



Fighting corruption

KEY POINTS

Corruption undermines good governance, which includes sound institutions and the effective operation of government in South Africa. The country needs an anti-corruption system that makes public servants accountable, protects whistle-blowers and closely monitors procurement.

These efforts to eradicate corruption need to include the private sector and individuals by increasing public awareness and improving access to information.

A strategy is needed to strengthen the independence of the judiciary, through improving the quality of judges and scaling up judicial training.

INTRODUCTION

Poor governance can critically undermine national development. For a more effective state, there must be accountability. Accountability refers to institutionalized practices of giving account of how assigned responsibilities are carried out and public resources used. In a democracy it is crucial for political leaders and public officials to account to the citizens for their actions. This is achieved through a system of institutional checks and balances including Parliament, oversight institutions and the judiciary. The Constitution calls for public servants to maintain a high standard of professional ethics. Political leaders and public officials should conduct themselves at all times in a manner that would bear the closest public scrutiny. Building integrity is an essential component of achieving good governance.

The diagnostic report of the National Planning Commission indicates that South Africa suffers from high levels of corruption that undermine the rule of law and hinder development and socioeconomic transformation. Defined as the misuse of an official position for personal gain, corruption occurs in both the public and private sectors. The costs of corrupt practices fall most heavily on the poor because they degrade the quality and accessibility of public services. State systems of accountability have been uneven, enabling corruption to thrive. This is not specific to the public sector. It is a broader societal disease. To address this comprehensively, anti-corruption efforts should target the bribe-maker, as well as the bribe-taker.

Overcoming corruption and lack of accountability in society requires political will, sound institutions, a solid legal foundation and an active citizenry that holds public officials accountable.

ACHIEVEMENTS SINCE 1994

Corruption was widespread during apartheid. Research by the Institute for Security Studies provides extensive evidence of “grand corruption” before 1994, concluding that “when the apartheid state was at its most repressive, it was also at its most corrupt”.¹ South Africa cannot hope to tackle corruption today without understanding its origins.

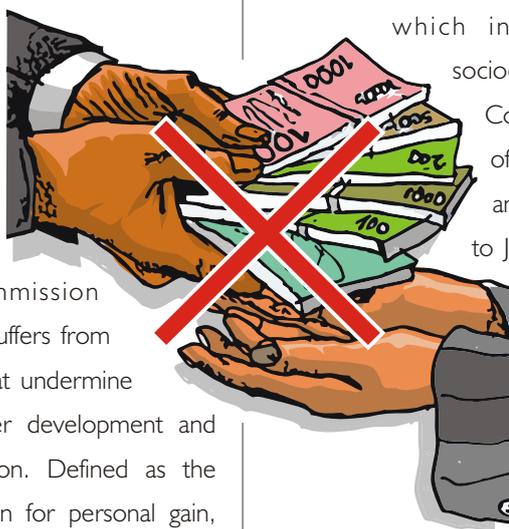
In the democratic era, steps have been taken to counter corrupt practices and put in place accountability mechanisms. Appreciative of the role of transparency in creating an accountable, responsive government, the Bill of Rights includes access to information and administrative justice,

which in turn enable other socioeconomic rights in the Constitution. The Promotion of Access to Information Act and the Promotion of Access to Justice Act were passed in

2000 to give effect to these rights. These laws provide a foundation for open, transparent and accountable government.

Together with the Prevention and Combating of Corrupt Activities Act (2004), Public Finance Management Act (1999) and Municipal Finance Management Act (2003), these laws form a solid legislative basis to fight corruption.

In addition to progressive laws, South Africa has created a number of institutions that deal with corruption and hold public officials to account. These include oversight institutions such as the Auditor-General and the Public Protector that were established in terms of chapter 9 of the Constitution to strengthen democracy. Several anti corruption agencies are operating with solid skills and political commitment.



VISION 2030

Our vision for 2030 is a South Africa that has zero tolerance for corruption. In 2030, South Africa will be a society in which citizens do not offer bribes and have the confidence and knowledge to hold public and private officials to account, and in which leaders have integrity and high ethical standards. Anti-corruption agencies should have the resources, independence from political influence, and powers to investigate corruption, and their investigations should be acted upon.

How South Africa will achieve its Vision 2030

The Commission has singled out four areas in which policies should be implemented towards an accountable state:

- **Building a resilient anti-corruption system.**

Anti-corruption efforts should create a system that can operate freely from political interference and can be supported by both public officials and citizens. In a resilient system, designated agencies have the capability and resources to investigate cases of corruption, leaders take action when problems are brought to their attention, citizens resist the temptation to pay bribes because they recognise that their individual actions contribute to a bigger problem, the private sector does not engage in corrupt practices, citizens speak out against corruption and the media fulfils its investigative and reporting function to expose corruption in the public and private sector.

- **Strengthen accountability and responsibility of public servants.** South African public servants should be made legally accountable as individuals for their actions, particularly in matters involving public resources.

- **Create a transparent, responsive and accountable public service.** State information, including details of procurement, should be made

openly available to citizens. Furthermore, an information regulator should be established to adjudicate appeals when access to information requested is denied.

- **Strengthen judicial governance and the rule of law.** Ensure the independence and accountability of the judiciary. Establish clear criteria for the appointment of judges and scale up judicial training to improve the quality of judges. The extension of community service to law graduates, to increase legal representation for the poor and speed up the administration of justice, should be considered.

BUILDING A RESILIENT ANTI-CORRUPTION SYSTEM

Fighting corruption requires an anti-corruption system that is well-resourced, operates freely from political interference and has the support of citizens. The proposals in this section deal with how to create a strong anti-corruption system that is suited to the South African context. The Commission proposes the following:

- Strengthen the multi-agency anti-corruption system
- Strengthen the protection of whistle-blowers
- Greater central oversight over the awarding of large tenders or tenders with long duration
- Empower the tender compliance monitoring office to investigate corruption and the value for money of tenders.

Strengthen the multi-agency anti-corruption system

South Africa has a number of agencies mandated to fight corruption. These are the South African Police Service (including the Directorate for Priority Crimes Investigation), the Special Investigations Unit, the Assets Forfeiture Unit (based in the office of the National Director of Public Prosecutions), and the Public Service Commission. The Public Protector and the Auditor-General also investigate



corruption, although this does not form part of their core mandate. Some have argued that the multiplicity of anti-corruption agencies undermines the fight against corruption as it divides resources and has resulted in an uncoordinated approach.

There has been much debate about whether South Africa should have a single anti-corruption agency.² Hong Kong's Independent Commission Against Corruption (ICAC) is a successful model for a single-agency system. It has been adopted in a number of countries including Australia, Botswana and Singapore. However, there are doubts about whether the model can be transposed into South Africa. Specific conditions in Hong Kong include "a relatively well-regulated administrative culture alongside a large, and again, well-resourced police force under a political and legal framework which supports anti-corruption activities".³ While there are ongoing efforts to develop South Africa's administrative capacity and improve the criminal justice system, as detailed in other chapters in this plan, the country does not have the institutional foundation to make the ICAC a viable option.

A functioning anti-corruption system requires "sufficient staff and resources with specific knowledge and skills; special legislative powers; high level information sharing and co-ordination; and operational independence".⁴ Independence entails insulating institutions from political pressure and interference. A single-agency approach is less resilient in this respect because if the lone anti-corruption body faces political capture, the independence of the entire system is compromised. A multiplicity of agencies provides the checks and balances that are essential in the South African context and develops a systemic resilience against interference.

The institutional independence of anti-corruption agencies is contentious, since they are all

accountable to the Executive. This may leave them vulnerable to political pressure and interference. Another issue is overlapping mandates and poor coordination between agencies. Duplication between agencies indicates that a clearer demarcation of functions is needed. Furthermore, weak coordination undermines their ability to investigate and prosecute corruption. The Commission proposes a review of the mandates and functions of all agencies with a view to some rationalisation. The autonomy of each agency should be reinforced to insulate them from political pressure.

Strengthening the anti-corruption system requires increasing the agencies' specialist resources. More capacity should be created for corruption investigations – more funding is required to employ skilled personnel and sophisticated investigative techniques. While thousands of cases are investigated, few get to court. Specialised teams of prosecutors and special courts should be established to expedite the resolution of corruption cases.

Public education drives are needed to communicate the effect of corruption on the delivery of services, and the mechanisms through which cases of corruption can be reported. Agencies should be required to conduct public awareness campaigns. This would require adequate resources and partnerships with non-governmental organisations.

South Africa pioneered a multi-sector approach to fighting corruption with the establishment of the National Anti-Corruption Forum in 2001. This forum is composed of members from government, business and civil society. It was established to coordinate sectoral strategies against corruption, to advise government on the implementation of anti-corruption strategies, to share information and best

practice, and to advise sectors on the improvement of sectoral anti-corruption strategies. Unfortunately, there has been insufficient commitment and continuity from the different sectors in the forum and the institution is underfunded. The National Anti-Corruption Forum has a valuable role to play in combating corruption at all levels in society. Therefore efforts should be made to strengthen it with the necessary resources in order to be more effective.

To tackle corruption, there must be political will and support for anti-corruption agencies. Political will refers to not only public statements of support, but a commitment to providing sufficient resources and taking action against corrupt officials. Political parties must strive to maintain ethical conduct among their members. Political leaders must realise the effect of their behaviour on the integrity of the political office they hold.

Take a societal approach to combating corruption

Corruption is a broader societal problem. The private sector plays a role on the supply side of corruption, for example through paying bribes for government contracts. There are incidences of corruption within the private sector itself such as price-fixing and collusion between businesses, as well as charging inflated rates for government contracts. When exposed, corruption is often investigated quietly and kept out of the public domain. Investigations often lead to dismissal but rarely result in or include criminal prosecution. An obligation must be placed on the private sector to use the criminal justice system, not merely administrative sanctions, to deal with corrupt activity. Consideration must be given to establishing a structure to which private sector non-compliance with the law can be reported. Additional consideration could be given to making it a

requirement for businesses to include corruption cases in their annual reports to increase transparency and build public trust.

Some businesses have set up independent ethics complaints facilities to allow employees to report corruption anonymously. Business Leadership South Africa has developed a Code of Good Corporate Citizenship for its members, committing them to ethical conduct in regard to customers, competitors, suppliers, government, regulatory authorities and their own employees. The business sector in the National Anti-Corruption Forum has proposed developing integrity pacts as a tool in public contracting. The pact is essentially an agreement between government and all bidders for a public contract that stipulates that neither side will pay, offer, demand or accept bribes, collude with competitors to obtain the contract, or engage in such abuses while executing the contract. These anti corruption initiatives must be encouraged and extended across the private sector.

Corruption is a societal ill and requires the commitment of all members of society. Citizens and companies in the private sector should stop offering bribes to government officials. South Africans must make the connection between the petty incidents of corruption they participate in daily – such as the “cold drink” to a traffic officer to avoid a fine – and the grand corruption they see reported in the newspapers. The country must create a shift in attitude towards corruption. In this regard, the Commission welcomes Corruption Watch, which provides a place where citizens can report corrupt behaviour within the public and private sector. Anti-corruption, ethical behaviour and integrity should be a component of any social compact. An independent media also increases public awareness by investigating and reporting on cases of corruption.



Strengthen protection of whistle-blowers

Protection for whistle-blowers creates a culture of exposing wrongdoing. While the Protected Disclosures Act (2000) provides some protection, it does not do enough. The percentage of people who identify themselves as prepared to “blow the whistle” has dropped by 10 percent over the last four years.⁵ The legislation has several weaknesses.

The scope of protection in the law is too narrow. The Protected Disclosures Act is limited to “occupational detriment”, which needlessly restricts the application of the act to whistle-blowers in a formal permanent employment relationship. It excludes all persons in other commercial relationships with the relevant organisation. In addition, the range of bodies to which a protected disclosure may be made is limited to the Auditor General and Public Protector. Disclosures to sectoral complaints mechanisms or professional bodies are not regarded as protected disclosures by the PDA.

The possibility of conditional amnesty for whistle-blowers implicated in corruption is not clear. Currently the Protected Disclosures Act does not guarantee immunity against civil or criminal liability for making a disclosure in good faith. This could discourage people. Adequate security for whistle-blowers has not been established and the act does not ensure the confidentiality of whistle-blower identity. Opinions vary on what constitutes “adequate protection”. Confidentiality may be required to protect whistle-blowers from victimisation. Physical and economic protection may be required in some cases. Further policy research is required to strengthen whistleblower protection.

There is no public body tasked with providing advice and promoting public awareness, and no public body dedicated to monitoring whistle-

blowing. Many government departments have not implemented the act and regulations to direct them on implementation have yet to be published.

In response to these gaps, the Commission recommends the following:

- A review of the Protected Disclosures Act. This review should consider expanding the scope of whistle-blower protection outside the limits of “occupational detriment”, permit disclosure to bodies other than the Public Protector and the Auditor-General and strengthen measures to ensure the security of whistle-blowers.
- Regulations to the Protected Disclosures Act should be developed as soon as possible and government departments must develop policies to implement the act.

Improve oversight over procurement procedures for increased accountability

The chapter on building a capable and developmental state contains a number of proposals on designing procurement systems to deliver value for money and enable effective government. In addition, a tiered system of review for tenders, depending on their value, with differentiated safeguards and procedures should be considered. Automatic safeguards could be built in, so that tenders above a certain amount are reviewed by the Auditor-General and the Parliamentary Standing Committee on Public Accounts, with a public hearing to exercise oversight over the award process.

Empower the tender compliance monitoring office to investigate corruption and the value for money of tenders

The vast range of tender opportunities in the public service has come with increased opportunities for corruption for both officials and contractors. The

government is conscious of these challenges and has put some measures in place to introduce greater accountability in supply-chain management practices. The Office of the Accountant General in the National Treasury is responsible for promoting and enforcing the effective management of revenue and expenditure in departments, as well as monitoring the proper implementation of the Public Finance Management Act and the Municipal Finance Management Act by state institutions. This includes setting and monitoring procurement standards and practices.

The Commission also proposes that the office investigates the value for money of tenders. This would entail, for example, auditing the bill of quantities for projects to ensure that the unit costs of materials is not excessive and that the state institution derives maximum utility from the service procured.

Strengthen accountability and responsibility of public servants

Public officials and elected representatives are responsible for administering public resources on behalf of the society. It is in the best interests of civil society that these resources are managed in an efficient, transparent and accountable fashion. The proposals in this section deal with improving integrity systems in order to strengthen the individual accountability of public servants. Measures to enforce the accountability of public servants should promote the principles of Batho Pele. These proposals should be read in conjunction with those in the building a capable and developmental state chapter on strengthening delegation, accountability and oversight in the public service.

South Africa has developed several mechanisms to manage integrity and promote ethical conduct in the public service. This includes the public service

code of conduct in the public service regulations, Financial Disclosure Framework and supply chain management prescripts. However the implementation of these measures has been poor leading to frustration about the delayed response of departments in preventing and combating corruption.

Implementation and adherence to the code of conduct is limited with departments sometimes taking months to institute disciplinary processes against offending officials. Reports by the Auditor-General indicate that a large number of government employees and their spouses have been involved in government contracts raising suspicion of abuse of office. This is despite there being rules in place in the public service code of conduct to prevent officials from engaging in transactions that may result in improper personal gain or are in conflict with the execution of their official duties.

The financial disclosure framework compels senior managers to disclose their financial interests. However non-compliance is endemic. Managers are seldom sanctioned for failing to disclose their interests and departments do little with the information they receive, besides forwarding it to the Public Service Commission. In addition the limited application of the framework to senior managers has resulted in 'unregulated public servants' having business interests which conflict with public interest. Recent Auditor-General reports indicate that the majority of public servants with business interests are those excluded by the financial disclosure framework.

The practice of "javelin-throwing", in which public servants use their office to set up future business opportunities, is a problem. It is also common for officials found guilty of corruption in one department to surface in another.



Strengthening the accountability of public service requires more consistent implementation of existing rules.

The Commission recommends the following:

- An accountability framework should be developed linking the liability of individual public servants to their responsibilities, in proportion to their seniority.
- Rules restricting the business interests of public servants should be made more specific and clearer. The Commission recommends a study to investigate expanding existing regulations and improving the institutional processes and capacity to manage the rules.
- Restraint-of-trade agreements should be considered for senior civil servants and politicians at all levels of government. Exit interviews and proper record-keeping would enable the restraint of trade agreements and prevent corrupt officials from moving around the public service.
- Corrupt officials should be made individually liable for losses.

Create an open, responsive and accountable public service

Transparency is an important element of public accountability. Dissatisfaction about lack of access to information on service delivery is prominent in public protests. Section 32 of the Constitution enshrines the right of access to information. The Batho Pele principles state that government should inform citizens about the services they are entitled to and government administration must be open and transparent. However in practice, the state has been poor at making information available timeously and in a form accessible to all citizens. Government officials are often reluctant to provide information when it is requested. Requests for

information are routinely ignored, despite the existence of the Promotion to Access to Information Act. There is endemic lack of compliance.⁶

Ineffective implementation of the Promotion of Access to Information Act is due to wilful neglect, lack of appreciation of the importance of the right, an institutional culture of risk aversion and/or secrecy and a lack of training. The absence of a useable enforcement mechanism is one of the primary obstacles.⁷ Unlike most modern access to information laws, the act does not create a specialist adjudicatory body, such as an information commissioner or commission. Such a body should be established to dispense quick, accessible and inexpensive access to justice for those appealing decisions to withhold information, or so-called deemed refusals where no answer comes in response to a request.

The Commission proposes the following:

- The Protection of Personal Information Bill seeks to establish an information regulator covering certain aspects of information and personal data. This regulator should be equipped with the necessary resources to do its job properly and independently. The body should strike a balance between its responsibilities to protect personal data and providing recourse to those claiming their right of access to information.
- More “open data” should be made available. Open data is information that is made actively available without a request from an individual. This is provided for in the Promotion of Access to Information Act, but generally not implemented due to lack of expertise. Examples of information that should be made available would be tender information, environmental impact assessments and mineral licences.

Strengthen judicial governance and the rule of law

Without a reliable, honest, efficient court system, there can be no access to justice, no confidence on the part of investors in the economy and little prospect of holding powerful private and public actors to account.

Although generally sound, South Africa's rule of law could further realise the transformative promise of the Constitution. Challenges such as court administration inefficiencies that denude people of their right to access justice, and judicial appointments that call the impartiality of selection processes into question must be addressed.

Judicial governance concerns both the independence and the accountability of the judicial branch of government, and encompasses issues such as selection and appointment, ethics, leadership and management, and the administration of the courts. The selection and appointment of judges is the responsibility of the Judicial Service Commission (JSC); the administration of the courts falls under the Department of Justice. The previous chief justice established a body to review policy on court administration in order to move towards a system of judiciary-led court administration. This would increase both administrative and financial efficiency in the courts, judicial accountability and independence. The establishment of the office of the chief justice is a welcome first step towards the achievement of this goal but the Commission recommends that the process be accelerated.

For the law to be an agent of change, it must be interpreted and enforced in a progressive,⁸ transformative fashion. This requires a judiciary that is progressive in its philosophy and legal inclinations. The selection and appointment of judges affects socioeconomic transformation, as well as the rule of

law and the independence of the courts. Unfortunately, there is little or no consensus in the Judicial Service Commission (JSC) or in the legal fraternity about the qualities and attributes needed for the bench.

Although the Constitution stipulates general criteria for the appointment of judicial officers; it is important for the JSC to elaborate further guiding principles to build consensus on the qualities and attributes of the "ideal South African judge"⁹. The criteria should include a progressive philosophy and an understanding of the socioeconomic context in which the law is interpreted and enforced. While the JSC published a broad list of criteria for judicial appointments in September 2010, they require further development and a clear understanding of their meaning and application.

The training of judges also requires attention. The South African Judicial Educational Institute (SAJEI) commenced operations in January 2012. It has conducted a series of training programmes for different levels of judicial officers. The Commission welcomes this development. The SAJEI must be given all the support it requires and be well-resourced to enable it to develop a cohort of judges equipped to play the transformative role required by the Constitution.

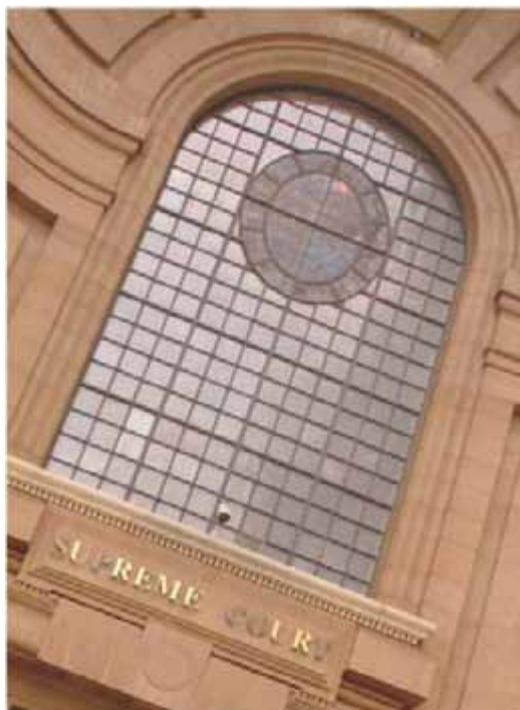
Further reforms include the composition of the JSC itself, which is argued to be too large to function effectively, and to be hamstrung by political interests. The JSC's role is expanding and consideration should be given to whether it is optimally structured to fulfil its responsibilities.

Access to justice and speedier resolution of court cases are important for working people who struggle to get time off to attend court. Long court rolls lead to unnecessary delays and postponements and many poor people cannot



afford the transport to court. The heads of court set up a Judicial Case Management Committee which has made a number of recommendations to implement a new case management system. A pilot project will be launched in 2012 to test this. The Small Claims Court plays an important role in civil matters involving smaller claims. It should be strengthened and resourced to be able to serve the whole country, including rural areas.

The cost of justice for the poor presents a barrier to accessing justice; it can lead to the unintended miscarriage of justice when bail is unaffordable and the accused are not adequately represented. Legal Aid South Africa does laudable work representing litigants who cannot afford legal assistance. The Commission recommends that this institution is adequately resourced so as to improve access to justice. Law graduates should also be viewed as a resource to increase access to legal representation and speed up the administration of justice in the lower courts. An audit of unemployed graduates should be done to place them where they are needed and consideration should be given to extending compulsory community service to law graduates.



The Commission proposes the following:

- Accelerate reforms to implement a judiciary-led independent court administration.
- Establish clear criteria for appointment of judges, with emphasis on the candidates' progressive credentials and transformative judicial philosophy and expertise.
- The SAJEI must be given all the support it requires and be well-resourced to fulfil its mandate effectively.
- Consider whether the current structure of the JSC is adequate to fulfil its expanding mandate.
- Extend compulsory community service to law graduates.

CONCLUSION

In order to achieve its developmental goals, South Africa must develop a society with zero tolerance for corruption, in which citizens are able to hold their leaders to account. Leaders in government, business and civil society should conduct themselves with integrity and be held to high ethical standards. Achieving this requires strengthening the accountability institutions that are already in place and tackling corruption across society. Sanctions must be applied impartially to those who betray public trust or break the law. With political will and consistent application of the right strategies corruption can be significantly reduced and public trust restored.

The existing instruments set up by government should be strengthened and supported by the whole society. Civil society response to corruption should be welcomed and lauded.

By 2030 the language in South Africa should have shifted from fighting corruption to increasing integrity. To achieve this, the nation has to commit to the values of the Constitution and engage as active, responsible citizens to achieve the vision of 2030.



NOTES

1. Van Vuuren H (2006). *Apartheid grand corruption*. Report prepared for the second National Anti-corruption Summit. Cape Town: Institute for Security Studies.
2. Camerer L (1999). *Tackling the Multi-headed Dragon – Evaluating prospects for a single anti-corruption agency in South Africa*. Institute for Security Studies Occasional Paper 38.
3. *ibid.*
4. Camerer, 1999.
5. Ipsos Markinor (2010). *Whistle blowing, the Protected Disclosure's Act, accessing information and the Promotion of Access to Information Act: Views of South Africans, 2006–2010*.
6. The South African Human Rights Commission's 2009/10 report states that "an analysis of compliance with Section 32 reports for multiple levels of government over the decade since PAIA's passage into law has provided clear evidence of poor levels of compliance with its provisions. These levels of compliance point to a low level of awareness, a lack of accountability for non-compliance and the importance (or lack thereof) accorded to PAIA in the sector" (p 158).
7. Asmal et al (2007). *Report of the ad hoc committee on the Review of Chapter 9 and associated institutions*. Report to the National Assembly of the Parliament of South Africa.
8. "Progressive" in this context means having "a deep commitment to constitutional values on a range of issues including, empathy and compassion, access to justice, socioeconomic rights and judicial deference." Taken from Cowen S (2010). *Judicial Selection: A Timely Debate*. Available at: <http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf> (accessed 3 August 2011).
9. *Ibid.*