

Corruption in South Africa: The politics, the law and all the shenanigans in between

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South Africans are sick and tired of corruption. They are angry, frustrated and despondent. And they have every reason to be. South Africa has many problems: crime, unemployment, poverty, gender-based violence, inequality, low economic growth and now – in common with many other countries – COVID-19. The list goes on and on. What makes corruption the biggest threat among all these is that it cuts across all of them and impacts on their gravity in different ways.

The South African Constitution envisages a society based on democratic values, social justice and fundamental human rights. The way things are going, that society is never likely to happen. That is because corruption has been, and continues to be, the greatest threat to any possibility of realising that constitutional dream. In South Africa, like everywhere else where corruption is rampant, it occurs both in the public and private sectors, where it affects democracy and human rights by deteriorating institutions and diminishing public trust in government. It impairs the ability of government to fulfil its obligations and ensure accountability in the delivery of economic and social services like healthcare, education, clean water, housing, and social security. This is because corruption diverts funds into private pockets – which impedes delivery of services – thereby perpetuating poverty, inequality, injustice and unfairness. The problem is aggravated when government is the main culprit. “Government” here, of course, refers to the dictionary meaning of the term, namely, “the group of people with the authority to govern a country or state”.

Corruption existed in ancient Egypt, China and Greece

There are those who argue that corruption is as old as mankind and, therefore, it is here to stay. Indeed, corruption is known to have existed in ancient Egypt, ancient China and ancient Greece. In Robert Bolt’s 16th Century play *A Man for All Seasons*, Richard Rich’s opening remark is “But every man has his price.” In the 1836 play *The Government Inspector*, Nikolai Gogol cleverly satirised the human greed, stupidity and extensive political corruption in Imperial Russia at the time. And in a recent [article](#) in *The Conversation* (28 August 2020), Steven Friedman wonders why South Africans express shock at corruption when “it is perhaps the country’s oldest tradition.” He locates the advent of corruption in South Africa at the arrival of Jan van Riebeeck in 1652, through to the ensuing colonialism and apartheid. He argues that in reality, “corruption has been a constant feature of South African political life for much of the past 350 years. It is deeply embedded and it will take a concerted effort, over years, not days, to defeat it”.

Agreed, but does it have to be that way? At the time of Jan van Riebeeck and during the 350 years of colonialism and apartheid, we did not have the legal framework that we have now. Here is a brief overview of that framework.

Firstly, international law is replete with anti-corruption treaties and agreements. The main international anti-corruption legal instrument is the [UN Convention against Corruption](#) (UNCAC). Its focus is on prevention, criminalisation, international cooperation, asset recovery and implementation mechanisms. The other important legal instrument is the [United Nations Convention against Transnational Organised Crime](#) which focuses mainly on the fight against organised crime, and includes several provisions relating to corruption. In the specific African context, the [African Union Convention on Preventing and Combating Corruption](#) is the most relevant legal instrument. Its main emphasis is on the need for member states to develop

mechanisms of preventing, eradicating, and punishing acts of corruption. Article 7 of the Convention is dedicated to the fight against corruption and related offences in the public service and Article 8(1) obliges state parties to create, within their domestic legal systems, an offence of illicit enrichment. Another international instrument that has a bearing on public corruption in Africa is the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions. Its main purpose is to provide a framework for criminalising corruption in international business transactions. There is also the 2011 [UNCITRAL Model Law](#) on Public Procurement, which contains international best practices on public procurement procedures and principles in a national setting. It also seeks to harmonise public procurement processes across nations. The Southern African Development Community Protocol against Corruption is also important. South Africa is a party to all these legal instruments, having signed and ratified all of them.

Several provisions in the Constitution have direct or indirect bearing on corruption

Domestically, South Africa is not short of legal instruments either. Although the word “corruption” is not mentioned anywhere in the South African Constitution, several provisions in the Constitution have direct or indirect bearing on it. Not only does the Constitution create certain offices to ensure transparency and accountability of government officials, it also contains anti-corruption provisions that span across a large variety of sectors such as administration, public service, security services, finance, etc. Examples include section 32(1)(a)(b) which provides for the right of access to information, section 33(1)-(2) which provides for the right to administrative action that is lawful, reasonable and procedurally fair and section 182(1)(a) which gives the Public Protector power to investigate any conduct in state affairs or in the public administration of any sphere of government that is alleged or suspected to be improper. They also include section 188(1) which requires the Auditor-General to audit and report on the accounts, financial statements and financial management of all state entities and section 188(2) which authorises the Auditor-General to audit and report on the accounts, financial statements and financial management of any state-funded institution.

Also relevant is section 195 which outlines basic values and principles governing public administration, section 215 which requires national, provincial and municipal budgets and budgetary processes to promote transparency, accountability and the effective financial management and section 217 which provides the constitutional basis for public procurement in the country.

Anti-corruption statutes

The main anti-corruption statute in South Africa is the [Prevention and Combating of Corrupt Activities Act](#) 12 of 2004 (PCCA). The PCCA is a very comprehensive statute that creates the general offence of corruption and offences in respect of corrupt activities relating to public officers, members of the legislative authority, judicial officers and members of prosecuting authority. Another relevant anti-corruption statute in South Africa is the Prevention of Organised Crime Act 121 of 1998 which provides for measures to combat organised crimes, money laundering and criminal gang activities. Also relevant is the [Protected Disclosures Act](#) 26 of 2001 (PDA) which makes provision for the procedure in terms of which employees and workers, in the private and public sector may disclose information relating to unlawful or irregular conduct by their employers or employees. It also provides protection for employees or workers who make such disclosure.

Then there is [the Public Finance Management Act](#) 1 of 1999 (PFMA) which was adopted to modernise financial management by ensuring transparency, accountability and the sound management of revenue, expenditure, assets and liabilities of provincial and national governments. Similarly, the [Municipal Finance Management Act](#) 56 of 2003 (MFMA) provides for sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government. The object of the act is, inter alia, to ensure transparency, accountability, and appropriate responsibility in the financial affairs of municipalities and municipal entities. Accordingly, it provides the legal framework for the implementation of an integrated supply chain management process in local government.

Other relevant statutes include the Companies Act 17 of 2008 whose Regulations create a duty to combat corruption and addresses certain issues relating to whistleblowers and the Public Services Act 103 of 1994 section 41(1)(b)(v) which requires the Minister to make regulations on a Code of Conduct in terms of which public servants must act in the best interests of the public, act honestly in dealing with public money and report fraud and corruption. Finally, the Executive Members' Ethics Act 82 of 1998 (EMEA) provides for the publishing of a code of ethics (after consultation with Parliament and by proclamation in the Government Gazette) governing the conduct of members of the Cabinet, Deputy Ministers and members of the provincial Executive Council.

Mention also ought to be made of subsidiary legislation, such as the PFMA Regulations which provide for a practical framework within which supply-chain management practices are to take place, the MFMA: Municipal Supply Chain Management Regulations which regulate the procedure for competitive bidding procurement and the PFMA Regulations and Preferential Procurement Policy Framework Act Regulations which provide for an operational framework for the preference point system envisaged in the PPPFA.

The problem is politics

Clearly, there are sufficient laws to address corruption in the country. The problem therefore, lies elsewhere. And the word that immediately comes to mind is – yes, you guessed it – politics. It is fair to say that most of the corruption in South Africa is political. According to Tom Lodge, “Corruption becomes systemic when corrupt activity begins to appear at all levels within a political system and when it becomes repetitious, constituting a parallel set of procedures to those which properly constitute the formal functions of the bureaucracy.” That sounds like South Africa, doesn't it? And if you are still in doubt, look at the recent flurry of arrests including the seven suspects in the Free State who appeared in the Bloemfontein Magistrate's Court in connection with a [fraudulent tender involving R255 million](#). Or better still, just tune in once, on any odd day, into the Zondo Commission hearings and all your doubt will be erased. Why – because in all these cases there is a link to an important political figure high up in the hierarchy of the government. Which is why most South Africans are wondering what it will take to get the real culprits to account – the politicians in high places. Only then will the shenanigans stop and corruption will be seen to be addressed.

But we all have a role to play. The law enforcement agencies must do their work without fear or favour. In so far as the judiciary is concerned, there is no doubt that judges, by virtue of their position in society, have an important role to play to ensure the effectiveness of anti-corruption laws and institutions. Courts, as we know, play an important role in the protection of human rights and the maintenance of the rule of law. They do this mainly through the interpretation of the

Constitution and through their law-making powers of interpreting legislation and developing the rules of the common law. The plethora of anti-corruption laws in South Africa mentioned earlier can only be effective if properly interpreted and implemented, taking into account the Bill of Rights contained in the constitution. Thankfully our judiciary can still walk tall and rightly claim to be not as corrupt as the other two arms of government – the executive and the legislature.

The role of civil society

The role of civil society is critical. There are a number of civil society organisations in South Africa that can and do play an important role in the fight against corruption. [Corruption Watch](#) and the [National Anti-Corruption Forum](#), for example, can do a lot more in being corruption watchdogs, exposing cases of corruption, challenging corrupt officials and institutions and identifying corruption-prone areas, particularly in government.

At the end of the day, exceptional leadership from the very top might be a big part of the solution. President Cyril Ramaphosa, in my humble view, should take advantage of the little goodwill that remains, clean up the rot and sacrifice aspirations of a second term for a legacy that will etch him closer to Nelson Mandela (who himself only served one term) in the memories of present and future South African generations. Who knows? That might well be the only thing that assures him of a second term!