

Position Paper on the Independent Anti Corruption Commission

Transparency International Zimbabwe (TI-Z)

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Introduction

Transparency International (TI) is the only global not-for-profit organisation and politically non-partisan movement combating corruption. It is dedicated to increasing government accountability and curbing both international and national corruption. Transparency International recognises that the responsibility for corruption is a shared one and its emphasis is on reforming systems, not exposing individuals. Corruption undermines good governance, it distorts public policy and leads to the misallocation of resources leading to low or slow development and ultimately hurting those who can least afford it.

Corruption generating conditions peculiar to the region include but are not limited to the digital divide and poor information exchange, capacity constraints and technical challenges associated with generating demand for accountability in the midst of poverty and limited literacy, north-south dependency, repressive political environments, lack of credibility in international engagements and transparency inhibiting legal regimes.

In order to foster a culture of responsiveness, civil society engagement in the policy process is being encouraged. The paradigm of developing political will for ensuring adherence to transparency and accountability through civil society participation with other stakeholders in governance, informed the formation of Transparency International (T.I) in 1993. T.I seeks to combat corruption through awareness raising and system reform. The Secretariat is based in Berlin, Germany and there are approximately 87 chapters in the world with 30 of them being in Africa. These chapters are autonomous and they set out their own programmes and seek their own funding.

The Zimbabwean chapter of Transparency International (TIZ) was established in 1996 and its mission statement is to combat corruption in the public and private sectors as well as in civil society through networks of integrity. TIZ has made substantial strides in raising awareness on anti-corruption activities in these sectors.

The Constitution was amended after several calls had been made to deal with the escalating cost of corruption in Zimbabwe. This was done through Amendment No.16. This Amendment provides for the establishment of an Anti-Corruption Commission. Although the Amendment was promulgated in 2000 the Commission has still not been set up. Many hailed this amendment, as it was long overdue, however the manner in which the amendment proposes to set up this commission is unsatisfactory. The newly instituted Nepad recognizes that anti-corruption institutions are required for the economic success of African countries. In this paper TIZ seeks to provide pointers for the creation of an independent anti-corruption commission that is in keeping with transparency and accountability using lessons learnt from other countries that have such a commission. The paper will discuss the mistakes made as well as the successes particularly from an African perspective.

Analysis of Amendment 16

Section 108A of the Constitution was created by Amendment 16, it states that the President will appoint members to this commission. This section does not mention the independence of this commission, which according to international standards is vital for its existence and its effectiveness. The SADC Protocol on Corruption signed by Zimbabwe in August 2001 refers to setting up of institutions that will fight corruption, although it does not outrightly state that an anti-corruption commission should be independent, this has been proved through experience that it should be.

Commissioners

In order to have an independent commission it is necessary for the public to be involved in the selection of the members of the commission. Inviting nominations from the public after stating clear criteria of the qualities required for such a commission can do this. These nominations

will then be presented to Parliament, which will peruse and shortlist the nominees they have found suitable and take these up to the President for endorsement. The nominees should be persons from all sectors of society including the private sector and civil society. It is essential when nominating an individual to assess whether he/she has personal integrity and is from an organisation that upholds accountability and transparency.

Nominees can also be sought from interest groups such as civic society organisations, professional bodies such as the Chartered Accountants and even from the private sector. Approximately ten commissioners should be nominated.

There should be gender balance in the composition of the commission, this is to say that the commission should not only consist of men and women but they should be persons who are gender sensitive. There is a gender related aspect of corruption that has to be taken into consideration as the effects of corruption affect men and women differently.

The purpose of this is to have a commission that is there to serve the interests of the nation as a whole not the privileged few. Section 108A states that persons of integrity with knowledge and experience in administration or the prosecution or investigation of crime or for the suitability for appointment, if these members are appointed by the President challenging their appointment, becomes very difficult if they do not fit this criteria. The selection criteria provided by Section 108A is very narrow and giving the public a chance in the selection process may improve the quality of the commissioners.

The commission should be in a position to hire its own lawyers, computer and systems analysts, accountants and any other professionals it requires.

Functions of the Commission

The functions of the commission are tabled in section 108A (3) as briefly to combat corruption, theft, misappropriation, abuse of power and other improprieties in the public and private sectors; to make recommendations to the Government and the private sector to increase accountability and integrity and to prevent improprieties and to exercise any other functions imposed by an Act of Parliament. After having studied other African Commissions, the commission must include in its functions the following:

- a. Investigating the conduct of any person which in the opinion of the commission may be connected or conducive to corruption,
- b. Receiving and investigating any complaints alleging corruption in any public body,
- c. Educating the public on the evils of corruption,
- d. Assisting any law enforcement agents of the government in the investigation of offences involving dishonesty or cheating of the public revenue,
- e. Advising heads of public bodies to change in practices or procedures compatible with the effective discharge of the duties of such public bodies which the commission regards as necessary to reduce the likelihood of the occurrence of corrupt practices,
- f. Assisting any law enforcement agencies of the government in the investigation of offences involving dishonesty or cheating of the public revenue,
- g. Examining the practices and procedures of the public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures are in the opinion of the commission, may be conducive to corrupt practices,
- h. Enlisting and fostering public support in combating corruption.

Having these broad functions increases the likelihood of the commission being successful, as it will not be restricted to certain aspects of corruption.

Independence of the Commission

The issue of independence is important since if the commission is under a ministry there is the danger of political interference and issues of political accountability and allocation of resources for the commission are raised to establish such independence. If politics is the key aspect the commission will not be successful. In most existing anti-corruption commissions the officials are appointed by the Head of State and report either directly to the Head of State

or through a ministry. This is giving too much power to the Head of State and this may be detrimental if he/she is not seen to be committed to the anti- corruption cause. Section 108 A (1) states that this will be the case in Zimbabwe.

Finances of the Commission

For this commission to succeed it must have adequate financial resources provided by the responsible government. The reason for this is that in order to tackle corruption at high levels the commission must have the resources to be able to investigate and detect the practices. There are high-tech methods of misappropriation especially in the private sector and the commission and those working under it have to be abreast with these methods. Only in Malawi and Botswana have the commissions stated that they have sufficient funding. In African countries where such commissions exist, surveys were conducted and these indicated that in order to curb corruption independent commission require sufficient funding. Zimbabwe should learn a lesson from these countries while it is in the process of establishing its own commission. Section 108A of the constitution is limited.

Considering the nature of the commission it should have its own budget allocation and not be part of a ministry as the issues of independence and control will arise. Other commissions in Zimbabwe have been funded, through a ministry, and have thus lost their autonomy, e.g. the Electoral Supervisory Commission and the ineffective Ombudsman's office. Constitutional changes have to be made to allow the commission to be autonomous.

Powers of the Commission

It is important for the commission to have the power to investigate cases of corruption, section 108A (4)(a) states that Parliament can confer powers of investigation on the commission. This in our opinion is inadequate as this should be one of the commission's major duties. It is a well-known fact that the law enforcement agency is ill equipped to deal with sophisticated methods of corruption.

The commission must have powers of prosecution and not rely on the AG. This is because the AG can decline to prosecute, as he is part of the cabinet. It is imperative for the commission to have it's own powers to investigate and prosecute thereby taking away the responsibility of corruption from the police and AG. The fact that the commission be created and remains autonomous is an integral aspect of its success.

Public education is another aspect that the commission has to be involved in as one of its principle powers. The proposed commission as provided for by the Constitutional Amendment does not confer such powers on the commission. The most important aspect of public education is that the general public will be made aware of the evils of corruption and how each case impacts on their lives. Once this happens the prevention arm of the commission should be its strongest as when the public says no to corruption in all sectors, i.e. government departments and private sector, it demands accountability and good governance, the levels of corruption will decrease.

The protection of whistleblowers must be incorporated in the commission. Whistleblowing is the act of reporting a corrupt act to the relevant authority, regardless of the motivation. Providing legal protection to whistleblowers is a key component to any systematic effect to fight corruption, it is important to provide whistleblowers with strong assurance against retaliation and encourage them to come forward and speak out in the public interest. It is necessary to seek significant solutions to the problems that cause people to refuse to come out in the open with cases of corruption. The purpose of the protection of whistleblowers is supposed to be the first step in mitigating the fear of reporting and reluctance on the part of the potential whistleblower. Section 108 A does not mention whistleblowers protection and we as TIZ see this as a major oversight on the part of the constitutional amendment.

International Conventions

Internationally, there has been an increased effort to curb corruption this is a result of the realization of the astronomical sums of money lost through this deed. There are bodies that have adopted conventions on anti- corruption e.g. Organisation for Economic Co-operation Development (OECD) Convention Against Bribery of Foreign officials, OAS (Organisation for

American states) has an Inter- American Convention against corruption. UN Declaration Against Corruption and Bribery and the International code of conduct for public officials and the TI Lima Convention give clear guidelines of how these conventions can be implemented at all levels, i.e. internationally, regionally and nationally.

These conventions have to be taken into consideration especially where they have been signed and can also be used as a guideline to enact or amend our own legislation and in the establishment of the commission. The conventions are not limiting the fight of corruption to be squarely on the government's head but the private sector and civil society must be engaged to combat corruption nationally and internationally.

Corruption Survey

In an anti-corruption perception survey conducted by TIZ in 2001, the general perception among people interviewed was that an anti- corruption commission is necessary which must be independent, this was said by 76% of the interviewees. The survey took into account the need to get the views of both men and women so that the gender analysis would be part of the findings of the survey. It was crucial to find out the views of men and women because corruption affects the sexes differently due to the economic, social and political position of men and women in the Zimbabwean society. 72.7% stated that this commission should be appointed by a Parliamentary committee and not by the President.

The creation of such a commission requires independence from government to enable it to investigate and prosecute government officials involved in corruption cases, as government being the biggest employer in the country corruption is inevitable. Looking at other African Commissions these problems have arisen, as the commissioners do not effectively investigate government officials or those closely associated with the President, as they know on which side their bread is buttered. If such a commission is independent, the ideal situation would be that members of parliament appoint it and it gets endorsed by the President after a selection process that is described above.

Another problem with African Commission is the reporting mechanism. If appointed by the President, does the commission report to the President and what happens to cases involving the President or his family and friends? In other countries where these commissions exist the major complaint was that they do not investigate grand corruption involving senior officials. One leader stated, "Unsure of political commitment from leadership, these officials are left trying to interpret political signals to determine whether or not certain public leaders are immune to investigation. As a result, the institutions are seen to be less willing to undertake investigations of close allies political authority"

The commission, provided its appointment is done through Parliament, should report to the Public Accounts Committee. Parliament is a representative body of national interests. It is more profitable in terms of accountability for the Commission to report through a parliamentary committee and not an individual. A proper reporting mechanism of the commission is imperative for the success of this commission. There have been many cases involving senior government officials that have not been concluded in the courts, as there has been political interference.

The Zimbabwean commission could be formed following the highly successful Hong Kong Independent Commission Against Corruption (ICAC). The main emphasis of this commission was prevention and public participation. This commission recognized the need to involve the public in the fight against corruption and it was determined that the best possible way to win the public was to prosecute and punish high-level perpetrators. "Big and corrupt actors must be named and punished so that a cynical citizenry believes that an anti-corruption drive is more than just words." This commission was "responsible for taking a good hard look at practices and procedures within the Government and public utilities. This is done through careful examination and analysis of systems; methods work approach, and policies. The object is to eliminate and simplify wherever possible or desirable, unenforceable laws,

cumbersome procedures and vague and ineffectual practices conducive to corruption.” – This was stated by one of the officials of the ICAC.

The ICAC has three components,

1. Operations Department, which was in charge of investigations
2. Corruption Prevention Department, which evaluated where various agencies were vulnerable to corruption and helped the agencies take remedial measures,
3. Community Relations Department, which involved the people in the fight against corruption.

When confronted with systematic corruption, understanding that the usual law enforcement approaches are insufficient; it is almost impossible to succeed with the investigations aspect when the investigatory arm of the government is regarded as corrupt.

The secret to the success of anti-corruption activities is in the formulation of policies and a change in systems. There has to be a strategy against corruption, this strategy must focus on corrupt systems instead of on the corrupt individuals. It is necessary to concentrate on the systems that enable one to participate in corrupt activities. These systems include situations where there are few checks and balances, where there is a blurred line between the executive, the legislature and the judiciary (no separation of powers) and no good systems of control.

This strategy should examine ways of reducing monopoly power, as this is where corruption can thrive and increasing transparency in the public sector. It is imperative to always keep in mind that corruption is a crime where the risk is small, the penalties insignificant and the benefits enormous. Where there is monopoly power, the probabilities of greater rewards are higher, in order to reduce corruption information and incentives have to be increased. The anti-corruption strategy requires the development of clear concepts of ends and means in the short and long term and in order for an anti-corruption commission to be taken seriously it needs to be successful in the early stages.

Closer to home, several countries in Africa have established anti-corruption commissions, it is necessary to discuss these briefly to learn lessons from their mistakes as well as their successes.

Nigeria

An Independent Corrupt Practices and Other Related Offences Commission was established by The Corrupt Practices and Other Related Offences Act of 2000. This Commission has the power to investigate and prosecute offenders, and it also has the protection of whistleblowers functions. The Act clearly stipulates the type of people who can become commissioners and the duties they are expected to perform.

Of all the African states, the Nigerian commission is the most progressive as it is independent, in that it is a corporate body with perpetual succession and can sue and be sued in its own right. This commission incorporates all the provisions being requested by TIZ in the Zimbabwean commission. This commission is relatively too new for it to show any noticeable decrease in the levels of corruption. Strength is that the government has manifested the political will to combat corruption.

Malawi

The Anti-Corruption Bureau was set up, it has the statutory responsibility to undertake public education, corruption prevention, investigating and prosecuting cases of corruption under the Corrupt Practices Act. Critics have, however, stated that no successful prosecutions have been completed by the commission since its inception.

Zambia

The Anti-Corruption Commission was established in 1986 and amended in 1996 but it has not been sufficiently effective in the fight against corruption. The Anti-Corruption Commission Act in itself is a commendable piece of legislation as it categorically states that “ the commission shall not in the performance of its duties, be subject to the direction or control of any person

or authority." This however has not been the case as it has been marred by political interference and it is not independent hence its ineffectiveness.

This commission has the power to arrest, search and seize, its mandate is mainly to highlight management weakness and prevent corrupt practices in both public and private sectors. The Act gives the commission the right to prosecute any offences under the Act, after receiving directions from the Director of Public Prosecution. There is however no protection of the whistleblowers, which is a major oversight.

Botswana

The Corruption and Economic Crime Act of 1994 established the Directorate on Corruption and Economic Crime and it has adequate government support in terms of manpower and financial resources made available to it. The Directorate has the power to investigate any public official as well as to educate the public on the evils of corruption. However it is a public office and its success is dependent on the government in power and this undermines its independence.

Namibia

Namibia's Ombudsman's office has the power to determine corruption cases and it does so as the office was empowered to investigate all instances of alleged corruption and the misappropriation of public funds and forward them to the relevant authorities. This office has however not been successful because it is not easily accessible as the general public does not know of its existence and its functions. It is also not independent as the Ombudsman is appointed by the president and it is a public office.

Sierra Leone

The Anti Corruption Act 2000 creates the Anti Corruption Commission, this commission is through a presidential appointment which is not desirable. Its functions include investigation of alleged corrupt practices, taking steps to eradicate corruption, examining the practices and procedures of government departments and public education. This commission is limited in that it lacks independence and it does not have the right to prosecute. It is considered progressive because it protects whistleblowers and it deals effectively with those make who false reports.

Tanzania

Tanzania has the longest serving anti-corruption commission, the Prevention of Corruption Directorate, which was established in 1968. The government of Tanzania has acknowledged that support from the civil society, the media and the private sector is essential for the successful implementation of an anti-corruption strategy. The Directorate is empowered to have public awareness programmes on how corruption hinders the development of a country and how it ultimately damages the fabric of society.

This directorate also recognizes the need for the protection of whistleblowers and that this information of protection has to be disseminated to the public for them to co-operate. It has not shown a decrease in the levels of corruption even though the government has demonstrated its political acceptance of the anti-corruption drive.

Conclusion

Having stated the above points, in conclusion our submission is that the Anti-Corruption Commission, should be independent, the selection of the commissioners should involve the public and the powers of the commission should be broad enough to encompass investigating corruption cases and prosecuting them. This commission should be give powers to also play an active part in public awareness programmes.

We are cognizant of the fact that some of the issues we are raising require constitutional changes and amendments to certain pieces of legislation but due to the importance of the issues we are of the opinion that this should be done in order to have a successful commission. This is in reference to the fact that prosecution powers be given to the commission and taken away from the Attorney General, amongst other issues.

An Independent Anti-Corruption Commission is an important and necessary step for Zimbabwe to take, to be seen to be serious about combating corruption in all sectors. Article 4 of the SADC Protocol Against Corruption states the preventative measures that each signatory should take to ensure that corruption is curbed. In section g) it states that institutions responsible for implementing mechanisms for protecting, detecting, punishing and eradicating corruption should be established. Since Zimbabwe signed the Protocol, it should be seen to be implementing its articles.