



COUNCIL
FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN
CONSTITUTION

CORRUPTION: TOWARDS A COMPREHENSIVE SOCIETAL RESPONSE

EXECUTIVE SUMMARY

1. As an organisation created to promote progressive constitutionalism, the Council for the Advancement of the South African Constitution (CASAC) is concerned by the debilitating effects of corruption and unethical behaviour on the democratic foundations, and the impact this has on the socio-economic rights and dignity of people.
2. The South African Constitution envisages a society based on democratic values, social justice and fundamental human rights. Corruption is inimical to democracy, eroding the legitimacy of democratic institutions and subverting the rule of law. Corruption diverts resources and increases the costs of goods and services.
3. We define corruption as an unlawful arrangement between two or more parties to secure illegitimate advantage for national interests or private benefit or enrichment, through subverting or suborning a public official or any person or entity from performing their proper functions with due diligence and probity. It is important to recognize that corruption occurs in the public and private sectors, as well as within civil society, and that unequal power relations compound the problem.
4. Chapter One looks at the elements of leadership, values and partnerships in combating corruption. South Africa's history of conquest, colonialism, dispossession and apartheid provided the conditions for corrupt practices to take root and flourish. The state pre-1994 was

morally and legally corrupt. The litany of corruption under apartheid has been well documented. Some of these unethical patterns of behaviour have been adopted by the new elites in the democratic era. The culture of corruption and tolerance of it is taking hold in all sectors of our society. These practices have undermined the values that the liberation struggle embraced and which are now articulated in the Constitution.

5. South Africa has implemented many measures since 1994 to deal with corruption although some institutional and legislative gaps remain. The active involvement of citizens and organs of civil society must also take centre stage in the fight against corruption. Strong leadership, sound values and ethics as well as a determined political will are key ingredients to prevent and combat corruption. CASAC proposes a campaign to “Red Card Corruption” involving all sectors of South African society.
6. Chapter Two identifies key weaknesses in the current legal rules and procedures, and institutional frameworks in the light of our constitutional commitments, international obligations and the need for an effective framework to combat corruption.
7. South Africa has ratified six international Agreements dealing with corruption:
 - UN Convention Against Corruption
 - AU Convention on Preventing & Combating Corruption
 - OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
 - UN Convention against Transnational Organised Crime
 - SADC Protocol against Corruption
 - SADC Protocol on Combating Illicit Drugs
8. These international instruments give rise to a range of obligations:
 - To establish an independent anti-corruption agency or agencies;
 - To ensure that steps are taken to investigate and where appropriate prosecute corrupt acts; to prevent corruption by removing obvious opportunities for corruption; and to educate the public on the harms of corruption.
 - To ensure transparency and access to information in the fight against corruption;
 - To establish mechanisms that encourage participation in the fight against corruption by the media, civil society and non-governmental organisations; and
 - To adopt measures that address corruption not only in the public sector but also in the private sector.

9. There are several existing institutions whose mandate includes corruption. These include the South African Police Service including the Directorate for Priority Crime Investigation (Hawks); the Special Investigating Unit (SIU) and the Asset Forfeiture Unit (AFU). The offices of the Public Protector and the Auditor General also have investigative and monitoring roles to play in respect of acts of corruption. The National Treasury has the responsibility to establish frameworks for the management of public finances, and the Financial Intelligence Centre deals with crimes of money-laundering.
10. In addition there are various multi-agency initiatives:
- Anti-Corruption Task Team (Hawks, SIU and AFU and Special Commercial Crimes Prosecutors of the NPA)
 - National Treasury Initiative (Accountant-General, SARS & FIC)
 - DPSA Special Anti-Corruption Unit (working in partnership with the SIU)
11. Despite the plethora of institutions, three problems have been identified in current system:
- I. There continues to be poor monitoring and enforcement, with few prosecutions.
 - II. There is no entity with a clear public education mandate with respect to corruption.
 - III. Organisations with a responsibility to combat corruption are not truly independent as they are responsible to the executive. The Public Protector and the Auditor-General, while institutionally independent, do not have a primary mandate to combat corruption.
12. A dedicated independent agency with a three-pronged mandate of investigation, prevention and education is suggested. Political will is seen as the critical ingredient in the success of any structure aiming to deal with corruption. An OECD Report on Specialised Anti-Corruption Institutions in 2007 states that:
- “An anti-corruption institution should have a clear legal basis governing the following areas: mandate, institutional placement, appointment and removal of its director, internal structure, functions, jurisdiction, powers and responsibilities, budget, personnel-related matters (selection and recruitment of personnel, special provisions relating to immunities of the personnel if appropriate, etc.), relationships with other institutions (in particular with law enforcement and financial control bodies), accountability and reporting, etc.”*
13. It is argued that in order to inspire public confidence an anti-corruption agency must be truly independent of executive or state control. Other key

organisational principles canvassed include accountability (to parliamentary structures or civilian oversight), appointment procedures for the head of the agency and its staff, independence of the head of the agency, and the provision of adequate resources for the functioning of the agency.

14. It is suggested that the agency should investigate all complaints that it receives, leaving no room for allegations of bias to be levelled against it should a selective approach be followed. The issue of whether the agency should have the power to institute its own investigations in the absence of a prior complaint is raised for further debate.
15. The extent of the legal powers to be granted to the agency to execute its mandate are also canvassed – should they have powers to intercept communications, to detain people for interrogation, to access financial data, asset freezing, recovery and confiscation?
16. It is recommended that while the agency should work closely with prosecutors, the two functions should be kept separate, with the prosecuting authority providing a check on the sufficiency of evidence obtained before a prosecution is launched. The issue of whether the discretion conferred on prosecutors not to prosecute in the public interest should apply to cases of corruption is also posed as it may lead to perceptions of bias.
17. The public education mandate of the proposed agency forms a critical component of its work, and needs to be executed in collaboration with all sectors of civil society. Creative partnerships between the agency and civil society bodies will need to be developed to educate the public about the form, nature and impact of corruption on society.
18. The five shortcomings of the existing legal framework for dealing with corruption are articulated as follows:
 - Inadequate protection for whistleblowers
 - Failure to implement a “cooling-off period” for politicians and public servants
 - Enforcement of codes of conduct regarding disclosures of interests
 - Absence of regulation of party political funding
 - Rules of criminal procedure that allow accused persons to delay and circumvent the criminal prosecution process
19. CASAC advocates the establishment of a dynamic partnership between political parties, government, business, and other civil society organs in order to secure buy-in from all sectors of society and build a foundation for the establishment of a culture opposed to corruption through public education campaigns. In particular CASAC seeks to facilitate greater

involvement by organs of civil society in implementing public education campaigns and rooting out corruption.

19. CASAC calls on all sectors of South African society and all citizens to engage with this report and its proposals, and to make their own contributions as to what should be done to stem the tide of corruption. We urge all South Africans as well as government and organs of civil society to say “we will no longer tolerate this foul play”, ‘Red Card Corruption’!