasising the 'multi-purpose' nature of a single agency approach in which an institution's focus on anti-corruption is distinguished by activity type: usually investigation, prevention, education. Moreover, it describes this as a 'multi-purpose agency with law enforcement powers' model, in which prosecutorial functions are separated to 'preserve the checks and balances within the system ...' (OECD 2007: 22).

The existential distinction between multiple and single agency forms also gives way to the vexing relationship between institutional accountability and independence, pertaining to the single agency form in particular. In Meagher's (2005) study most of the single agency varieties appeared to function within the executive branch of government. Indeed, Meagher (2005: 94; see also Heilbrunn 2004: 3) notes that the celebrated progenitors of the single agency model, Hong Kong's ICAC and Singapore's CPIB, 'lack formal independence' through being 'responsible to their respective chiefs of state'. Moreover, Heilbrunn (2004: 15) has observed that 'in some circumstances, a commission linked to the executive branch is used to settle old scores with political rivals'. This would clearly impugn the independence of such entities. Taking into account such risks, other single agency models may be worth considering, such as in Uganda and in the Australian state of New South Wales, where these agencies are directly accountable to legislative authorities and whose powers are, in the Ugandan case, constitutionally vested^{viii} But direct legislative branch accountability also poses its own challenges, including sufficient oversight capacity within parliaments; the critical issue of parliamentary insulation from executive interference; and the perverse risk that parliamentary-controlled agencies may actually feed an adversarial relationship with other anti-corruption jurisdictional agencies accounting directly to executive authorities, which could potentially undermine the authority of the agency (Heilbrunn 2004: 11-12; 15). There is also the matter of jurisdictional breadth to consider, or the scope of an agency's investigating powers based on the type of offence and the sector(s) involved. Meagher's (2005: 90-92) research associated many single anti-corruption agencies operating under direct executive oversight as having comprehensive or broad mandates, which does prompt the question of how influential operating in the executive space may be to the jurisdictional power conferred onto agencies.

South Africa's specialist anti-corruption institutional framework

The single versus multiple agency approach to anti-corruption is an old debate in South Africa, which can be traced to Camerer's (1999) assessment of whether a single public service anti-corruption agency was preferable to various entities performing distinct roles in this regard. She firstly observed that there were at least ten agencies in South Africa which shared responsibility for anti-corruption. Two years later, in its own evaluation of anti-corruption agencies, the Public Service Commission (2001b: 79-80) also recognised the existence of at least ten agencies with a role in anti-corruption. These are listed in table 1.

Table 1: Anti-corruption agencies in South Africa

Agency	Mandate that covers anti-corruption
Auditor-General	Referred to as 'pro-active intervention', auditing of departmental financial management practices
Public Protector	Investigation of non-criminal cases involving ethical/code of conduct transgressions in the public service
Public Service Commission	Oversight, monitoring, and research on financial misconduct including some investigative work on relevant cases
Independent Complaints Directorate	Investigate cases of police misconduct, including corruption, where cases are 'fairly simple, non-complex and non-resource demanding...'
South African Police Service Commercial Branch	Investigate criminal offences including corruption
SAPS Anti-corruption Unit (does not exist in its present form)	Investigate cases of alleged corruption by Police members
National Prosecuting Authority (NPA)	Prosecute criminal cases involving corruption
Directorate of Special Operations (operates under the NPA)*	Investigate high profile and complex criminal cases of an organised nature, including corruption
Asset Forfeiture Unit (operates under the NPA)	Investigate cases and seize or freeze assets
Special Investigating Unit	Forensic investigation of corruption and recovery of state assets

*Has since been dissolved

Earlier opinions concerning the existence of various agencies sharing responsibility for anti-corruption subscribed to the view that each entity had a role to play in a collaborative effort to reduce incidences of corruption in the public and private sectors. Camerer (1999) argued that the idea of 'rationalising existing anti-corruption agencies to supposedly improve their effectiveness and speed up prosecutions, has to be challenged.' She instead called for improved co-ordination between agencies, where elsewhere in her assessment she cited the following description drawn by the Heath Special Investigating Unit:

We are dealing with a multi-headed dragon and various different kinds of swords are required to attack the different types of heads of the dragon. The Unit is therefore of the view that the various organisations all have a role to play in the fight against corruption and maladministration.

Taking the Heath Unit's metaphor to its logical conclusion would mean that corruption could exploit the complex institutional environment of the public sector by taking various forms or shapes, spawning the not unreasonable contention that a

mixture of entities may be needed with the ability to regulate, monitor, evaluate as well as criminally investigate and prosecute the activities of state institutions. Having said this, in its own early evaluation of South Africa's various anti-corruption agencies, the PSC (2001b:104) did not rule out the future possibility of a 'single independent anti-corruption agency which deals with all aspects of corruption'. The Commission was however guided by the proviso which, perhaps in keeping with the pragmatic tone of the multi-headed dragon metaphor, believed this could best emerge through an evolutionary process subject to improved co-ordination and a more 'holistic' approach amongst the existing entities. This reasoning is evident in other analyses, including a subsequent United Nations Office on Drugs and Crime/Department of Public Service and Administration Country Corruption Assessment Report (2003: 60-61), which noted that the 'issue of a single anti-corruption agency needs to be put in perspective', where 'fragmentation, insufficient coordination, poor delineation of responsibility and assimilation of corruption work impacts on the resourcing and optimal functioning of these agencies ...'. Despite these functional attempts to debate the institutional configuration of anti-corruption enforcement, the experience of the arms deal and DSO illustrates the vulnerability of various institutional forms to collective political forces in South Africa.

The 'arms deal': political pressure and inter-branch institutional conflict

The South African government's strategic defence procurement programme, otherwise known as the 'arms deal', has been a lightning rod for anti-corruption campaigners in the country. It has been the subject of many books, including insider accounts of the institutional politics that characterised efforts to investigate alleged corruption involving elected officials and bureaucrats in the multi-billion dollar programme. This was most notably expressed in the jurisdictional wrangling and skirmishes involving a variety of institutions in the executive and legislative spheres (i.e. Parliament's Standing Committee on Public Accounts), and amongst constitutionally-independent agencies with a role in investigating corruption (inc. Auditor-General, National Prosecuting Authority, Public Protector). The source of the controversy surrounds the content and production of a 'Joint Investigation Report' (JIR) authored by the three aforementioned agencies in which it was claimed interference and non-co-operation by executive^{ix} institutions, which was most notably enabled by an orchestrated attempt within the governing ANC to forestall the momentum of the investigation, which effectively reduced the depth of the probe and force of its findings and with it the independent investigatory standing of the agencies concerned (Feinstein 2007; Holden, Van Vuuren 2011; Taljaard 2012). The depiction of inter-branch institutional conflict outlined in insider accounts was strongly characterised by the governing ANC in both the executive and legislative branches closing ranks around the scope and depth of the JIR probe, reflecting collective action pressures being brought to bear on South Africa's multi-agency framework.

The arms deal generally brings to mind Heilbrunn's (2004: 10) reference to a 'disarticulation among branches of state', as being one of the impediments of trying to effectively replicate a single powerful agency model in some countries. Potentially more telling however is Heilbrunn's (2004: 14) concern with the intentions of political leaders, arguing that '[o]ne method to slow reform is an anti-corruption commission that communicates a willingness to fight venality while postponing difficult acts'. The word 'commission' is used in the text of Heilbrunn's article to denote agencies or

institutions, rather than ad hoc committees mandated with a specific task. It might therefore be reasonable to speculate whether South African President Jacob Zuma's announcement in 2011 of a commission of inquiry into corruption allegations in the arms deal can be regarded as postponing the difficult act of pursuing institutional reforms, namely the creation of an independent anti-corruption institution (RSA 2011c). Indeed the case of the Scorpions and the Hawks would also suggest that intra-party collective action incentives lay at the root of this decision.

Executive agency wars: the dissolution of the 'Scorpions' and the creation of the 'Hawks'

The most significant example of intra-branch institutional conflict precipitated by intra-party collective action tactics, and a potential harbinger of the state's attitude towards a strong single agency response, is the controversial dissolution of the Directorate of Special Operations (2001-2009) which was popularly known as the 'Scorpions'. The Scorpions were arguably the closest South Africa has come to instituting an anti-corruption entity modelled on the single powerful agency model, with one notable distinction: it was invested with both investigative and prosecutorial functions and housed within the country's top prosecuting institution: the National Prosecuting Authority. As pointed out earlier, prosecutorial functions are not typical of the single agency functional mix (Meagher 2005: 81). This combination of functions contributed, in part, to the motivation employed by the government to restructure the DSO which effectively led to its dissolution in 2009. But the story begins in 2005, when then President Thabo Mbeki convened the Khampepe Commission (RSA 2006) to address concerns relating to the legal role, institutional placement and jurisdictional mandate (e.g. investigating high priority organised crimes, including corruption) of the DSO amongst a collection of agencies equipped with investigative and intelligence gathering functions amongst South Africa's criminal justice agencies, and specifically the South African Police Service. It should be added that the technical criteria marking the Commission's terms of reference were also politically tinged by accusations that the DSO was abusing its investigative power, which in particular pertained to cases involving ANC politicians. In this regard, the Commission's findings did not address the effectiveness of anti-corruption institutions *per se*, but reflected the more politically sensitive question of who polices anti-corruption, and specifically which executive institutions assumed responsibility for what aspects of anti-corruption enforcement. As with the inter-branch conflict amongst institutions in the arms deal, the Commission was to emphasise jurisdictional conflict which in this instance concerned the *de facto* joint or shared role in criminal investigations between the South African Police Service, which functioned under the political oversight of the Minister for Safety and Security, and the DSO whose political oversight is invested in the Minister of Justice and Constitutional Development.

The Commission (RSA 2006: 10) was careful to point out that this joint mandate was not unconstitutional or legally invalid, but that it effectively fell prey to the familiar challenge of 'wicked problems', or the jurisdictional conflict that often arose when multiple institutions were charged with executing a joint or shared mandate. Clearly the sensitivities around a shared mandate to investigate organised crime and corruption, especially where this was alleged to involve high profile persons which then included incumbent President Jacob Zuma, created an

inordinately tense situation. Whilst upholding as sound the initial arguments which brought the DSO into existence, as well as preserving its direct line of accountability to the Ministry of Justice^x, the Commission (RSA 2006: 11) invoked South Africa's constitutional principle of 'co-operative governance' by stressing the failure of joint ministerial and administrative mechanisms to consult over and diffuse potential operational conflicts. More significantly though, and through a recommendation that would portend the subsequent emasculation of the DSO as it had previously functioned, the Commission advised that the law enforcement or investigative function of the DSO fall under the direct oversight of the Minister for Safety and Security. This would have clear institutional ramifications in rendering the DSO's law enforcement functions subject to the oversight of the SAPS (RSA 2009).

Backed by this latter recommendation, the governing African National Congress presided over by a newly elected executive led by Mr. Zuma, resolved at its 52nd National Conference in December 2007 to effectively remove the policing/investigative functions of the DSO, as it had then operated, by transferring these to the SAPS. The party offered in defence of its position the need to avoid functional/jurisdictional conflict which had led to competing mandates or 'turf wars'^{xi} between the NPA and the SAPS (ANC 2008b). The ANC argued that its decision would institutionally harmonise the country's executive approach to crime prevention by 'strengthen[ing] the fight against crime by ensuring the integration of all policing functions under a single command structure.' (ANC 2008a) This decision invited widespread public criticism claiming that the DSO was both an effective anti-corruption body, and that a newly elected ANC leadership was primarily motivated by a desire to protect senior ruling party politicians from being investigated for corruption. This argument was subsequently fuelled by the ANC's removal of Thabo Mbeki as state president in September 2008, precipitated by a High Court judgement alleging that the NPA and within it the DSO unfairly pursued a prosecution of Mr. Zuma; and that this was subject to undue executive interaction and interference, rendering Mr. Mbeki's position and standing within the ANC untenable (RSA 2008). Others argued that splitting the investigatory and prosecutorial powers of the DSO, which was initially regarded as increasing the agency's capacity to pursue convictions, would 'not bode well for the fight against organised crime in South Africa' (ISS 2008).

The ANC's resolution resulted in amendments to the enabling legislation governing both the SAPS and the NPA, which came into effect in 2009. This dissolved the DSO as it had heretofore functioned and transferred its legal power to authorise investigations into high priority crimes to the SAPS. In turn, a new Directorate for Priority Crime Investigation (DPCI), popularly known as the 'Hawks' was created within the SAPS, to assume a more expansive investigative capacity. The widespread public discontent with the dissolution of the DSO resulted in a legal challenge brought against the legislative amendments by a private citizen, Hugh Glenister, which reached South Africa's Constitutional Court on appeal in 2010. In a split decision the Constitutional Court (RSA 2011a) decided in favour of Mr. Glenister's argument that the legislative effect of the DSO's dissolution and the DPCI's creation did not render the latter sufficiently 'independent' as an anti-corruption agency. Most significant about this finding was that what began as a case of jurisdictional conflict in the Khamepepe Commission had widened into a broader critique of the failure, in the Court's opinion, to shield specialised anti-corruption institutions within the executive from undue political influence and interference;

claims that were ironically levelled at both the DSO in the past and now at the DPCI! The text of the Court's decision therefore rekindled debate about the political vulnerability of South Africa's specialised institutional approach to anti-corruption enforcement. This however differed from the earlier intra-party collective action pressures exerted on the JIR probe, which induced jurisdictional conflict between executive, legislative and constitutional institutions. This time intra-party collective action incentives were dividing executive institutions themselves, within the cluster of criminal justice agencies.

Clearly the issue of independence still looms large in this institutional equation, which gave way to divergent views from the Justices of the Court presiding over the matter. In his minority decision, Justice CJ Ngcobo rejected the assertion of Mr. Glenister and an amicus curia that the state had a duty to create an independent anti-corruption entity^{xii}, which was partly motivated by the argument that international commitments did not bind the state to a 'particular form' of independence free from both the particularities attending corruption and the politico-legal framework across various countries. Having said this, Justice Ngcobo ultimately found that the legislative amendments which, procedurally, reconfigured investigations functions and powers between the NPA and the SAPS, and which institutionally resulted in the dissolution of the DSO and the creation of the DPCI, were sufficient to shield the latter from 'undue political influence' (in terms of its structural and operational configuration and autonomy), which he considered a critical element in determining the independence of an anti-corruption unit.

Justice Ngcobo's finding also raised the question, and more precisely a distinction, relating to whether the DSO and DPCI effectively limits the definition and debate on the ideal conception of an independent anti-corruption entity as outlined in international literature and multi-lateral agreements. In other words, are these entities to be understood as specialist criminal investigations units which include corruption as one of several types of high priority crime (e.g. organised, commercial)^{xiii} and which, in this instance, may be distinguished from the more popular distinct multi-purpose single agencies with limited prosecutorial powers? This distinction would evidently have some bearing on the question of independence, according to Justice Ngcobo:

It is therefore permissible to locate anti-corruption agencies within existing structures such as the NPA and the SAPS. However, the independence of the law enforcement bodies that are institutionally placed within existing structures in the form of specialised departments or units requires special attention. The centralised and the hierarchical nature of their structures and the fact that they report at the final level to a Cabinet minister, as in the case of the police and the NPA, presents a risk of interference.

In this regard, do the DSO and DPCI in particular preclude the creation of other entities which might be equipped with a more focused mandate and whose institutional location would fall outside existing executive structures, to increase the level of operational autonomy? This would appear crucial to the very question of 'independence' in the DPCI case, given the extensive space that the judgement accords to unpacking the explicit and implicit requirements attending the independence of anti-corruption entities; and ultimately to the significance of Justice DCJ Moseneke and Justice J Cameron's divergent and majority opinion that South

Africa is both internationally bound to create an independent anti-corruption structure and that the enabling legislation that created the DPCI does not sufficiently provide for this independence. Indeed, Justice Ngcobo in particular recognised that '[i]t may well be that another structure could have been established' (RSA 2011a: 76). This possibility was given further attention by Justices Moseneke and Cameron by citing the National Directorate of Public Prosecutions (under which the DSO functioned) as well as South Africa's Chapter 9 constitutional bodies as representing, in terms of institutional form, greater degrees of independence (RSA 2011a: 110). One should however revert back to the experience of the arms deal to critically assess the *de facto* functional autonomy of bodies such as these, which despite their formal operational independence and arms-length relationship to the executive, cannot otherwise shield them from political pressures. More revealing still, in critiquing the level of political oversight applied to the DPCI, is that both Justices explicitly argue that the nature of the DPCI's anti-corruption mandate does not in itself, regardless of legislative remedies, resolve the bigger question of an ideal independent anti-corruption unit:

We point out in this regard that the DPCI is not, in itself, a dedicated anti-corruption entity. It is in express terms a directorate for the investigation of – “priority offences”. What those crimes might be depends on the opinion of the head of the Directorate as to national priority offences-and this in turn subject to the Ministerial Committee's policy guidelines.

It could be concluded that the effect of intra-party collective action pressures brought to bear on specialist agency responses to enforce anti-corruption, which precipitated jurisdictional conflicts both across branches of government (arms deal & JIR) and within the executive itself, have and continue to impede South Africa's institutional progress in this area. Meagher (2005: 88) tellingly^{xiv} links agency establishment to capturing the 'constitutional moment', occasioned by major scandals or crises^{xv} and exemplified by a coherent political stance on an institutional strategy. It could be argued that the arms deal, which unquestionably represented South Africa's constitutional moment, should have induced this level of institutional soul searching instead of prompting the more limited commitment to convene an ad hoc commission to investigate allegations of corruption (RSA 2011c). Furthermore, despite the plausible functional argument advanced by the ANC which resulted in the dissolution of the DSO and the creation of the DPCI, and regardless of current efforts to remedy the legal dispute concerning the latter's independence, it could also be argued that the creation of the DPCI falls short of the constitutional moment hurdle by amounting to a reactive response to the dissolution of the DSO. This also encapsulates aspects of the constitutional court judgement which specifically question whether the DPCI should be regarded as a dedicated anti-corruption entity, a question which sits uncomfortably within a wider set of concerns about whether such an entity should, in any event, be located within existing law enforcement structures. Indeed, the international literature on single agency options appears to eschew such an arrangement, with Quah (1999: 86), drawing on anti-corruption agency responses from Asian countries arguing that such bodies should be 'removed from police control', citing all three patterns of agency model: countries without an independent agency, countries that employ several or multiple agencies, and those with an independent anti-corruption agency (e.g. Hong Kong, Singapore).

How might the influence of party politically-motivated collective action incentives foretell future scenarios for specialist anti-corruption institutions in South Africa? Revisiting Batory's (2010: 9) institutional analysis may be instructive, and specifically her caution that the creation of specialist anti-corruption agencies in such climates can be motivated, whilst also being functionally impaired, by the logic of 'symbolic action'; or the need to be seen to be combating corruption than actually combating it. She interestingly grounds this in the predominance of collective action thinking over agency considerations, where the likelihood of such agencies having to 'regulate their own principals' is said to be pitted against 'particularly strong incentive[s]' acting upon politicians and political parties to keep a short leash on the level of authority ceded to such entities. Elsewhere, Batory (2010: 2) describes this as the unenviable task of agencies performing, at once, the role of regulator and regulatee, which places them in a potentially compromising position in relation to the political parties calling for their creation. The implication of this is that there is little chance that legislative amendments to the DPCI will result either in the kind of functionally robust and autonomous anti-corruption agency envisioned in the international literature, or indeed satisfy the broader challenge of balancing independence with accountability. More significant is that the experiences of the arms deal and the DSO/DPCI transition acutely illustrates the inhospitable institutional environments, be it in the legislative, executive or constitutional spaces, in which specialised anti-corruption entities have functioned in South Africa.

Conclusion

This paper has argued that despite a demonstrable record of incremental and progressive measures to combat corruption in South Africa, defined by a law and order/organisational control approach, the institutional environment that shapes and gives effect to these measures can either be hostile to or disempowering of their effectiveness. Evidence from within state institutions as well as across these institutions, in the form of specialised anti-corruption bodies, has illustrated the susceptibility of anti-corruption measures framed along principal-agent lines of accountability to collective action motives, pressures and incentives. The nature of the collective action pressures observed within institutions fuelled motives to engage in financial misconduct, as well as the protections and admonitions that can sustain these acts. These pressures were also evident around reporting and disclosure, in which conventional principal-agent lines of accountability can be subverted in order to stifle and render un-conducive the institutional climate and incentives for reporting. Finally, at an inter-institutional level, more overt displays of intra-party political motives were shown to have thwarted efforts to both institutionalise robust and specialised anti-corruption capacity within the state, as well as undermine the effectiveness of South Africa's existing multi-agency framework.

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ⁱ The 'homelands' were distinct political territories located outside of South Africa to house the country's black population according to ethno-linguistic differences.

ⁱⁱ Based on data from the public service personnel information system (PERSAL), obtained from the DPSA.

ⁱⁱⁱ Refers to such reasons as: 'A general lack of internal controls, poor supervision and segregation of duties'

^{iv} Based on an interview with the DPSA, Pretoria, 18 September 2009; see also PMG 2009b; RSA 2011e,

^v In comparison to the percentage share of SMS members in the public service as a whole

^{vi} Recent changes introduced by the DPSA (RSA 2011e) in the form of a 'Public Sector Integrity Management Framework' have extended the criteria for financial interest disclosure as well as applications to undertake remunerative work outside the public service.

^{vii} Heilbrunn (2004) employs the cognate term ‘anti-corruption commissions’ to denote an anti-corruption agency, although this might need to distinguish between permanent and ad hoc entities convened for a specific purpose.

^{viii} Heilbrunn (2004: 3) distinguishes within executive-controlled agencies between Hong Kong’s ICAC, as a ‘universal model’ carrying out investigative, prevention and communication functions, and Singapore’s ‘investigative model’; whilst further distinguishing the ‘parliamentary model’, exemplified by the New South Wales ICAC.

^{ix} Included the departments of Defence, Justice, and Foreign Affairs. Also includes the Special Investigating Unit, which operates under direct Presidential proclamation and therefore under Executive oversight. The SIU was controversially not authorised to participate in the JIR investigation.

^x This was linked to a national crime prevention strategy which sought to ‘increase national conviction rates through prosecution-led investigations’ (RSA 2006: 21).

^{xi} The OECD (2007: 25; see also Heilbrunn 2004: 1) also cautioned that in the case of creating single specialised anti-corruption agencies certain factors need to be considered such as ‘invoke[ing] jurisdictional conflicts and turf battles with other institutions; and ... it can be abused as a tool against political opponents.’

^{xii} See paragraph 113: ‘...I conclude that there is no constitutional obligation to establish an independent anti-corruption unit as contended by the applicant and the amicus’.

^{xiii} The OECD (2007: 22) distinguished this as ‘law enforcement type institutions’

^{xiv} Refers to a *double entendre* on the word ‘constitution’, which on the one hand could simply refer to the initiation or creation of an entity, or on the other hand refer to the legal statute which gives birth to the entity.

^{xv} See also Heilbrunn 2004: 2 on a ‘precipitating crisis’ prompting calls for institutional reform.