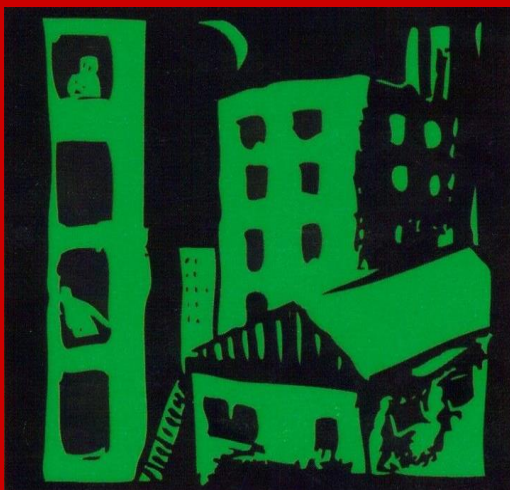
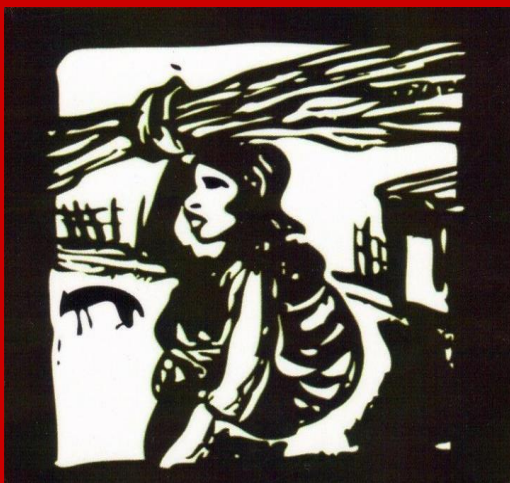


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A human rights based approach to fighting corruption in Uganda and South Africa: shared perspectives and comparative lessons

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ABSTRACT

This article focuses on corruption in Uganda and South Africa. It begins with a brief analysis of the effects of corruption on the two countries before looking comparatively at their anti-corruption legal frameworks by analysing the relevant constitutional and legislative anti-corruption provisions. The choice of Uganda and South Africa for comparison is based on several factors. The two countries have much in common. They are both transitional societies with disturbing histories characterised by apartheid, oppression and repression in South Africa, and colonialism and military dictatorships in Uganda. In the

mid-1990s, the two countries adopted new constitutions that contained Bills of Rights. Such similarities justify comparison for purposes of shared perspectives, approaches and good practices. Moreover, there are many benefits to be gained from comparative research involving cross-national studies – including a deeper understanding of how different countries do things in the context of differing political, cultural and socio-economic circumstances. The choice of the two countries is also based on the research interests of the author who, besides comparing Ugandan and South African anti-corruption approaches, also calls for a human rights based approach that empowers ordinary people to demand transparency, accountability and responsibility from elected representatives and public officials.

Keywords: Corruption, human rights, constitution, legislation, South Africa, Uganda.

1 INTRODUCTION

Corruption is probably as old as humankind. The practice is known to have existed in ancient Egypt, in ancient China and in ancient Greece. In the play *A man for all seasons*, located in the 16th century, Richard Rich's opening remark is "but every man has his price".¹ This remark is as true today as it was then. Also true is the fact that corruption occurs all over the world and permeates all levels of society, all nations, cultures, organisations, institutions and people. Corruption occurs in the public and private sectors of many nations. In some countries it has become a way of life.²

Although corruption is a well-understood concept, which refers to the abuse of public power for private gain,³ it is usually defined in various and disparate ways, some of which verge on inadvertently justifying it. According to Rose-Ackerman, for example:

"Corruption has different meanings in different societies. One person's bribe is another person's gift. A political leader or public official who aids friends, family members and supporters may seem praiseworthy in some societies and corrupt in others."⁴

Referring specifically to corruption in Africa, another commentator posits:

"... everyone in Africa has routine experience in dealing with corruption (and the like), this being a part of the social landscape. It has even become a part of popular

¹ Bolt R *A man for all seasons* London: Globe Theatre (1960) at 2.

² Biswas AK & Tortajada C "From our ancestors to modern leaders, all do it: the story of corruption" *The Conversation* 7 September 2018.

³ Tanzi V "Corruption around the world: causes, consequences, scope and cures" (1998) 45 *International Monetary Fund Staff Papers* 564.

⁴ Rose-Ackerman S *Corruption and government: causes, consequences and reform* Cambridge : Cambridge University Press (1995) at 37.

know-how, at the base of good usage of administrative services, and is indispensable for survival in the post-colonial milieu.”⁵

This socio-legal approach is evident in both South Africa and Uganda. As in many new democracies, corruption is slowly becoming “normal”, “acceptable” and part of the fabric of life.⁶ In South Africa, corruption is seen by some as a form of redress and mechanism for the reallocation of resources to the previously disadvantaged. One commentator has warned that because of that, South Africa is at a “tipping point” where corruption is in danger of becoming the accepted social norm.⁷ In Uganda it is well known, for example, that “giving out envelopes” is code for giving bribes. Despite many criticisms, the President has defended the handing out of the brown envelopes and justified it on the basis of the norms, traditions and values of Ugandan society. Those who support the President’s view may well quote Article 126 (1) of the Ugandan Constitution, which enjoins judges to take into account the “norms, values and aspirations of Ugandans” in exercising their judicial functions. They may well argue that, in fact, handing out brown envelopes (ie corruption) is a norm or value of the people which the courts must take into account.

These sentiments and arguments tend to imply that corruption is almost a way of life that has found some form of acceptance in African societies. This is a dangerous slippery slope because the dangers of corruption are all too obvious. Apart from diverting funds from their rightful purposes into unscrupulous hands, it is a threat to human rights as it erodes accountability, violates many international human rights conventions, and undermines basic principles and values, such as, equality, non-discrimination, human dignity, and social justice. It also affects human rights by weakening institutions and diminishing public trust in government. It impairs the ability of governments to fulfil their obligations and ensure accountability in the implementation and protection of human rights – particularly socio-economic rights pertinent to the delivery of economic and social services.

Adopting a comparative approach, this article discusses the legal frameworks for combating corruption in Uganda and South Africa. This is done by highlighting the relevant constitutional provisions pertinent to corruption and analysing the anti-corruption legislation in both countries. The choice of Uganda and South Africa for comparison is based on several factors. First, “in terms of comparative research, there are many benefits to be gained from cross-national studies – including a deeper understanding of how different countries do things in the context of differing political,

⁵ Olivier de Sardan JP “A moral economy of corruption in Africa” (1999) 37 *Journal of Modern African Studies* 25 at 28.

⁶ Gumede W “Policy Brief 14: Combating Corruption in South Africa” [Monitoring, Policy Briefs](#) 3 March 2017.

⁷ See generally Gumede (2017).

cultural and socio-economic circumstances”.⁸ Secondly, South Africa and Uganda have much in common. They are both transitional societies with disturbing histories characterised by apartheid, oppression and repression in South , and colonialism and military dictatorships in Uganda. In the mid-1990s, the two countries adopted new constitutions that contained Bills of Rights. Such similarities justify comparison for purposes of shared perspectives, approaches and good practices. Thirdly, the choice of the two countries is based on the research interests of the author.

It ought to be pointed out, however, that there are fundamental differences between the two countries. On the African continent, South Africa is seen as an economic powerhouse compared to Uganda, which is seen as one of the world’s poorest and least-developed countries.⁹ Secondly, “by African standards and to some extent internationally, South Africa is a fledgling multi-party democracy that, by and large, respects the rule of law, whereas Uganda is [seen by some as] a benevolent dictatorship with little regard for the rule of law and democratic governance”.¹⁰ In the specific context of corruption, South Africa’s 2019 Corruption Perception Index was at 44 compared to Uganda’s 28.¹¹ The corruption levels between the two countries are disparate. Such differences justify comparison for purposes of comparative lessons that the countries can learn from each other.

The article begins with a brief analysis of the effects of corruption on South Africa and Uganda, before looking comparatively at the anti-corruption legal frameworks of both countries. The article acknowledges the sufficient anti-corruption legal frameworks in South Africa and Uganda, questions the lack of enforcement of the anti-corruption laws, and then argues for a human rights based approach to fighting corruption. This argument is based, among other things, on the ability of that approach to empower ordinary people to demand transparency, accountability and responsibility from elected representatives and public officials. A brief discussion of the possible role players is undertaken before concluding, inter alia, that stronger civil society participation and engagement and the participation of other role players, such as the judiciary and the government , are critical in actualising the suggested human rights based approach.

⁸ Mubangizi JC “A comparative discussion of the South African and Ugandan Human Rights Commissions” (2015) 48 *The Comparative and International Law Journal of Southern Africa* 124 at 127.

⁹ Staff Writer “[The richest and poorest countries in Africa](https://businesstech.co.za/news/wealth/125197/the-richest-and-poorest-countries-in-africa/)” *BusinessTech* 31 May 2016 available at <https://businesstech.co.za/news/wealth/125197/the-richest-and-poorest-countries-in-africa/> (accessed 20 February 2020).

¹⁰ Mubangizi JC “The South African Public Protector, the Ugandan Inspector-General of Government and the Namibian Ombudsman: A comparative review of their roles in good governance and human rights protection” (2012) 45 *The Comparative and International Law Journal of Southern Africa* 304 at 306.

¹¹ Transparency International “Corruption Perceptions Index 2019” available at https://www.transparency.org/files/content/pages/2019_CPI_Report_EN.pdf (accessed 20 February 2020).

2 IMPACT OF CORRUPTION ON HUMAN RIGHTS IN SOUTH AFRICA AND UGANDA

Wherever it occurs, corruption has the effect of channelling public funds and resources from their lawful and intended purposes into the pockets of unscrupulous public officials. As such, corruption has a devastating impact on the human rights of the majority of the population if, as in South Africa, that majority consists of poor people. The South African Constitution, particularly its Bill of Rights, is hailed as one of the most progressive in the world, mainly because it provides for all categories of human rights, including socio-economic rights. By their nature, socio-economic rights have important social and economic dimensions as most of them reflect specific areas of basic needs or delivery of particular goods and services. The delivery of such goods and services requires substantial budgets that are often allocated by government. However, corruption has the effect of putting pressure on such budgets, thereby undermining the quality of goods and services delivered and violating the socio-economic rights of the people. It is therefore submitted that the abuse of public funds meant for the provision of socio-economic goods constitutes a violation of socio-economic rights.

It is not only socio-economic rights that are negatively affected by corruption. Indeed corruption affects all human rights, including civil and political rights. It is for that reason that the Constitutional Court of South Africa held in *South African Association of Personal Injury Lawyers v Health & others (SAAPIL case)*¹²: “Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms.”¹³ The Constitutional Court has since made several other pronouncements on the effect of corruption on human rights including in the case of *Hugh Glenister v President of the Republic of South Africa & others (Glenister case)*,¹⁴ where it stated that “[e]ndemic corruption threatens the injunction that government must be accountable, responsive and open” and that “[i]t is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy”.¹⁵

It was earlier mentioned that, compared to Uganda, South Africa is a more democratic State. It must be pointed out, however, that corruption has been identified as one of the greatest threats to this democracy. Reflecting on alliances that have emerged in post-apartheid South Africa, one commentator has warned against “corruptive collusions that ... run the risk of creating a parallel system of power that turns our democracy into an empty shell”.¹⁶ A similar argument is made by Soma Pillay who contends that “corruption is likely to appear on every observer’s list of factors that

¹² *South African Association of Personal Injury Lawyers v Health & others* [2000] ZACC 22.

¹³ *SAAPIL case* (2000) at para 4.

¹⁴ *Hugh Glenister v President of the Republic of South Africa & others* [2011] ZACC 6.

¹⁵ *Glenister case* (2011) at para 177.

¹⁶ Bruce D “Control, discipline and punish? Addressing corruption in South Africa” (2014) *SA Crime Quarterly* 49 at 58.

threaten to obstruct South Africa's path towards sustainable development".¹⁷ It may well be argued that, by impacting democracy and sustainable development in South Africa, corruption also impacts human rights.

It must be pointed out that corruption affects human rights in Uganda much in the same way as it does in South Africa. Judging by the difference in the Corruption Perception Index of the two countries, however, corruption is more rampant in Uganda than in South Africa. Another difference is in the nature and magnitude of corruption incidents/scandals in the two countries. In South Africa, the highest level of corruption is believed to take place in local government. "Tenderpreneurship" in the public procurement system is another important mechanism through which corruption takes place. Corruption is also known to be rampant in the police, the Department of Home Affairs, and several other sectors.

In Uganda, the sector most affected by corruption is public procurement although the police are perceived to be the most corrupt institution in the country.¹⁸ An important difference between South Africa and Uganda is that the judiciary is perceived to be far more corrupt in Uganda than in South Africa. In 2019, the Ugandan Inspector General of Government (IGG) issued a list of the 50 most corrupt government institutions; the judiciary came in ninth position.¹⁹ It must be mentioned, however, that in Uganda the upper levels of the judiciary demonstrate higher standards of professionalism and independence than the lower levels.²⁰ In South Africa, the judiciary is perceived to be fairly corruption free at all levels. This has significant implications for human rights as one of the main functions of the judiciary is the protection of human rights. Corruption in the judiciary compromises this role. The same applies to corruption in the police, which is also more widespread in Uganda than in South Africa. Both the judiciary and the police also have the responsibility of maintaining the rule of law by interpreting and enforcing the law. Interestingly, both South Africa and Uganda have fairly strong anti-corruption legal frameworks, an aspect to which we next turn our attention.

¹⁷ Pillay S "Corruption – the challenge to good governance: a South African perspective" *The International Journal of Public Sector Management* (2004) 17(7) 586.

¹⁸ Chêne M "Overview of Corruption in Uganda" (2009) available at <https://www.u4.no/publications/overview-of-corruption-in-uganda.pdf> (accessed 21 February 2020).

¹⁹ Najib M "Tracker: What did the committee formed by chief justice Bart Katureebe to probe corruption in the judiciary achieve?" (2020) *Watchdog News* available at <https://www.watchdoguganda.com/news/20200208/87115/tracker-what-did-the-committee-formed-by-chief-justice-bart-katureebe-to-probe-corruption-in-the-judiciary-achieve.html> (accessed 2 May 2020).

²⁰ See generally Chêne (2009).

3 INTERNATIONAL LEGAL FRAMEWORK

The main international anti-corruption legal instrument is the UN Convention against Corruption (UNCAC).²¹ Its focus is on prevention, criminalisation, international co-operation, asset recovery and implementation mechanisms. Both South Africa and Uganda are parties to the Convention, having ratified it on 22 November 2004 and 9 September 2004, respectively. The other important legal instrument is the United Nations Convention against Transnational Organised Crime,²² which focuses mainly on the fight against organised crime, and includes several provisions relating to corruption. South Africa ratified the Convention on 20 February 2004 and Uganda on 9 March 2005.

In the specific African context, the African Union Convention on Preventing and Combating Corruption²³ 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. South Africa ratified the Convention on 11 November 2005 and Uganda on 30 August 2004.

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.²⁴ Its main purpose is to provide a framework for criminalising corruption in international business transactions. South Africa has ratified this Convention but Uganda has not. There is also the 2011 UNCITRAL Model Law on Public Procurement,²⁵ 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. As far as South Africa is concerned, the Southern African Development Community Protocol against Corruption²⁶ is also important.

4 ANTI-CORRUPTION LEGISLATION IN SOUTH AFRICA

4.1 Constitutional perspective

Although the word “corruption” is not mentioned anywhere in the South African Constitution,²⁷ several provisions in the Constitution have direct or indirect bearing on corruption. Not only does the Constitution create certain offices to ensure transparency and accountability of government officials, it also contains anti-corruption provisions

²¹ Adopted by the UN General Assembly on 31 October 2003, by Resolution 58/4.

²² Adopted by the UN General Assembly on 15 November 2000, by Resolution 55/25.

²³ Adopted by the 2nd Ordinary Session of Assembly of the Union, Maputo, on 11 July 2003.

²⁴ Adopted by the OECD Negotiating Conference on 21 November 1997.

²⁵ Adopted by the UN General Assembly Resolution 66/95 of 9 December 2011.

²⁶ Adopted by the SADC on 14 August 2001.

²⁷ Constitution of the Republic of South Africa 1996.

that span a large variety of sectors, such as, administration, public service, security services, finance, etc.

The relevant constitutional provisions include section 32 which provides for the right of access to information; section 33 which provides for the right to administrative action that is lawful, reasonable and procedurally fair and the right to be given written reasons; 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 or that can result in prejudice. They also include section 188 which requires the Auditor-General to audit and report on the accounts, financial statements and financial management of all State departments and administrations, municipalities and any other institutions or entities funded from the National Revenue Fund or a Provincial Revenue Fund. 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 effective financial management, and section 217 which provides the constitutional basis for public procurement in the country.

4.2 Legislative perspective

The main anti-corruption statute in South Africa is the Prevention and Combating of Corrupt Activities Act (PCCA).²⁸ The preamble to the Act recognizes that corrupt activities have the ability to negatively affect constitutionally protected rights, sustainable development and the rule of law. It also recognizes that corrupt activities have a negative effect on democratic institutions, national economies and ethical values. It aims to criminalize general corruption and various corrupt activities, and it places a duty on certain persons holding positions of authority to report corrupt activities. The PCCA is very comprehensive. It 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 the prosecuting authority.²⁹ Section 10 also creates offences of receiving or offering of unauthorized gratification by or to a party to an employment relationship. Sections 11 – 15 provide for offences in respect of corrupt activities relating to witnesses and evidential material during certain proceedings, offences in respect of corrupt activities relating to contracts, procuring and withdrawal of tenders, auctions, and offences in respect of corrupt activities relating to sporting events.

The PCCA makes provision for the establishment and endorsement of a register to place certain restrictions on persons and enterprises that have been convicted of corrupt activities relating to tenders and contracts. In that regard, sections 28(1)(a) and (b) provide that where a person or enterprise has been found guilty and sentenced to an offence of corrupt activities relating to contracts or tenders, that person or enterprise's name, conviction, sentence and the order made by the court, will be endorsed in the

²⁸ Prevention and Combating of Corrupt Activities Act 12 of 2004.

²⁹ Sections 3-9.

register. Any other business or enterprise belonging to a person who has been convicted of corrupt activities, that was involved in the commission of a crime, may also be entered into the register. Under section 32, this register becomes a public record.

Another relevant anti-corruption statute in South Africa is the Prevention of Organized Crime Act.³⁰ It provides for measures to combat organized crime, money laundering and criminal gang activities. It also prohibits certain activities relating to racketeering and provides for the prohibition of money laundering. An important aspect of the Act is that it creates an obligation to report certain information. In that regard, sections 2 to 6 provide for offences related to racketeering activities, money laundering, assisting a person to benefit from the proceeds of unlawful activities, and acquiring or using the proceeds of unlawful activities.

Also relevant is the Protected Disclosures Act (PDA)³¹ which makes provision for the procedure in terms of which employees and workers, in the private and public sectors, 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. The objects of the PDA, in terms of section 2, are to protect employees/workers from occupational detriment on account of making a protected disclosure, to provide remedies if the employee/worker has suffered an occupational detriment, and to provide procedures in terms of which the disclosure is made.

The Public Finance Management Act (PFMA)³² is another relevant statute. It 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. It sets out procedures for efficient and effective management of all revenue, expenditure, assets and liabilities. It also provides for certain responsibilities of persons entrusted with financial management in government.³³

The Municipal Finance Management Act (MFMA)³⁴ 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 Act³⁵ whose Regulations create a duty to combat corruption and addresses certain issues relating to whistleblowers, and

³⁰ Prevention of Organized Crime Act 121 of 1998.

³¹ Protected Disclosures Act 26 of 2000.

³² Public Finance Management Act 1 of 1999.

³³ Section 38 of PFMA.

³⁴ Municipal Finance Management Act 56 of 2003.

³⁵ Companies Act 71 of 2008.

the Public Services Act³⁶ which provides for the organisation and administration of the public service. It also regulates conditions of employment and discipline within the public service. It should be noted that section 41(1)(b)(v) of the Act 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. The Code also prohibits employees from undertaking outside remunerative work without prior approval. A contravention of the Code amounts to misconduct. Another relevant statute is the Executive Members' Ethics Act (EMEA)³⁷ which 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 Councils.

In analysing South African anti-corruption legislation, mention ought to be made of the Promotion of Access to Information Act (PAIA)³⁸ which gives effect to the constitutional right of access to any information held by the State or by any other person. This Act is intended to foster a culture of transparency and accountability in public and private bodies. Similarly, the Promotion of Administrative Justice Act (PAJA)³⁹ aims to give effect to the constitutional right to procedurally fair, lawful and reasonable administrative action.

Finally, 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, the PFMA Regulations, and the Preferential Procurement Policy Framework Act (PPPFA) Regulations which provide for an operational framework for the preference point system envisaged in the PPPFA.

5 ANTI-CORRUPTION LEGISLATION IN UGANDA

5.1 Constitutional perspective

As with South Africa, the Constitution of Uganda contains a number of provisions that have a direct or indirect bearing on corruption. Some of these provisions encourage transparency and accountability, whereas others create organs, such as the IGG and the Auditor-General, with power to ensure that public and private institutions uphold openness and accountability. The relevant constitutional provisions include section 41 which provides for the right to access information, section 42 which provides for the right to just and fair treatment in administrative decisions, and section 163 which establishes the Office of the Auditor-General.

³⁶ Public Services Act 103 of 1994.

³⁷ Executive Members' Ethics Act 82 of 1998.

³⁸ Promotion of Access to Information Act 2 of 2000.

³⁹ Promotion of Administrative Justice Act 3 of 2000.

Section 163(3) empowers the Auditor-General “to audit and report on the public accounts...of all public offices including courts, the central and local government administrations, universities and public institutions”. Section 164(2) states that “any person holding a political or public office, who directs or concurs in the use of public funds contrary to the instructions, shall be accountable for any loss arising from that use and shall be required to make good the loss even if he or she has ceased to hold that office”. Under section 196, Parliament is required to enact laws that require each local government to draw up a comprehensive list of its internal revenue sources, which prescribe financial control and accountability measures for compliance by all local governments, and which impose regular audit requirements and procedures on local governments.

Also relevant is section 225 which establishes the Office of the Inspector-General of Government whose functions are set out under section 225(1) to include, amongst others, eliminating and fostering the elimination of corruption, abuse of authority and public office, and promoting fair, efficient and good governance in public offices. Section 227 provides for the independence of the Inspectorate of Government and states that the Inspectorate “shall not be subject to the direction or control of any person or authority and shall only be accountable to Parliament”. Section 230 grants the Inspectorate of Government special powers “to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of public office”.

Another relevant provision is section 233 which provides for a Leadership Code of Conduct. Under section 233(2) the Leadership Code of Conduct requires “specified officers to declare their incomes, assets and liabilities from time to time and how they acquired or incurred them, as the case may be”. It also provides that the Code “shall prohibit conduct that is likely to compromise honesty, impartiality and integrity, lead to corruption or that would be detrimental to the public good, welfare or good governance”.

5.2. Legislative perspective

The main anti-corruption statute in Uganda is the Anti-Corruption Act.⁴⁰ The Act was intended, inter alia, “to provide for the effectual prevention of corruption in the public and private sector”.⁴¹ Part 2 of the Act deals with the criminalisation of various acts of corruption across a number of sectors. For this reason, the Act has been criticised as being “a piece of criminal legislation that classifies certain acts and omissions as offences, and then sets out the punishment for each such offence – usually a fine, jail term or both”.⁴² In that regard, the following offences are created by the Act: the general

⁴⁰ Anti-Corruption Act 6 of 2009.

⁴¹ Preamble to the Act.

⁴² Akurut I “An analysis of the Anti-Corruption (Amendment) Bill No. 7 of 2013” available at <http://cepa.or.ug/analysis/an-analysis-of-the-anti-corruption-amendment-bill-no-7-of-2013/> (accessed 24 February 2020).

crime of corruption (section 2), corrupt transactions with agents (section 3), corrupt activities relating to the procurement of tenders (section 4), the offence of bribery of a public official (section 5), and diversion of public resources (section 6). Section 9 deals with conflict of interest and section 12 criminalises sectarianism. The offence of nepotism is under section 13, and sections 19, 20 and 22 deal with embezzlement, causing financial loss, and false accounting. Sections 23 – 25 deal with fraudulent false accounting, false claims and false certificates by public officials.

Another relevant statute is the Penal Code Act⁴³ which is the main criminal law statute in Uganda. Division 2 of the Act deals specifically with offences against the administration of lawful authority and chapter 9 deals with corruption and abuse of office. The sections in this part of the Act reiterate some of the offences created in the Anti-Corruption Act, for example, sections 86, 87, 89, 90 and 91 which deal with false claims by officials, abuse of office, false certificates by public officers, unauthorised administration of oaths, and false assumption of authority, respectively.

As mentioned earlier, section 225 of the Ugandan Constitution establishes the Office of the Inspector-General of Government. This constitutional provision is given effect by the Inspectorate of Government Act,⁴⁴ which reiterates the duties of the Inspectorate to include investigating the conduct of any public officer which may be connected with the abuse of his office and economic malpractices by the officer (section 8(h)), taking necessary measures to detect and prevent corruption in public offices and in particular disseminating information on the effects of corruption on society (section 8(i)(iii)), and investigating and prosecuting cases involving corruption, abuse of authority or of public office (section 14(5)). The Ugandan Office of the Inspectorate of Government is very similar to the Office of the Public Protector in South Africa.

The Leadership Code Act⁴⁵ provides a minimum code of conduct for leaders. It requires leaders to declare their incomes, assets and liabilities. Section 4 of the Act deals with the declaration of income, assets and liabilities of a leader, and section 6 with the failure of a leader to submit the correct information about his income, assets and liabilities. Under section 7, the contents of the declaration of income, assets and liabilities of leaders are regarded as public information and shall be accessible to all members of the public, and under section 11, a leader who directly or indirectly accepts any property or gift which influences or is likely to influence him/her to do a favour to any person commits a breach of the code. Section 15 deals with general prohibited conduct. This includes the prohibition of the abuse of power to obtain personal benefits and neglecting financial obligations.

A similar statute is the Code of Conduct and Ethics for Uganda Public Service,⁴⁶ which sets out the standards of behaviour for public officers in the Uganda public

⁴³ Cap 120 of 1950.

⁴⁴ Inspectorate of Government Act 2002.

⁴⁵ Leadership Code Act of 2002.

⁴⁶ Code of Conduct and Ethics for Uganda Public Service, 2005.

service. It is designed to ensure impartiality, objectivity, transparency, integrity, efficiency and effectiveness of public officers when performing their duties. The Code recognizes that public service has the responsibility of providing timely, high quality and cost-effective services to the nation. This will only be achieved if public officers are loyal, committed, results orientated, and customer centred, and if they observe a high standard of conduct in their official and private capacities. Section 4(6) of the Act deals with conflict of interest and specifically states that when executing official government business, an officer must not put himself in a position where his personal interests conflict with his professional duties and responsibilities. Section 4(7) states that a public officer shall not engage in any arrangements that would cause financial embarrassment, such as bankruptcy. Under section 4(8)(5), a public officer shall not use official information acquired in the cause of his official duties to gain a personal benefit. Under section 4(10), a public officer shall hold his office in trust and be accountable to the public for all the resources under his control, such, as finances, public property, human resources and administrative resources. Section 4(11) deals with the handling of gifts, bribes, favours and presents by the public officers.

Other relevant statutes include the Whistleblowers Protection Act,⁴⁷ which provides for procedures for disclosure of information that relates to irregular, illegal or corrupt practices; and the Public Finance Management Act,⁴⁸ which, amongst other things, provides for fiscal and macro-economic management, the roles of Accounting Officers, and the establishment of accounting standards and audit committees. They also include the National Audit Act,⁴⁹ which gives effect to articles 154(3) and 163 of the Constitution and, amongst other things, provides for the auditing of the accounts of central Government, local government councils, administrative units, public organisations, private organisations and bodies; and the Anti-Money Laundering Act,⁵⁰ which provides for the prohibition and prevention of money laundering and imposes certain duties on institutions and persons, businesses and professions that could be used for money laundering purposes.

6 COMPARATIVE PERSPECTIVES

As mentioned earlier, the word “corruption” is not mentioned anywhere in the South African Constitution. In the Ugandan Constitution, on the other hand, it is mentioned five times. That said, however, there are more similarities between the two constitutions in terms of anti-corruption provisions than there are differences. For example, both constitutions contain provisions which aim to promote transparency and accountability in both the private and public sectors. The constitutions of both countries contain provisions relating to the right of access to information⁵¹ and the right to fair

⁴⁷ Whistleblowers Protection Act 6 of 2010.

⁴⁸ Public Finance Management Act of 2015.

⁴⁹ National Audit Act of 2008.

⁵⁰ Anti-Money Laundering Act of 2013.

⁵¹ Section 32 of the South African Constitution and s 41 in the Ugandan Constitution.

administrative action.⁵² Unlike the South African Constitution, however, the Ugandan Constitution does not require the national legislature to enact legislation to give effect to these rights.

Another similarity is that both constitutions contain provisions relating to the functions of the ombudsman (known in South Africa as the Public Protector and in Uganda as the IGG). Both of these institutions are given the power to investigate the affairs and conduct in any sphere of government that are suspected to be improper or to cause prejudice. Both institutions are important in the fight against corruption and the abuse of power. The independence of both of these offices is constitutionally guaranteed.⁵³ Both the Ugandan and South African legislatures have enacted legislation which deals with ancillary matters relating to the Inspectorate of Government and the Public Protector, respectively.

Both the Ugandan and South African constitutions establish the institution of the Auditor-General,⁵⁴ empowered to audit and report on the financial management of public and private offices and institutions. The functions and special powers of the Auditor-General in both countries are spelled out in national legislation enacted for that purpose. The role of the Auditor-General has also been supported by case law. In the recent South African cases of *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector (DA case)*⁵⁵, it was stated that “the Auditor General is vested with special investigative powers, which extend beyond its regular auditing function, and which may be exercised in the public interest and on request”.⁵⁶ The Ugandan Auditor-General has also been involved in several corruption related cases including *Uganda v Agel Yovantino Akii & another*;⁵⁷ arising from a Special Audit Report on Capital Development Expenditure in Gulu Referral Hospital, and *Uganda v Tumukunde Gibson*⁵⁸ , arising from a Financial and Engineering Audit of Ntungamo District roads.

It is also important to note that both the South African and Ugandan constitutions contain provisions relating to ,inter alia, the treasury, procurement, public funds and taxes,⁵⁹ all intended to ensure transparency and accountability of government organs and institutions and to introduce generally recognised financial controls and practices. Insofar as anti-corruption legislation is concerned, the two most important statutes in

⁵² Section 33 of the South African Constitution and s 42 of the Ugandan Constitution.

⁵³ Section 181(4) of the South African Constitution and s 227 of the Constitution of Uganda.

⁵⁴ Section 188 of the South African Constitution and s 164 of the Constitution of Uganda.

⁵⁵ *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* [2019] 3 All SA 127 (GP).

⁵⁶ *DA case* (2019) at para 141.

⁵⁷ *Uganda v Agel Yovantino Akii & another* HCT-00-CO-CSC-203/2011.

⁵⁸ *Uganda v Tumukunde Gibson* CRB280/2012.

⁵⁹ Sections 216, 217, 228 and 229 of the South African Constitution and s191 of the Ugandan Constitution.

South Africa and Uganda, as was mentioned earlier, are the South African PCCA⁶⁰ and the Ugandan Anti-Corruption Act⁶¹, respectively. Both statutes have the general aim of criminalising the act of corruption and contain a number of provisions that are similar, for example, the criminalisation of corrupt activities relating to tenders, public officials and bribes.

However, the Ugandan statute contains a larger variety of offences relating to corruption than its South African counterpart. The former criminalises specific actions that can effectively perpetuate corruption and not only the act of corruption itself. Such prohibitions include conflict of interest, sectarianism, nepotism, the false assumption of authority, and embezzlement. It is also important to note that the Ugandan Penal Code prescribes various sentences for those found guilty of certain crimes listed in the Anti-Corruption Act. There is no similar provision in the South African legislative equivalent. On the other hand, though, the South African PCCA provides for the establishment of a register for all persons convicted of corrupt activities related to contracts and tenders. The register becomes a public record. There is no Ugandan legislative equivalent.

Another area of comparison is between the South African PDA⁶² and the Ugandan Whistleblowers Act.⁶³ Both these Acts aim to protect persons who make disclosures on unlawful or irregular conduct from being victimized. A remarkable difference between the two statutes is that the Ugandan Whistleblowers Act does not only protect whistleblowers from victimisation but also criminalises act of victimisation itself. An interesting feature of the Act is that whistleblowers are rewarded for making a disclosure (section 19). This creates some kind of incentive for people who suspect improper and corrupt conduct to report it. This does not have a South African legislative equivalent.

Other comparable statutes are the Ugandan Anti-Money Laundering Act,⁶⁴ and the South African Prevention of Organized Crime Act.⁶⁵ The Ugandan statute is entirely dedicated to the crime of money laundering and covers a wide range of aspects, such as, preventative measures and the seizure and forfeiture of assets in relation to money laundering, and it creates offences and penalties. On the other hand, the South African Prevention of Organized Crime Act only covers the offence of money laundering in section 4. Also comparable are the Ugandan Leadership Code Act and the Code of Conduct and Ethics for Uganda Public Service, on one hand, and the South African EMEA, on the other. All these statutes aim to provide some code or minimum standard of conduct for members of government and public officials. A notable feature of the Ugandan Leadership Code Act is that leaders are not only required to make a declaration of their assets, incomes and liabilities but also those of their spouses,

⁶⁰ Prevention and Combatting of Corrupt Activities Act 12 of 2004.

⁶¹ Ugandan Anti-Corruption Act 6 of 2009.

⁶² Protected Disclosures Act 26 of 2000.

⁶³ Whistleblowers Act 6 of 2010.

⁶⁴ Anti-Money Laundering Act of 2013.

⁶⁵ Prevention of Organized Crime Act 121 of 1998.

children and dependents (sections 4 and 6). A leader who fails to do so, will be in breach of the Code.

One of the most famous corruption cases in South Africa is *S v Shaik and others*⁶⁶ which involved a close friend of the then South African President, Zuma. Shabir Shaik was convicted of two counts of corruption and one of fraud, relating to his facilitation of a bribe, allegedly by a French arms company, to Zuma in the so-called “arms deal”. Shaik was sentenced to 15 years in jail but was released on medical parole after serving just over two years. In Uganda, a famous corruption case is *Uganda v Lwamafa Jimmy & 3 others*.⁶⁷ Jimmy Lwamafa was a Permanent Secretary and the most senior civil servant in the Ministry of Public Service. He and two other top employees of the Ministry were found guilty of swindling 88.2 billion Uganda shillings in a pension scam. The three were given jail terms ranging from 5 to 10 years.

It is clear from the foregoing comparative discussion that there is sufficient anti-corruption legislation in both South Africa and Uganda. The anti-corruption legal frameworks of both countries are strong and adequate. The general consensus is that there is even no need to reform them. The courts in both countries have also been active in dealing with corruption cases. The question remains, however, as to why the legal frameworks are not given proper effect. Why is the enforcement of the anti-corruption laws so poor that corruption remains one of the biggest threats in those countries to democracy, sustainable development and human rights? Reasons given have ranged from weak enforcement agencies to poor governance and lack of political will. Some have argued that “what is needed is an investment in recruiting and training competent people to staff the various law enforcement and prosecutorial agencies”.⁶⁸ It is submitted, however, that in addition to that, there is need for a human rights approach, a discussion of which now follows.

7 A HUMAN RIGHTS BASED APPROACH

7.1 The rationale

It is quite clear from the foregoing discussion that both the South African and Ugandan legal frameworks for fighting corruption mainly focus on criminalising it. Although the constitutions of both countries contain Bills of Rights with some provisions that are relevant to corruption, there is little focus on a human rights perspective. As argued elsewhere, not only does corruption have an adverse impact on the enjoyment of human rights but it is also a violation of human rights.⁶⁹ When corruption diverts funds into the

⁶⁶ *S v Shaik & others* [2008] ZACC 7; 2008 (5) SA 354 (CC).

⁶⁷ *Uganda v Lwamafa Jimmy & 3 others* (Criminal Session Case No. 0003 of 2016) [2018] UGHACD 11 (21 December 2018).

⁶⁸ Pickworth J & Williams D *Bribery & Corruption* London: Global Legal Group (2013) at 174.

⁶⁹ Mubangizi JC & Sewpersadh P “A Human Rights-based approach to combating public procurement Corruption in Africa” (2017) 10 *African Journal of Legal Studies* 66 at 70. See also Peters A “Corruption as a violation of international human rights” (2018) 29(4) *The European Journal of International Law*

corrupt hands of unscrupulous officials, the rightful purposes for which the funds were intended are compromised. These purposes may well have included projects or services intended to benefit ordinary people. In that way, corruption becomes a violation of the human rights of the people who are denied these services. Moreover, corruption “produces unequal and discriminatory outcomes and perpetuates inequality [It] thwarts economic development, leads to widespread poverty and directly violates people’s socio-economic rights”.⁷⁰

The socio-economic rights referred to include environmental rights, property rights, and the right to education. They also include the right of access to adequate housing, healthcare services, sufficient food and water, and social security. Again, as argued elsewhere, corruption is more likely to affect socio-economic rights than other rights, because socio-economic rights tend to have social and economic ramifications as most of them reflect specific areas of basic needs or delivery of particular goods and services which are likely to generate large public contracts that create opportunities for corruption.⁷¹

It is in that context and for that reason that a human rights based approach to fighting corruption in Uganda and South Africa is called for. The most appropriate description of a human rights based approach is perhaps the one suggested by the Scottish Human Rights Commission which states :

“A human rights-based approach is about empowering people to know and claim their rights and increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling rights ... It is about ensuring that both the standards and the principles of human rights are integrated into policymaking as well as the day to day running of organisations.”⁷²

According to the European Network of National Human Rights Institutions (ENNHRI), a human rights based approach is underpinned by five key human rights principles, namely, participation; accountability and transparency; non-discrimination and equality; empowerment of rights holders; and legality.⁷³

It is important to note that the Office of the United Nations High Commissioner for Human Rights (OHCHR) promotes a human rights based approach to anti-corruption. According to the OHCHR, it is “an approach that puts the international human rights

1251, and Bacio-Terracino J “Corruption as a violation of human rights” *International Council on Human Rights Policy* available at <https://ssrn.com/abstract=1107918> (accessed 16 June 2020).

⁷⁰ Mubangizi & Sewpersadh (2017) at 71.

⁷¹ Mubangizi & Sewpersadh (2017) at 75.

⁷² SHRC ‘What is a human rights based approach?’ available at <http://careaboutrights.scottishhumanrights.com/whatisahumanrightsbasedapproach.html> (accessed 30 February 2020).

⁷³ ENNHRI ‘Applying a Human Rights-Based Approach’ available at <http://ennhri.org/Applying-a-Human-Rights-Based-Approach> (accessed 30 February 2020).

entitlements (the ‘rights-holders’) and the corresponding obligations of the State (the ‘duty-bearer’) in the centre of the anti-corruption debate and efforts at all levels”. It is in that context that Navi Pillay (former United Nations High Commissioner for Human Rights) stated that “a human rights-based approach to anti-corruption responds to the people’s resounding call for a social, political and economic order that delivers on the promises of ‘freedom from fear and want’”.⁷⁴

In the specific context of Uganda and South Africa, the call for a human rights based approach to fighting corruption is underscored by the fact that both countries have constitutions which not only promote and guarantee the fundamental rights of all the citizens, but also contain provisions that have a direct bearing on corruption. The human rights based approach requires that all these constitutional provisions be used not only to protect human rights, but also to fight corruption.

The other advantage of a human rights based approach is that it emboldens and strengthens citizens to demand their rights. This brings the role of civil society into sharp focus. Indeed the role of civil society in fighting corruption cannot be overemphasised. This role is usually effected “through public awareness campaigns, civil activism, education, training and networking activities”.⁷⁵ It can also be carried out “through civil society participation in decision-making processes that can contribute to enhancing transparency and fairness”.⁷⁶ A human rights based approach provides a mechanism and basis for this.

In line with the argument that corruption is not only a violation of human rights but also adversely impacts on the enjoyment of human rights, it would not be far-fetched to submit that both Uganda and South Africa should consider developing and institutionalising a right to freedom from corruption. Whereas the 1948 Universal Declaration of Human Rights and other international human rights instruments do not include the right of freedom from corruption in their enumerated rights, there is no reason why an individual State like South Africa or Uganda cannot include it in their rights framework. According to Matthew Murray and Andrew Spalding, “globalisation has provided compelling reasons, both theoretical and utilitarian, to consider defining and recognizing freedom from corruption as a stand-alone human right”.⁷⁷ Moreover, there is universal agreement that corruption is a wrong against the public interest. As mentioned earlier, it does not only negatively impact on democracy, but it is also a major obstacle to sustainable development and the realisation of human rights. As stated by the former Secretary-General of the United Nations, Kofi Annan:

⁷⁴ OHCHR ‘The Human Rights Case Against Corruption’ available at <https://www.ohchr.org/EN/NewsEvents/Pages/HRCASEAGAINSTCORRUPTION.aspx> (accessed 30 February 2020).

⁷⁵ Mubangizi & Sewpersadh (2017) at 87.

⁷⁶ Mubangizi & Sewpersadh (2017) at 87.

⁷⁷ Murray M & Spalding A “Freedom from Official Corruption as a Human Right” Governance Studies at Brookings January 2015 available at https://www.brookings.edu/wp-content/uploads/2016/06/Murray-and-Spalding_v06.pdf (accessed 9 May 2020).

“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive.”⁷⁸

It is for this reason and in that context that a compelling case is made for elevating freedom from corruption to the status of a human right norm. Not only would it change the way in which corruption is understood and treated, but it would also give international and domestic anti-corruption laws greater normative weight and heighten their importance in public policy.⁷⁹ Another argument in support of a right to freedom from corruption is that it would effectively counter the so-called “socio-legal approach” referred to earlier that corruption is, to some extent, culturally normal and acceptable, particularly in African societies.

It is submitted that a right to freedom from corruption would fall under the category of collective rights, such as the right to a clean and healthy environment. Similar rights, though not included in the South African Constitution or the Ugandan Constitution, include the right to peace and the right to development. These are rights that are not enjoyed by, or confined to, a particular person in an individual capacity, but are enjoyed collectively by everyone in a particular society. Incorporating such a right into the constitutions of the two countries would not only further empower and strengthen individual citizens to fight corruption by demanding and enforcing their rights, but it would also enhance the fight against corruption through constitutional and judicial means.

7.2 The role-players

An effective human rights based approach would require various role-players, including the judiciary, civil society and the government. Insofar 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 and Uganda discussed earlier can only be effective if properly interpreted and implemented taking into account the Bills of Rights contained in the constitutions of the two countries.

⁷⁸ Annan K “Foreword to the United Nations Convention Against Corruption” (2004) available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (accessed 9 May 2020).

⁷⁹ See generally Murray & Spalding (2015).

The role of civil society in the actuation of a human rights based approach to fighting corruption is critical. There are a number of civil society organizations in South Africa and Uganda that play an important role in the fight against corruption in those countries. In South Africa they include Corruption Watch and the National Anti-Corruption Forum, for example. In Uganda they include Anti-Corruption Coalition, Transparency International Uganda, African Parliamentarians Network against Corruption, Civil Society Today, the Uganda Debt Network, and the NGO Forum. These civil society organisations fight corruption by acting as corruption watchdogs, exposing cases of corruption, challenging corrupt officials and institutions, and identifying corruption prone areas in the public and private sectors. They also do this by raising public awareness regarding the existence, gravity and dangers of corruption. It is submitted that a human rights based approach would be enhanced if civil society organisations emphasised awareness of people's rights and how such rights are violated through corruption.

The role of government is also critical. This can be done in various ways. These include passing the relevant laws and ensuring their effective implementation, empowering people by creating pathways that give citizens relevant tools to engage, and participate in, their governments, working with non-governmental groups, creating the necessary policies and institutions, and punishing corruption severely and consistently. These functions ought to be seen in the context of the various levels of government in South Africa and Uganda. In South Africa, local government can and should play its role by enacting relevant municipal legislation and by-laws and ensuring their effective implementation. The same applies to provincial governments. In South Africa, most provinces have drafted and adopted anti-corruption strategies and policies. It is important to note that the Anti-Corruption Strategy of the Limpopo Provincial Government, for example, specifically mentions "regard of the criminal justice system and the Bill of Rights" as one of the principles of its strategic framework. It also mentions that "employees should be capacitated on their rights and responsibilities as well as mechanisms that exist to fight corruption". This is a good example of adopting a human rights based approach to fighting corruption at the provincial level.

Through the Local Government Act,⁸⁰ Uganda introduced the decentralisation policy. In Uganda local governments are now responsible for the bulk of administrative and political processes within their respective areas of jurisdiction. There are several strategies that can be developed to curb corruption in local government. These include passing strict local government laws, sacking and prosecuting corrupt officials, and developing anti-corruption strategies and policies. It is through these processes and strategies that local governments in Uganda can adopt a human rights based approach to fighting corruption much in the same way as South Africa's provincial and local governments have done.

⁸⁰ Cap 243 of 1997.

8 CONCLUSION

Corruption is a problem in many African countries including Uganda and South Africa – albeit more so in the former than the latter. Both countries have constitutions with provisions that have a direct or indirect bearing on corruption. Both countries have also enacted various anti-corruption statutes. The impact of corruption on human rights in the two countries has been highlighted. The similarities and differences between the two countries' anti-corruption legal frameworks have also been discussed. It has been noted, however, that these legal frameworks mainly focus on criminalising corruption but do not give much attention to the human rights perspective and the role it can play in fighting corruption. It is for that reason and in that context that a human rights based approach is suggested. This approach has been supported and promoted by, among others, the OHCHR.

The main advantage of adopting a human rights- approach is that it empowers ordinary people to demand transparency, accountability and responsibility from elected representatives and public officials. It is suggested that both Uganda and South Africa could make better use of the various national human rights institutions established by the two countries' constitutions in fighting corruption. Stronger civil society participation and engagement are also suggested, together with the participation of other role-players, such as, the judiciary and the government. Finally, it is argued that institutionalising and creating a right to freedom from corruption – similar to other collective rights, such as the right to a clean and healthy environment – would further entrench and espouse the human rights based approach to fighting corruption in the two countries.

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