



INCLUSIVE SOCIETY INSTITUTE

Op-ed

Anti-corruption agencies need to be nurtured
By Professor Andrew Spalding

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The emblem of the Inclusive Society Institute, which has a high-level project on the go to investigate the merits of establishing an anti-corruption agency in South Africa, contains a flower, a Protea, which is a great metaphor for an effective anti-corruption movement. Just as the Protea must be cultivated over some time – and, at the same time, though it can take much effort to cultivate, it is itself very fragile – so too does building an effective set of institutions. And norms and measures, take time and need to be safeguarded.

Modern South Africa was born at about the same time as the modern anti-corruption movement. These both occurred in the 1990s, and both are still relatively young. There is still much to learn about how different measures fit in different countries and in different cultural contexts. Examples of countries that have made a significant pivot and have gone through the kind of rapid transition that South Africa now aspires to include Brazil and France. But, of course, when talking about commissions, Hong Kong is the example.

Sometimes an added commission is effective and sometimes it is not. Brazil is a country, for example, that made tremendous headway, in a short period of time, in addressing systemic government corruption without creating a commission. They did it simply by giving the existing federal prosecutors, who were themselves capable people, the prosecutorial tools they needed to address corruption.

Brazil gave prosecutors two much-needed tools to crack down on corruption: the obstruction of justice charge, which did not previously exist in Brazilian law and which the prosecutors could use to turn witnesses, and the non-trial resolution (NTR) – the out-of-court settlement. The NTR has been a tremendous component of the global anti-corruption enforcement effort, but also a highly controversial one. It cannot just be transplanted from one country to the next as its fit fluctuates within diverse contexts.

With new institutional measures, whether it is a new commission or some other body, there are three core functions. Firstly, there is the prosecutorial function. In the South African context, when creating a new commission, first and foremost is its prosecutorial capacity – its ability to crack down on corruption by prosecuting both public and private actors. This is of utmost importance.

The second function is the standards issue: the function of a dedicated anti-corruption agency is to promulgate standards that help guide public and private actors. In South Africa the nexus between corporations and the government is a big part of systemic corruption and this is one of the greatest challenges to be tackled. To succeed in doing so, clear standards will need to be set and effective enforcement tools provided that will enable prosecutors to encourage, if not require, companies to

adopt these standards. South Africa needs to think about the broad function of any new commission, in robustly developing standards (particularly, standards of corporate compliance) and what that might look like in the South African context.

Thirdly, it is very important to think about what the educational mission of any anti-corruption commission is. In the early days of anti-corruption enforcement of the anti-corruption movement, it was often said that there are places in the world where corruption is cultural. That is incorrect. In fact, there is no country in the world, at least none that has been encountered, where the belief is genuinely held that corruption is an affirmative good that needs to be preserved as a part of the culture, as a part of the system of government.

There are places where corruption is quite pervasive and there is a widespread sense of resignation to the necessity of corruption. There are certainly parts of the world where it is widely believed that corruption is not something you can control, but that is a different problem.

If that is the case, as it likely is in South Africa, then the educational mission is to convince people that corruption is not something you have to live with. It is not inherent in government. That there are measures that have been learned, studied and experimented with that can be adopted to reduce corruption.

It is often said, with enthusiasm, that South Africa is trying to build a world in which corruption has been eliminated. But there is no guarantee that corruption can be eliminated in its entirety. However, that itself is not a strike against the anti-corruption movement. Anti-fraud laws, for example, even in jurisdictions where they are thought to be very effective, have not eliminated fraud, but they reduce it to a point that it becomes the exception, not the norm. Convincing people that corruption is something we can reduce – and that reduction is itself the goal and is a realistic goal – is very important.

There are a few questions that remain in relation to an anti-corruption commission in South Africa. If the commission is to have a prosecutorial function, and it is to collect money through fines and penalties, what should be done with that money, how could such funds be reinvested into initiatives or programmes that will benefit the victims of corruption in South Africa? This is salient given that the victims are of course the citizens of South Africa, especially the most vulnerable ones.

To what degree might negotiated settlements, in other words non-trial resolutions (NTRs) or out-of-court settlements, be used? Supporters of this function believe that they increase the efficiency and effectiveness of anti-corruption prosecution by settling charges with defendants out of court rather than going to trial. However, in order to incentivise defendants to settle out of court, they have to be given penalty reductions, which can be highly controversial, because the public may believe that justice has not been done. This may be problematic in the South African context, but non-trial resolutions have been essential to the effective global prosecution of corruption.

Finally, if the anti-corruption movement in South Africa is going to stave off opposition to aggressive anti-corruption enforcement, are there past acts of corruption that will have to explicitly, or implicitly, be dealt with by way of amnesty? Granting amnesty for past acts of corruption, not necessarily for the sake of reconciliation, but to ward off opposition to anti-corruption enforcement is an extremely sensitive topic – as it ought to be – but it is something that South Africa will have to think about.

This is Part 3 of a 5-part series of a high-level dialogue on the establishment of a National Anti-Corruption Agency for South Africa. This is an extract from the Inclusive Society Institute report on the dialogue.