

Chapter 14

PROMOTING ACCOUNTABILITY AND FIGHTING CORRUPTION

“Everybody assists the institutions we have creatively redesigned to meet our varied needs; we reach out across communities to strengthen our resolve to live with honesty, to be set against corruption and dehumanising actions.”

Introduction

As the *Diagnostic Report* of the National Planning Commission notes, poor governance can fatally undermine national development. Evidence gathered by the commission indicates that South Africa suffers from high-levels of corruption that undermine the rule of law and hinder the state’s ability to effect development and socioeconomic transformation. The performance of state systems of accountability has been uneven enabling corruption to thrive. Corruption is not specific to the public sector; the private sector has been tolerant of and engages in corrupt practices. Although the entire country is harmed by corruption, the costs fall most heavily on the poor through the impact on the quality and accessibility of public services. Overcoming the twin challenges of corruption and lack of accountability in our society requires a resilient system consisting of political will, sound institutions, a solid legal foundation and an active citizenry that is empowered to hold public officials accountable.

What has been achieved since 1994?

Corruption, which is often perceived as a post-1994 phenomenon, was also widespread in the apartheid era. 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 This in no way excuses corruption today, but South Africa cannot hope to tackle corruption without understanding its origins.

In the democratic era, several significant 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 drafters of the Constitution included the right to access information and the right to administrative

¹ Van Vuuren H (2006). *Apartheid grand corruption*. Report prepared for the second National Anti-corruption Summit. Cape Town: Institute for Security Studies.

justice in the Bill of Rights. These rights are crucial to enabling the achievement of the other socioeconomic rights enshrined in the Constitution. To give effect to these rights, the Promotion of Access to Information Act and the Promotion of Access to Justice Act were passed in 2000. These laws provide a foundation for open, transparent and accountable government and, together with the Prevention and Combating of Corrupt Activities Act (2004), form a solid legislative basis to fight corruption.

In addition to progressive laws, South Africa has created a number of institutions that play an important role in combating corruption. These include the oversight institutions established in terms of chapter 9 of the Constitution to strengthen constitutional democracy, such as the Auditor-General and the Public Protector, which have played an important role in combating corruption and holding public officials to account. Several anti-corruption agencies are operating with solid skills and political commitment.

Vision 2030

Our vision for 2030 is a South Africa which has zero tolerance for corruption, in which an empowered citizenry have the confidence and knowledge to hold public and private officials to account and in which leaders hold themselves to high ethical standards and act with integrity. This South Africa has a resilient anti-corruption system in which anti-corruption agencies have the resources, credibility and powers to investigate corruption, and their investigations are acted upon.

How will South Africa achieve its Vision 2030?

The commission has singled out four areas of focus in which policies should be implemented to move towards an accountable state and zero-tolerance of corruption:

- Building a resilient anti-corruption system – The focus of anti-corruption efforts should be on creating a resilient anti-corruption system that can operate freely from political interference and is supported by both public officials and citizens. A resilient system is one where the 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 are empowered to 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 an open, 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 – Reform aspects of the judicial governance system to 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 in our courts. Consideration should be given to the extension of community service to law graduates in order to increase legal representation for the poor and speed up the administration of justice in the lower courts.

Building a resilient anti-corruption system

The commission proposes the following:

- Strengthening the multi-agency anti-corruption system
- Strengthen protection of whistle-blowers
- Centralise the awarding of large tenders or tenders with long duration
- Give greater teeth to the tender compliance monitoring office to investigate both corruption and the value for money aspect of tenders.

Strengthen the multi-agency anti-corruption system

South Africa has a number of agencies mandated to fight corruption. These include the Special Investigations Unit, the Public Protector, the Public Service Commission, the Auditor General, the Assets Forfeiture Unit, the Directorate for Priority Crimes Investigation, and the Independent Police Investigative Directorate. Some have argued that the multiplicity of anti-corruption agencies undermines the fight against corruption by dividing resources and has resulted in an uncoordinated approach to tackling corruption.

There has been much debate about whether South Africa should have a single anti-corruption agency.² Hong Kong's Independent Commission Against Corruption is often cited as a model for a single-agency system because of its well-publicised success in fighting corruption. The Independent Commission Against Corruption model has been adopted in a number of countries including Australia, Botswana and Singapore. While Independent Commission Against Corruption has been a great success in Hong Kong, there are doubts about whether the model can be transposed to South Africa. Its success has largely resulted from the specific conditions existing within Hong Kong, including "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 in place to make the ICAC model a viable option.

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.

Rather than focusing on the number of anti-corruption institutions, the emphasis should be on strengthening the anti-corruption system. 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 checks and balance, that are essential in the South African context, and develops a systemic resilience against interference.

Strengthening the anti-corruption system requires increasing the specialist resources of anti-corruption agencies, improving coordination and cooperation between agencies and ensuring that the independence of each of the agencies is maintained. There should be greater emphasis on preventing corruption through public education drives. This should cover how it affects the delivery of services essential to citizen’s daily lives and the mechanisms through which cases of corruption can be reported. While South Africans are highly aware of the evils of corruption they must be encouraged to make the connection between the seemingly petty incidents of corruption they participate in daily, such as the “cold drink” to a police officer to avoid a traffic fine, and the grand corruption they see reported in the Sunday newspapers. The aim should be to create a shift in attitudes towards corruption. Greater citizen participation in anti-corruption efforts should be encouraged by amongst other things strengthening the protection of whistle-blowers. An independent media also has a role to play in public awareness by investigating and reporting on cases of corruption.

No effort to tackle corruption can succeed without political will and support for anti-corruption agencies. Political will refers to more than public statements of support, and includes a commitment to acting on that support by providing sufficient resources and taking action against corrupt officials. Political parties must strive to maintain a high-level of ethical conduct amongst their members. Political leaders must remain conscious of the impact of their behaviour on the honour and integrity of the political office they hold.

Strengthen protection of whistle-blowers

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

⁴ Ibid.

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.*

Several weaknesses need to be addressed:

- The scope of protection in law is too narrow. For example, the Protected Disclosures Act is limited to whistle-blowers in a formal permanent employment relationship, excluding citizen whistle-blowers. It excludes all persons in other commercial relationships with the relevant organisation. This needlessly restricts the scope of protection to the employment relationship. Consider an employee who makes a disclosure about a client to her employer, and the employer transfers the employee rather than antagonising the client. Such an employee would not be protected.
- The range of bodies to which a protected disclosure may be made is too narrow.
- There is no public body tasked with providing advice and promoting public awareness, and no public body dedicated to monitoring whistle-blowing.
- The possibility of conditional amnesty for whistle-blowers implicated in corruption is not clear.
- Adequate security for whistle-blowers has not been established. Physical and economic protection may be required in some cases. Opinions vary on what constitutes “adequate protection”.

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

- Expand the scope of whistle-blower protection under the Protected Disclosures Act to include those outside the traditional employer-employee relationship.
- Permit disclosure to bodies other than the Public Protector and the Auditor-General and strengthen measures to ensure the security of whistle-blowers.

Centralise the awarding of large tenders

The law governing public procurement in South Africa has become increasingly complicated over the past decade. It is now so complex that there is reason to believe that it is impeding effective government. When even honest and competent bureaucrats find it difficult to understand what their legal obligations are and how to comply with them, the law requires simplification. The award of any tender is governed by numerous layers of law. Which of these layers applies in any given case depends on the context and the circumstances.

The complexity of procurement law also frequently works to the detriment of those who win contracts to provide goods and services to the state. Organs of state seeking to escape contractual obligations now frequently argue that the process resulting in the contract did not live up to the standards set by procurement law. It is often alleged by such organs of state that a competitive tender process did not occur, that the relevant signatory to the contract was not properly authorised, or that the process was inconsistent with the law. The law of procurement in such instances provides an expedient route of escape for those wishing to dodge their obligations.

The commission proposes a review and reform of procurement procedures. This would include legal reforms to simplify procurement, which ensure that accountability

mechanisms remain in place and that the law retains proper safeguards for detecting corruption and maladministration. The need for swift, effective service provision and a functioning oversight mechanism must be carefully balanced.

In addition, a tiered system of review for tenders, depending on their value, with differentiated safeguards and procedures should be considered. Such a system could have automatic safeguards built in, so that tenders above a certain amount are subjected to special review by the Auditor-General and the Parliamentary Standing Committee on Public Accounts, with a public hearing to exercise oversight over the tender award process.

Give greater teeth to the tender compliance monitoring office to investigate both probity and the value for money aspect of tenders

The practice of outsourcing and tendering for services has increased considerably in the last decade. The vast range of tender opportunities in the public service has also come with increased opportunities for corruption as both officials and contractors use the tender system to enrich themselves. The government is conscious of these challenges and has put in place some measures 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 (1999) and the Municipal Finance Management Act (2003) by state institutions. This includes setting and monitoring norms and standards with respect to procurement practices.

While this monitoring function is vital, the commission proposes strengthening the office to investigate the value for money of tenders. This would entail, for example, being empowered to audit the bill of quantities for projects to ensure that the unit costs of materials is not excessive and that the state institution in question derives the maximum utility from the service procured.

Strengthen accountability and responsibility of public servants

There are three generally accepted principles of the state's liability to pay the litigation costs of a functionary. The *first* is that the litigation costs are paid in circumstances where the state or the functionary is being sued or charged – in other words as a defendant or an accused. The *second* is that the conduct of the functionary that is the subject matter of the litigation is conduct that falls within the course and scope of the functionary's employment or state function. The *third* is that if the state does fund the litigation and the court determines that the conduct was not in the course and scope of the functionary's employment or state function, it is entitled to recover those costs from the functionary. In practice, there have been serious departures from these principles that have resulted in the state paying unnecessarily for costly litigation involving functionaries.

The State Liability Amendment Act (2011) makes provision for the principle of accountability of public servants.

The commission recommends that:

- The provisions in sections 13 (a) and (b) of the act be strictly enforced and monitored by the Public Service Commission.
- An accountability framework should be developed linking the liability of individual public servants to their roles and responsibilities and job descriptions in proportion with their functions and seniority. It should be made illegal for civil servants to operate or benefit from certain types of business.
- Restraint of trade agreements should be considered for senior civil servants and politicians in all spheres of government. Exit interviews and proper record keeping would enable this practice.

Create an open, responsive and accountable public service

The importance of transparency to public accountability has been demonstrated in theory and in practice. Dissatisfaction about lack of access to information on service delivery has emerged as a factor in public protests. In developing countries such as India, Bangladesh and Mexico, the right of access to information is used as leverage by communities to help them claim socioeconomic rights.

Section 32 of the Constitution enshrines the right of access to information. In practice, requests for information are routinely ignored, despite the existence of the Promotion to Access to Information Act, which aims to give effect to this section. There is endemic lack of compliance.⁶

There are many reasons for the lack of effective implementation of the Promotion of Access to Information Act, including wilful neglect, lack of appreciation of the importance of the right, an institutional culture of risk averseness and/or secrecy and a lack of training. The Asmal report on Chapter 9 institutions identified this as a serious challenge and diagnosed the absence of a useable enforcement mechanism as 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. The Asmal report recommended that such a body 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.

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.” (Page 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.

The commission proposes the following:

- The Protection of Personal Information Bill that is being discussed in Parliament seeks to establish an information regulator covering certain aspects of information and personal data. This body should be equipped with the necessary resources to do its job properly and independently. The body should strike the right balance between its responsibilities to protect personal data, while 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 also provided for in the Promotion of Access to Information Act, but generally not implemented due to lack of expertise. Some departments and municipalities have made an effort to make some information available. The Department of Mineral Resources has attempted to put all new order mining licenses on its website. Although many links are broken, the site attempts to make the data generally available. In addition, companies that hold those rights should make the information available. Other examples of information that should be made available would be beneficiary lists for housing projects, often a source of deep tension in communities, tender information, and environmental impact assessments.

Strengthen judicial governance and the rule of law

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

South Africa’s rule of law is generally in good shape, although more could be done to realise the transformative promise of the Constitution. Challenges such as inefficiencies in the court administration that denude people of the right to access to justice, and judicial appointments that call into question the impartiality of selection processes, must be addressed.

For the Constitution, and the law in general, to be an agent of change, rather than an obstacle to socioeconomic transformation, the law must be interpreted and enforced in a progressive, transformative fashion. This requires a judiciary that is progressive in its judicial philosophy and legal inclinations. The selection and appointment of judges is of crucial importance, not just to the rule of law and the independence of the courts, but to socioeconomic transformation. At present, there is little or no consensus in the Judicial Service Commission (JSC) or in the legal fraternity more generally, about the qualities and attributes needed for the bench.

Judicial governance concerns both the independence and the accountability of the judicial branch of government, and encompasses issues such as judicial selection and appointment, and judicial ethics, the leadership and management of the judiciary, and the administration of the courts. The selection and appointment of judges is the

responsibility of the JSC, a body established under the Constitution; the administration of the courts falls under the Department of Justice. The previous chief justice established a body to examine judicial reforms, and its forthcoming report will deserve serious consideration.

It is important for the JSC to lead a process to build consensus on the qualities and attributes of the “ideal South African judge”.⁸ The criteria should encompass a range of qualities and attributes, including a progressive judicial philosophy and an understanding of the socioeconomic context in which the law is interpreted and enforced. While the JSC published a list of criteria for judicial appointments in September 2010, these criteria are quite broad and will require further development, and a clearer understanding of their meaning and application.

The training of judges also requires attention. The Judicial Training Institute is yet to get off the ground. It needs to be launched soon to improve the lives of South Africans, and to ensure that the South African Constitution and jurisprudence retain their international standing. Further reforms that can be considered include the composition of the JSC itself, which is argued by some to be too large to function effectively, and to be hamstrung by political interests. The JSC’s increasing role in enforcing the Judicial Code of Conduct is one example of how its role is expanding, and consideration should be given to whether it is optimally structured to fulfil its various roles and responsibilities.

Access to justice and speedier resolution of court cases require more attention. This is particularly important for working people who struggle to get time off from work to attend court. In addition to the burden of long court rolls, which lead to unnecessary delays and postponements, many poor people cannot afford the costs of transport to courts. The cost of justice for the poor can present a major barrier to accessing justice; it can also lead to unintended miscarriage of justice when bail cannot be afforded and the accused not adequately represented. Law graduates should be viewed as a resource for the promotion of the rule of law. An audit of unemployed graduate law students should be done to ensure proper placement in much-needed areas.

The commission proposes the following:

- Accelerate reforms to implement a judiciary-led independent court administration.
- The JSC should lead a process to establish clear criteria for appointment of judges, with emphasis on the candidates’ progressive credentials and transformatory judicial philosophy and expertise.
- Scale up judicial training dramatically and as quickly as possible.

⁸ 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).

- Consider whether the current form and structure of the JSC is adequate to allow it to fulfil its constitutional mandate.
- Consider the extension of community service to law graduates. This will increase access to legal representation – especially for the poor – and speed up the administration of justice in the lower courts.

Conclusion

Accountable governance requires leadership. For institutions to be transformative and capable, they must be well led at all levels. Leadership in the public service is essential for the national development plan and for South Africa. Leadership that is devoted and dedicated, capable and committed, and self-sacrificial and not self-serving. South Africa needs a national conversation about the qualities of leadership that are required in all areas of public life. The first national plan provides an excellent opportunity to provoke that conversation and to identify the leadership attributes that are essential to build a just and equal nation.