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The Need for an Anti-Corruption Commission

1. Introduction[1]

In a Pastoral Letter published in 2013,[2] our Bishops called for attention to be given to the "rampant corruption" in the country, quoting Pope Francis to the effect that "corruption is worse than other sins because of the way it becomes a habit that hardens the heart." By then, the process we now call 'state capture' was well under way and it would only intensify over the next four years, until Jacob Zuma was finally ousted and the Gupta family fled to Dubai. The Zondo Judicial Commission of Enquiry, among others, has revealed in more and more detail just how rotten the public administration was in those years, and there is no doubt that our current economic woes (now being magnified by the Covid-19 crisis) stem to a significant degree from endemic corrupt dealings at all levels of the state, encouraged as always by private sector greed.[3]

Against this background, it might be thought that a strong, dedicated, independent anti-corruption entity was a necessity; and yet, South Africa does not have one. It is widely held that the framers of the Constitution overlooked the need for a body that would specialise in combating corruption because they assumed that the normal law enforcement structures – the triumvirate of police, prosecuting authority and courts – would do the job. They also naively failed to anticipate, it is argued, just how widespread and entrenched corruption would become.

No one knows exactly what corruption costs us, but it is striking that, whenever a new government initiative is announced, one of the first questions asked is about how to avoid its being derailed by corruption. No sooner had President Ramaphosa announced the Covid-19 relief package than he had to refer to the danger of the money being looted, and the need to take steps against this.[4] Even such a sacred and sombre moment as the funeral of Nelson Mandela prompted a spree of corruption for which, after an investigation by the Public Protector, certain Eastern Cape officials are now on trial.[5]

Which brings us to the entity that many people assume to be our main bastion against corruption, the Public Protector (PP).

2. The Public Protector

During her tenure as PP, Adv Thuli Madonsela acquired a reputation as a 'corruption buster', and was instrumental in uncovering numerous instances of theft of public funds and improprieties of all kinds. Even though her successor, Adv Busisiwe Mkhwebane, has in most estimations undone much of that good work, the office of the public protector – the institution, rather than the individual who leads it – continues to do good work against corrupt activities in the public sector.

The problem is that this is not the main focus area of the PP. Section 182 of the Constitution sets out the functions of the Public Protector:

> *1. The Public Protector has the power, as regulated by national legislation*
>
> *a. to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or*

suspected to be improper or to result in any impropriety or prejudice;

b. *to report on that conduct; and*
c. *to take appropriate remedial action.*

'Improper' conduct, 'impropriety' and 'prejudice' all have much broader meanings and applications than those directly related to acts of corruption. Mere laziness or incompetence on the part of an official, for example, that results in a citizen failing to receive the kind of service they are entitled to, would amount to improper conduct resulting in prejudice to the citizen. And the offices and staff of the PP around the country are indeed kept busy with thousands of such complaints every year.[6]

This is also apparent from the provisions of the Public Protector Act, 23 of 1994, which sets out the powers of the PP as follows in section 6(4):

The Public Protector shall be competent

(a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged

(i) maladministration in connection with the affairs of government at any level;

(ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;

(iii) improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money;

(iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or

(v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.

Subsections *(iii)* and *(iv)* are closely concerned with corruption, but the other subsections indicate a broader mandate as well. The issue, then, is not that the PP cannot or does not deal with corruption, but that it has a much wider brief; and, with limited resources it cannot do justice to that wider brief if it spends all its time on often complex and drawn-out investigations into corruption.

3. Other Anti-corruption Entities

South Africa has a variety of offices, units and agencies with an anti-corruption mandate, together comprising a multi-pronged approach to the problem. They include:

- The **Directorate for Priority Crime Investigation**, better known as the **Hawks**. This is a unit within the SA Police Service and consequently has no political or operational independence. Its track record through the Zuma/Gupta years was poor and, although it is now under better leadership, it has still not made any major breakthroughs in the anti-corruption fight.
- The **Special Investigating Unit** and the **Asset Forfeiture Unit**. The former is nominally independent while the latter is located within the National Prosecuting Authority. However, the SIU can act only on the basis of a presidential proclamation and cannot carry out investigations on its own initiative. The AFU has done valuable work in the past, but it is primarily concerned with recovering misappropriated funds, rather than preventing or prosecuting corruption.
- The **Auditor General**, like the PP, is a body set up under Chapter 9 of the Constitution with full operational and political independence. However, while the AG may uncover corruption its primary function is to ensure proper financial management and accounting standards in state entities.
- The **Financial Intelligence Centre** is a statutory body tasked with tracking money-laundering and the financing of terrorism. It also looks into illicit flows of money in and out of the country. Since much corrupt money needs to be laundered, and may find its way out of the country, the FIC can also play a part in the anti-corruption battle, but this is not its main task.

- The **National Treasury** and the **SA Revenue Service** have various anti-corruption components and investigation channels (which is one of the reasons why both these bodies were prime targets of the state capturers).

There are also a number of joint bodies with an anti-corruption mandate, such as the **Anti-Corruption Inter-Ministerial Committee** (established in 2014) and the **Anti-Corruption Task Team** (2010) and a **Multi-Agency Working Group** on procurement and supply-chain issues (2012). Given that the state capture phenomenon reached its peak in the years after these bodies came into being, their lack of effectiveness is apparent. In any event, all of them fall under one or more government ministry, and thus have no real independence.[7]

In addition to the question of independence, none of the agencies listed above has an educative or awareness-raising mandate. To the extent that they deal with corruption, they tend to look at its consequences and try to remedy the harm it has done. There is also the question of fragmentation. It is not apparent that this plethora of agencies, task-teams and units can effectively work together and share information; or that sufficient levels of trust can be achieved or maintained between them.

The multi-agency approach adopted so far in South Africa cannot be said to have worked at all well. However, this is not to say that a single-agency approach would solve the problem. After all, countries such as Zimbabwe, Namibia and Kenya all have constitutionally-mandated anti-corruption agencies with wide powers, but no one would seriously claim that corruption does not remain a serious concern in those countries. If a national anti-corruption agency is to succeed in its mandate, therefore, certain requirements must be met.

4. Characteristics of an Anti-Corruption Commission

There are various ways of setting out the formal characteristics of such a body, but a convenient listing has been developed by the CSO Accountability Now – it goes by the acronym STIRS, which stands for:

Specialised: The entity needs to work solely on corruption involving the public sector. It cannot have its focus distracted by looking at other crimes, no matter how serious, as is the case with the Hawks and as was the case with the Scorpions before 2008.

Trained: Corruption, especially at the higher end where sums of billions of Rands are involved, is a complex business. Those who investigate it need to match the skills of the expert accountants and lawyers who are employed by the corrupt to cover their tracks. Investigators and prosecutors will need specialist training to reach such levels of expertise.

Independent: This criterion is self-evident. The Zuma administration openly appointed malleable and politically acceptable people to important posts as part of the state capture project. Officials who refused to turn a blind eye were routinely removed from office. An anti-corruption commission must be free from control by the executive, and report only to Parliament, as is the case with the other Chapter 9 Institutions.

Resourced: Nominally independent institutions can be effectively neutralised by depriving them of the financial and human resources they need in order to carry out their mandate. Budgetary independence is thus as important as political independence.

Security of Tenure: The stringent requirements that must be met before a judge or the head of a Chapter 9 Institution can be dismissed are designed to ensure independence and to insulate such people from undue political pressure. The same must apply to the leadership of an anti-corruption body.[8]

Over and above these foundational points, an anti-corruption commission must have three broad functions: it must be able to investigate instances of corruption; intervene to prevent it; and carry out an educational mandate.

Its ***investigative powers*** should be original, that is, it should be able to act on its own initiative and not just when it receives a complaint. This is the case, for example, with the PP, and it is an extension of the principle of independence. It is clear, too, that these powers should be wide-ranging, otherwise it would be an easy matter to frustrate an investigation by declining to co-operate. Once again, experience derived from the PP and other Chapter 9 Institutions can be employed to establish investigative criteria for an anti-corruption commission.

Prevention of corruption would involve, for example, giving the commission some sort of oversight role regarding major public sector projects, procurement contracts, and so on. We often discover too late that such projects have been tainted, or completely undermined, by corruption and even with the best will it is difficult to undo the damage. This applies, for instance, to the multi-billion Rand expenditure on the Medupi and Kusile power stations; various recent Transnet locomotive contracts; and the notorious Nkandla saga, to mention just a few.

Since such a commission could never have sufficient staff to monitor the tens of thousands of low level transactions involving public money that occur every year, it would also have to carry out an ***educative*** role, promoting honesty and integrity in the public service. Again, much could be learnt from other Chapter 9 Institutions which have an educative mandate, usually expressed as "to promote respect for" certain social goods such as human rights, gender equality, national unity and the like.

5. Composition

It is important, both for its independence and for purposes of ensuring public confidence, that an anti-corruption commission should be directed by people of unquestionable integrity who are also politically non-partisan. We have more than enough such people to draw on – retired judges, academics, senior clerics, community leaders and civil society activists. As is the case with the Human Rights Commission and the Electoral Commission, for example, these commissioners would oversee the work of a professional staff.

We also have long experience in the best – and worst – ways of selecting and appointing people to such a body. The methods of the Judicial Service Commission are widely respected – an open system of nominations, public interviews of candidates, followed by recommendations for formal appointment by the President. It is true that other open selection processes, such as that followed in the appointment of the current Public Protector, have not always delivered perfect results, but no such process is entirely fool proof.

6. Legal Status

It would be a relatively simple matter to bring an anti-corruption commission into being by way of ordinary legislation, but this would be a less than satisfactory way of doing it. For one thing, it would be an equally easy matter to do away with it if it proved to be a thorn in the side of the majority party or parties; and its powers and functions could also be easily amended and circumscribed.

In effect, the commission would not really be independent and able to act impartially if its continued existence was at the whim of a bare parliamentary majority.

Another consideration is that it should enjoy the same status as the other Chapter 9 Institutions, especially the PP and the Auditor-General, with both of which it would need to work closely. In particular, its recommendations should have the same weight, force and effect as those of these two institutions.

Creating a new Chapter 9 Institution would require a constitutional amendment, and this is always a drawn-out and more complex process than passing an ordinary Act of Parliament. However, it is hard to imagine that the two largest parties, at least, would object to the creation of such a body, and therefore the passage of the necessary amending legislation ought not to be difficult.

7. Conclusion

There is as yet no popular clamour for the establishment of an anti-corruption commission. As mentioned above, many people assume that we already have such a body in the form of the PP. Others seem to think that the new appointees at the National Prosecuting Authority and the Hawks will get to grips with corruption in due course, which is very unlikely.

Others will argue – and it is a recommendation in the National Development Plan, a document that is now almost forgotten – that it would be unwise to put all the anti-corruption eggs into one basket; and that the existing range of agencies should instead be strengthened. That is a valid view, but in the eight years since the NDP was published, instead of seeing the agencies strengthened we have watched them being hollowed out. And the little that has been done since the end of the Zuma era to rescue some of them has not brought an end to entrenched corruption.

Perhaps the report of the Zondo Commission of Enquiry into State Capture will give impetus to the

efforts of those who think that a designated, well-trained, well-resourced, independent anti-corruption commission, with Chapter 9 status, is the way to go.

Whatever one's point of view, it is abundantly clear that what we have been doing up to now to combat corruption has simply not worked.

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[1] CPLO and the Hanns Seidel Foundation co-hosted a Roundtable Discussion on this topic on 13th March this year. The main speakers were Lawson Naidoo, Executive Secretary of the Council for the Advancement of the SA Constitution (CASAC), and Paul Hoffman SC, Director of Accountability Now. Much of this paper, especially sections 3 and 4, is based on the contributions of Mr Naidoo and Adv Hoffman. A podcast of their presentations is available on the CPLO website www.cplo.org.za

[2] *A Call to Examine Ourselves in the Widespread Practice of Corruption*, SACBC, Pretoria, August 2013.

[3] President Ramaphosa recently said that state capture had cost the country at least R500 billion. https://www.fin24.com/Economy/South-Africa/ramaphosa-says-state-capture-cost-sa-more-than-r500bn-overseas-criminals-will-be-brought-to-book-20191014

[4] https://www.news24.com/SouthAfrica/News/ramaphosa-vows-that-covid-19-budget-to-fall-prey-to-looting-20200424

[5] https://citizen.co.za/news/south-africa/1748832/protector-lifts-lid-on-madiba-r300m-funeral-looting/

[6] For a full description of the purpose and functions of the Public Protector in South Africa, see https://www.researchgate.net/publication/233482747_The_role_of_the_public_protector_in_fighting_corruption Although not a recent article, it is extremely detailed and provides a thorough overview of the purpose behind the creation of this office.

[7] It is encouraging that there has recently been an attempt to consolidate some of government's anti-corruption work. See https://www.gov.za/speeches/south-africa-ready-consolidate-its-national-anti-corruption-strategy-14-sep-2019-0000

[8] For more on the STIRS criteria and their origins in a judgement of the Constitutional Court, see https://www.biznews.com/leadership/2020/02/14/unlikely-year-orange-overalls-paul-hoffman-corruption

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