

Prevention and combating of corruption in Zambia

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Abstract

On 27 August 2009, the Government of the Republic of Zambia launched a national anti-corruption policy and strategic document aimed at providing a framework for preventing and combating corruption in a comprehensive, coordinated, inclusive and sustainable manner. That significant milestone marked a candid acknowledgement that previous efforts at legal and institutional reforms have had very limited impact on the prevalence of corruption which, in the Zambian context, ranges from petty bribes and misuse of state power at public goods and services delivery points, to the embezzlement and looting of national resources.

This paper seeks to critically evaluate the extent to which these latest policy objectives and strategic interventions advance the so-called war on corruption. The paper argues that given the pervasive and insidious nature of corruption, it is not enough to adopt pious declarations and public campaigns in the name of zero-tolerance for corruption. What is required is unwavering political will to follow-through on these declarations, buttressed by a holistic approach to enhance transparency, accountability, integrity and participation by all segments of society.

INTRODUCTION

It is common cause that corruption, in all its varied manifestations, is like a cancer, remorselessly eating away at the very moral fibre of society and causing incalculable harm to the development efforts of the societies involved.¹ It is a universal problem, although its deleterious effects are felt more in countries with weak democratic foundations. As Uljjesa Zvekić of

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¹ C Mbonu 'Corruption and its impact on the full enjoyment of human rights, in particular, economic, social and cultural rights' *Preliminary Report of the Special Rapporteur*, E/EN 4/sub.2/2004/23 7 July 2004 at 5; see also Mbonu *Progress Report* E/CN 4/sub 2/2005/18 22 June 2005 and *Schabir Shaik and Others v The State* 2006 1 SCA 134 at 223; *South African Association of Personal Injury Lawyers v Heath and Others* 2001 7 BCLR 77 at 80.

the United Nations Office on Drugs and Crime, Regional Office for Southern Africa has perceptively observed, ‘over the intervening millennia, corruption has served countless times as an illicit means of achieving wealth and obtaining privilege, of securing and sustaining political and economic power’ and ‘reinforces the hand of those who seek profit outside the realm of law and the economy’.²

The international community has responded to the scourge of corruption in a variety of ways. At the heart of the global anti-corruption effort is the UN Convention against Corruption 2003, which requires state parties to the Convention to, *inter alia*, pass criminal laws against the bribing of their own and foreign officials and other corrupt practices, such as embezzlement and money laundering, and to take preventive measures against corruption, facilitating co-operation among governments for the purposes of extradition and asset recovery.³

In similar vein, the World Bank and its sister institution, the International Monetary Fund, under the much maligned Washington Consensus, developed a common and coordinated strategy, demanding that ‘good enough governance’ or simply ‘good governance’ should be a condition *sine qua non* for the disbursement of loans to debtor countries. At the heart of these structural adjustment programmes were the norms of accountability, transparency and participation in the conduct of public affairs.⁴

At the regional level, article 3(4) of the Constitutive Act of the African Union states, *inter alia*, that the objectives of the Union include the promotion of democratic principles and institutions, popular participation, and good governance. These principles are the very antithesis of corruption.

² U Zvekic (ed) ‘Corruption and anti-corruption in Southern Africa’ 2002 United Nations Office on Drugs and Crime, Regional Office for Southern Africa at 4.

³ The UN Convention Against Corruption was adopted by the General Assembly in its resolution 58/4 of 31 October 2003 with the following purposes: promote and strengthen measures to prevent and combat corruption more efficiently and effectively; promote, facilitate and support international co-operation and technical assistance; promote integrity, accountability and proper management of public affairs and public property *etcetera*. (See art 1 for the statement on the purposes of the Convention).

⁴ United Nations ‘The right to development: study on existing bilateral and multi-lateral programmes and policies for development partnership’ E/CN 4/sub 2/2004/15 at 8; UN Commission on Human Rights ‘The Role of Good Governance in the Promotion of Human Rights’ Resolution 2000/24, which identifies five good governance indicators: transparency, responsibility, accountability, participation and responsiveness; World Bank Report on Africa, Washington DC 1989; see further, C Theobald ‘The World Bank: good governance and the new institutional economics’ (1990) 59 *Law and State* 20–24.

Furthermore, the African Convention on Preventing and Combating Corruption and Related Offences, adopted by the Heads of State at their summit in Maputo, Mozambique in July 2003, provides, *inter alia*, comprehensive and mandatory provisions with regard to the following:⁵

- declaration of assets by designated public officials and establishment of codes of conduct;
- restrictions on immunity for public officials;
- access to information by the media and the protection of whistle blowers;
- transparency in procurement and accounting procedures;
- transparency in the funding of political parties;
- the establishment, maintenance and strengthening of independent national anti-corruption authorities; and
- The criminalisation of a wide range of offences, including bribery (domestic or foreign); diversion of property by public officials, trading in influence, illicit enrichment, money laundering and concealment of property.

As will be explained below, these stipulations are germane to the central thrust of this paper. It is also instructive to point out that at the African regional level, one of the key objectives of the New Partnership for African Development (NEPAD) is the promotion and protection of democracy, good governance and human rights, anchored on clear standards of accountability, transparency and participative governance. These benchmarks lie at the heart of the 'war on corruption'. Furthermore, the African Peer Review Mechanism seeks to entrench the fundamental values of clean governance; transparency in the conduct of public affairs, and participatory democracy.⁶ Central to these commitments was the realisation by African leaders that the process of sustainable economic development is contingent upon a number of factors, including good economic, corporate and political governance as pre-requisites to development. It is therefore incumbent on member states to carry out institutional reforms by adopting, amongst others, measures to combat corruption and the embezzlement of public funds.

⁵ See in particular the Preamble to the Convention for the Convictions of the Heads of State and Articles 1–12 of the Convention.

⁶ New Partnership for African Development, adopted in October 2001 in Abuja, Nigeria, July 2001 at: www.nepad.org.ng. The African Peer Review Mechanism was adopted at the 6th Summit of the NEPAD Heads of State and Government, Abuja, Nigeria, March 2003. See also B Boyle 'Holding themselves to a higher standard' *Sunday Times* 30 April 2006 at 4.

At sub-regional level, member states of the Southern African Development Community view good governance as one of the cornerstones of the region's development agenda. Through the SADC Protocol Against Corruption 2001, member states committed themselves to the promotion of the values of integrity, transparency and accountability in the conduct of public affairs, and to the strengthening of the norms of pluralism, accountability and democratic governance.⁷

In its preamble the Protocol notes the 'serious magnitude' of corruption in the SADC regions, its destabilising effects, particularly in undermining good governance, including the principles of accountability and transparency.⁸ The Protocol seeks to achieve the following three principal purposes:

- To promote and strengthen the development of mechanisms needed to prevent, detect, punish and eradicate corruption in the public and private sectors;
- To promote, facilitate and regulate inter-state cooperation so as to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the public and private sectors; and
- To foster the development and harmonisation of policies and domestic legislation in the region in relation to the prevention, detection, punishment and eradication of corruption in the public and private sectors.⁹

In order to achieve these lofty objectives, the Protocol enjoins state parties to take effective preventative and deterrent measures against the scourge of corruption. These positive obligations are designed to create, maintain and strengthen:

- a) standards of conduct for the correct, honourable and proper fulfilment of public functions as well as mechanisms to enforce those standards;
- b) systems of government hiring and procurement of goods and services that ensure the transparency, equity and efficiency of such systems;

⁷ The SADC Protocol against Corruption was adopted by the SADC Heads of State and Government at their August 2001 Summit in Malawi. It is the first sub-regional anti-corruption treaty in Africa. See further, Sub regional Office for Southern Africa, Eastern and Southern Africa Workshop Preparatory to the Fourth Development Forum (ADF IV) on Governance for a Progressing Africa, Perspectives on Governance in Southern Africa: Recommendations and Plan of Action, 24–26 November 2003, Lusaka, Zambia emphasising progress in the quest to promote the values of integrity, transparency and accountability in the conduct of public affairs 5.

⁸ See the Preamble to the Protocol. See further, SADC 'Towards a common future' at: <http://www.sadc.int/index/> (last accessed on 26 January 2011).

⁹ See art 2 of the Protocol where these purposes are articulated, in particular pars (a) to (c).

- c) government revenue collection and control systems that deter corruption as well as laws that deny favourable tax treatment for any individual or corporation for expenditure made in violation of the anti-corruption laws of the States Parties;
- d) mechanisms to promote access to information to facilitate eradication and elimination of opportunities for corruption;
- e) systems for protecting individuals who, in good faith, report acts of corruption;
- f) laws that punish those who make false and malicious reports against innocent persons;
- g) institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption;
- h) deterrents to the bribery of domestic public officials, and officials of foreign states, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable details, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable the law enforcement agencies to detect acts of corruption;
- i) mechanisms to encourage participation by the media, civil society and non-governmental organisations in efforts to prevent corruption; and
- j) mechanisms for promoting public education and awareness in the fight against corruption.¹⁰

Since Zambia is a founding member of SADC, it holds itself to higher standards of accountability. Furthermore, it is obliged to adopt such legislative and other measures under its domestic law to prevent and combat acts of corruption in the public and private sectors. In accordance with the rules of customary international law and the prescripts of the Vienna Convention on the Law of Treaties 1969, state parties are obliged to carry out their treaty obligations in accordance with the principle of *pacta sunt servanda*. In that respect, it is instructive to note that many countries have established anti-corruption agencies as lynchpins of their national integrity systems. The main pillars of such systems include:

- mechanisms supporting accountability and transparency in the democratic processes, including the management of elections and the financing of election campaigns;
- appropriate channels and structures that enable public officials to report alleged acts of corruption through the protection of privileged disclosures and whistle-blowing; and

¹⁰ See art 4 of the Protocol and SADC n 8 above.

- public procurement systems that are open, transparent, competitive.¹¹

It is against these benchmarks and international best practices that this paper discusses the juridical and regulatory frameworks dealing with corruption in Zambia, together with the associated package of policy measures. By adopting an historical and comparative approach, the paper identifies the milestones or landmarks in the origin and development of the law on corruption; the efficacy of anti-corruption agencies and the likely contribution of the 2009 National Anti-corruption Policy which promises, amongst others, to provide a framework for developing ways and means of preventing and combating corruption in a comprehensive, coordinated, inclusive and sustainable manner.¹²

Because corruption is a pervasive problem, and one ‘which always fights back’,¹³ it is not enough to come up with pious declarations about zero tolerance of corruption. What is required is an holistic approach that goes beyond mere moral campaigns and political sloganeering. The war on corruption requires political will from the political leadership, buttressed by appropriate anti-corruption laws and independent institutions, animated by the imperatives of transparency, accountability, public awareness and participation by all segments of society. This paper concludes with a set of recommendations designed to improve Zambia’s national integrity system. It is divided into four interrelated sections, starting with the typology of corruption in Zambia; followed by a discussion of the legal framework dealing with corruption; the institutional framework at the coal-face of the war on corruption, and finally, an assessment of the 2009 policy intervention.

TYPOLGY OF CORRUPTION IN ZAMBIA

Although there is no universally accepted and timeless definition of the concept of ‘corruption’, a glance at the literature reveals that corruption

¹¹ UN Office on Drugs and Crime, *Global Anti Corruption Barometre*, 2006. See further, J Court, G Hyden & K Mease *Making sense of governance: empirical evidence from sixteen transitional societies* (2004) where the authors identify six arenas of good governance, namely civil society, political society, government, bureaucracy, economic society and the judiciary. Daniel Kaufman *et al* refers to six dimensions of good governance, namely voice and accountability; political stability and the absence of violence; government effectiveness; regulatory quality; rule of law and control of corruption (World Bank Policy Research Working Paper 2196).

¹² Republic of Zambia, 1999, *National anti-corruption policy* (2009) at i.

¹³ Mbonu n 1 above at 5, quoting O Ezekwesili.

refers to the (mis) use or abuse of state power for private gain.¹⁴ In real life, corruption ranges from petty cases of bribery to grand corruption entailing the ‘looting’ or ‘plunder’ of national resources, mainly by highly placed public functionaries.¹⁵ In Zambia, specifically, it is common cause that the prevalence of corruption has been very high, particularly during the period 1991–2001, a point conceded by the government of Zambia in its 2009 National Anti-Corruption Policy.¹⁶ Even more disconcerting is the fact that previous legal, institutional, economic and social reforms have not achieved a significant reduction in the levels of corruption. In the 2011 worldwide corruption perceptions ranking of countries, Zambia is ranked at 101 out of 176 countries polled, with an index of 3,0 points out of 10. The underlying factors underpinning these high levels of corruption include: low salaries for public officials; lack of transparent and accountable political processes; poor economic governance; lack of an effective corruption reporting system; lack of an independent and effective judiciary; lack of an independent and effective media; and cultural factors.¹⁷

Apart from the well-known cases of petty corruption, the salient features of corruption in Zambia can be summarised under the following sub-headings.

Corrupt practices in the political sphere

It is generally accepted that corruption is endemic in Zambian politics, thus subverting electoral processes at all levels; undermining transparency in the processes of governance; denying access to accurate and adequate information; minimising accountability and probity in government; and alienating the ordinary people from their government.¹⁸ Typical examples of

¹⁴ Office of the High Commissioner for Human Rights *Good Governance Practices for the Protection of Human Rights* (2007) at 59. See also Zvekic, n 2 above; art 3 of the SADC Protocol on Corruption, 2001 for a more expansive conceptualisation of the term.

¹⁵ Mbonu n 1 above on corruption and its impact on the full enjoyment of human rights. On the looting and plundering of Zambia’s national wealth, see K van Donge ‘The plundering of Zambian resources by Frederick Chiluba and his friends: a case study of the interaction between national politics and the international drive towards good governance’ (2008)108/430 *African Affairs* at 9.

¹⁶ Government of Zambia n 12 above at I.

¹⁷ *Id* at 3. Kafunda, in a paper presented to the United Nations Economic Commission for Africa Committee on Human Development and Civil Society, Fourth Meeting, Addis Ababa, Ethiopia, 19–20 November 2007, attributes the problem of corruption to a number of factors including ‘poor public service delivery systems, inclination by officers to supplement what may be low incomes, pure greed and other related factors’.

¹⁸ Transparency International ‘Zambia: an opinion poll on the perceptions and experiences of corruption and governance measurement tools in Sub-Sahara’ 2005; see also Transparency International, Zambia available at: Tizambia@zamnet.zm. See also the

corruption in the political sphere in Zambia include: cases of abuse of public resources by the ruling party, the Movement for Multi-Party Democracy, during election campaigns; government leaders making donations to schools, community projects, community-based organisations and faith-based groups during election campaigns, thus garnering political support by prying on the poverty of the people; the ‘looting’ of public money for the purchase of motor-vehicles, bicycles and other campaign materials by the ruling party; and the misuse of the President’s discretionary fund in ‘buying’ political support, including inducing opposition members of the National Assembly to defect to the ruling party.¹⁹

Economic corruption

One of the most alarming facts of corruption in the Zambian economic life is the fact that it has graduated from petty bribes to grand corruption and predatory practices, involving the looting and plunder of the nation’s wealth by the politically connected, including senior government officials in the National Treasury and Ministry of Finance and National Planning, the very custodians of National Wealth.²⁰ The *dramatis personae* and network of ‘looters’ involved in these practices were well documented in the case of *Attorney-General for Zambia v Meer Care and Desai*.²¹ Other examples of grand corruption and predatory practices in the public domain include the theft of an estimated USD 52 million by Chiluba and the former Chief of the Zambia Intelligence and Security Services, Xavier Chungu, through the ZAMTROP account maintained with the London Branch of the Zambian National Commercial Bank. A part of this money ended up with Chiluba’s tailors in Switzerland (Boutique Baale, USD 11 million), for monogrammed handmade shirts and handmade shoes. Sharing in the stolen money, is Chiluba’s daughter, Helen Chiluba, who received \$90 000; Chiluba’s second wife, Regina Mwanza, who received gifts of \$352 000; \$91 664 received by

Political Council for Justice and Peace ‘The fight against corruption’ The Vatican, 2–3 June 2006 at 2 available at: <http://www.vatican.va/roman-curia/political-council> (last accessed on 18 November 2009).

¹⁹ WA Chanda *National Integrity System Country Study Report* (2003) at 1–12. See also *Attorney-General for Zambia v Meer Care and Desai and Others* HC04CO3129 [2007]. EWHC 952, delivered in the Chancery Division, see also *The Post* (Lusaka) 11 November 2003 citing numerous examples of nullifications of sets held by cabinet ministers for serious electoral malpractices and corruption. See Further, M Szeftel ‘Political theft and the spoils system in Zambia, the state as a Resource itself’ 1982 *Review of African Political Economy* 2–4.

²⁰ Van Donge n 15 above at 72–79; *Attorney-General for Zambia v Meer Care and Desai and Others* n 19 above.

²¹ See the introduction to the judgment n 19 above, especially pars 3–8; See also van Donge n 12 above ; and the *Saturday Post* 5 May 2007 at 1–4.

the former Chief Justice, Matthew Ngulube; and \$179 000 given to fundamental churches in the USA and various payments to many beneficiaries, as itemised in the *Attorney-General v Meer Case*. Although these payments are not exhaustive, the overall picture is one of grand theft and connivance on an unprecedented scale between Chiluba, his bankers, lawyers, business associates, and even the former Auditor-General, Mr Fred Siame.²²

Another example of economic corruption is the disappearance of between 763–1000 tankers of petrol destined for Zambia National Oil Company, including what Chanda describes as the loss of USD 100 million by the same company through the importation of oil feedstock under dubious circumstances.²³ The parastatal company itself was liquidated under very suspicious circumstances involving corruption and collusion by government ministers, the Zambia National Commercial Bank, and international oil companies with political connections in the Chiluba and Mwanawasa Administration.²⁴

In addition to the above examples, there are also the Carlington maize scandal, involving the payment of USD 97 million to a Canadian Company in the name of Carlington Sales Ltd, for maize which was never delivered;²⁵ the payment of USD 20,5 million to Congolese arms dealer, Katebe Katoto, also known as Raphael Soriano, for the supply of military hardware to the Zambia Defence Force, which was never delivered;²⁶ the sale of copper and cobalt belonging to a parastatal, the Zambia Consolidated Copper Mines, to an Israeli company at a pittance; theft of millions of US dollars realised from the privatisation of parastatal companies; the theft of billions of Zambian Kwacha held under the Presidential Housing Initiative; the looting of (mostly) donor funding at the Ministry of Health, estimated to be in the region of 27 to 64 billion

²² Van Donge n15 above at 76 and the London Judgment n 19 above at pars 57–74 and par 138.

²³ Chanda n 19 above at 11; See the ‘Matrix of plunder’ *The Post* 25 June 2002. See also ‘Analysis of Zambia’s world of theft and abuse of public resources’ *Alexander Oil and Gas Connections* 7, 14 (12 July 2002) available at: <http://www.gasandoil.com> cited by Van Donge n 15 above at 77.

²⁴ Dennis Mumba, formerly Chief Executive Officer of the Zambian National Oil Company in a letter to the Clerk of the National Assembly dated 4 October 2005.

²⁵ Chanda n 19 above at 11.

²⁶ Van Donge n 15 above at 76. See also the London Judgment n 19 above at par 243.

Zambian Kwacha (ZK)²⁷ and many other schemes involving grand looting and plunder of national wealth involving the highest echelons of power.²⁸

What is particularly lamentable about grand corruption and these predatory practices in the case of Zambia is that in a country where more than seventy per cent of the population live in extreme poverty, below the World Bank benchmark of USD 1 per day, the political elites squandered scarce national resources with abandon, thus fundamentally distorting the trajectory of economic development by diverting funding aimed at the economic and social upliftment of the people.

Corruption in the Zambian judiciary

The judicial branch, supposed to be the mirror of the nation, has not escaped the scourge of corruption. In recent years, there have been some rumblings, spearheaded by the independent press and civil society organisations such as Transparency International Zambia and the Foundation for the Democratic Process (Fodep) that the Zambian judiciary is thoroughly compromised.²⁹

The antecedents of these perceptions are to be found in selective morality and application of the law in corruption cases; dubious acquittals of the politically connected; the refusal by the Director of Public Prosecutions to appeal against unfavourable judgments, and the case of Chief Justice Matthew Ngulube, who was forced to resign for receiving a bribe from former President Chiluba.³⁰ Corruption in the judiciary subverts the fundamental right to equality before the law and to the equal protection of the law as enshrined in the Constitution.³¹

²⁷ Author unknown 'Corruption? Whose corruption? Who perpetrated the corruption in the new scams and revelations' undated at 3–6. This document has been widely circulated to the Zambia diaspora electronically. The Dutch governments and other donors suspended aid support to Zambia's Ministry of Health after officials were accused of having looted ten million Kwacha (ZK10 000 000, ten million Zambian Kwacha) from that ministry. See *The Economist* 8 December 2009 at 1.

²⁸ Chanda n 19 above at 11; See also 'Matrix of plunder' n 23 above about Zambia's murky world of theft and abuse of national wealth.

²⁹ 'A disgraced judiciary' *The Post* 29 September 2010.

³⁰ The case against Chief Justice Ngulube was included in President Mwanawasa's address to the National Assembly on 11 July 2007. See also <http://www.zamnet.zm> (last accessed on 18 July 2002). Van Donge n 15 above at 76; see also *Attorney-General v Meer* n 19 above at par 57.

³¹ Constitution of Zambia, Act 18 of 1996, in particular Arts 11 and 18 of the Bill of Rights.

Even more disheartening is the fact that a corrupt judiciary engenders a culture of impunity, since illegal actions are not consistently punished and laws are not applied uniformly.

Furthermore, in a poor country like Zambia, corruption in the judiciary undermines access to justice by the poor and indigent segments of society, as they cannot afford to offer or promise bribes.³²

Perceptions that the judiciary is now an obstacle to the successful prosecution of the war on corruption are in stark contrast to the excitement and euphoria associated with the dramatic events of the winter of 2002. On 11 July 2002, the late President Mwanawasa addressed a special session of the National Assembly, laying a catalogue of charges of corruption and abuse of office by former President Chiluba (1991–2001) and calling upon the National Assembly to lift Chiluba's immunity in respect of criminal activities committed during his presidency. On 16 July 2002, the National Assembly, by an overwhelming majority, voted to revoke Chiluba's immunity, a move unprecedented on the Continent.

In thanking the National Assembly for agreeing to lift Chiluba's immunity, Mwanawasa made the telling point that 'no longer shall the people of Zambia allow dictatorship and corrupt leadership to rule over them'. He went on to caution that '[...] even for those leaders who intend to engage in corrupt practices, the decisions we are taking are having a deterrent effect. The aim which we all want is to create a clean society.'³³

Chiluba then sought, unsuccessfully, to overturn the decision of the National Assembly, first in the High Court, and then in the Supreme Court of Zambia. On 19 March 2003, the Supreme Court upheld the decision of the High Court dismissing Chiluba's application for judicial review of the National Assembly's decisions, pointing out that immunity did not mean impunity and a licence for serving presidents to go to town, arrogantly sending a message to the country that they were untouchable.³⁴

³² United Nations High Commissioner for Human Rights, n 19 above at 59; cf *South African Association of Personal Injury Lawyers v Heath and Others*, 2001 1 BCLR 77 (CC) at 80 E–F; *Schabir Shaik and Others v The State*, 2007 1 SA 240 (SCA) at par 223, 90.

³³ See <http://www.zamnet.zn> (last accessed on 18 July 2002). The President's speech is also available at Government Printer, Lusaka 2002.

³⁴ 'Chiluba seeks judicial review' *The Post* 18 July 2002 1–4; on 30 August 2002 the Lusaka High Court ruled that the National Assembly could lift Chiluba's immunity, a

Pursuant to these decisions, Chiluba was charged with several counts of theft and abuse of office in the sum of USD 500 000. However, in a dramatic turn of events, after a costly six year trial, Chiluba was, on 7 August 2009, acquitted on all counts, with the learned trial magistrate holding that the funds in question could not be traced to the National Treasury.³⁵ The Director of Public Prosecutions declined to file a notice of intention to appeal against the acquittal. Furthermore, the Task Force on Corruption which was created to investigate and prosecute cases of abuse of office during 1991–2001, was disbanded and its Chief Executive dismissed.³⁶ A public-spirited private lawyer sought to challenge the legality of the DPP's decision but his application was dismissed on the narrow and very technical ground that he lacked *locus standi*.³⁷ For the purposes of this paper, it is submitted that while the Director of Public Prosecutions has the discretion whether or not to appeal against decisions of the lower courts unfavourable to the state, such discretion is not an unfettered one.³⁸ It has to be exercised judiciously and prudently, always bearing in mind the public interest, especially in sensitive cases involving general considerations of public policy.³⁹ Prosecutorial independence has to be enjoyed within the purport and spirit of the Constitution. Further, there are compelling reasons in favour of appealing decisions of the lower courts. While presiding officers in the magistrate's courts and Puisne Judges of the High Court sit alone and are, therefore, sole arbiters on questions of fact and proper interpretation of the law, decisions in the Supreme Court are always arrived at after much deliberation and persuasion, thus moderating the idiosyncracies, prejudices and preferences of individual judges.⁴⁰

decision affirmed by the Supreme Court on 19 March 2003.

³⁵ See Lewis Mwanangombe 'former President Chiluba acquitted of corruption charges following 6-year trial' *The Examiner* 17.08.2009 at 1, See also: <http://www.printhus.chickability.com> (last accessed on 17 November 2009).

³⁶ See several articles in *The Post* 25–30 September 2009.

³⁷ Laura Hamusute, 'Lusaka Lawyer to subpoena Malila, Chinyama over Chiluba acquittal', *The Post* 9 November 2009 at 1–4. Private prosecutions require the support of the Attorney-General under art 56 (7) of the Constitution of Zambia, 1996.

³⁸ See art 56(3) of the Constitution, 1996 and in particular 56(7).

³⁹ See the proviso to art 56 (7) of the Constitution, 1996. Cf Lord Greene, MR oft-quoted in the famous case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] ALL ER 680 holding that administrative discretion must be exercised reasonably by excluding irrelevant considerations; taking into account of relevant considerations; guiding oneself properly in law .

⁴⁰ See Benjamin Cardozo *The nature of the judicial process* (1979)1–50.

Another significant setback in the so-called war on corruption has been the recent decision by the Zambian High Court refusing to recognise and register a judgment granted in favour of Zambia by the Chancery Division of the High Court in London.⁴¹ This was in a civil matter in which the Attorney-General, as a judgment creditor, sought leave of the High Court to register a judgment handed down in the London High Court, Chancery Division, to recover approximately USD 46 million, allegedly stolen by former President Chiluba from the National Treasury through an account maintained in the London Branch of the Zambia National Commercial Bank by the Zambia Intelligence and Security Services. The trial judge held that the judgment in question could not be enforced under the Foreign Judgments (Reciprocal Enforcement) Act, Chapter 76 of the Laws of Zambia, but at common law.⁴² It is important to point out that while the High Court in London adopted a purposive approach to statutory interpretation and deprecated the avarice of the Zambian elites who looted and squandered millions of dollars while the majority of Zambians eked out a living in abject poverty, the Zambian judge adopted a literalist approach and the ‘austerity of tabulated legalism’ in rejecting the Attorney-General’s application.⁴³

The most obvious implication of this very brief judgment is that the Zambian government has to bring civil proceedings in the Zambian courts *de novo*. The Zambian government has indicated that it will not appeal the judgment⁴⁴ – this in a country where the physical infrastructure, such as

⁴¹ *The Attorney-General v Frederick Jacob Titus Chiluba and Others*, 2007/HP/H/004, handed down in September 2010. Auwal Musa Rafsanjani, an anti-corruption campaigner in Nigeria has made the poignant observation that Chiluba’s acquittal underscored how investigators and prosecutors in impoverished African countries often can’t compete with the legal firepower marshalled by wealth leaders accused of corruption. (*The Examiner* 17 August 2009 at 2.)

⁴² *Attorney-General v Chiluba* n 41 above at 12–20.

⁴³ *Per* Justice Peter Smith at par 15 of the *Attorney-General v Meer Case* n 19 above. The Solicitors Regulation Tribunal recently suspended the practising license of Mohamed Iqbal Meer, one of Chiluba’s lawyers in London for allowing their law firm to be used to launder money stolen from the Zambian government by former President Chiluba. See *The Post* 2 August 2011 at 1 available at: <http://www.postzambia.com>. The phrase ‘austerity of tabulated legalism’ was first coined by Lord Wilberforce in the Privy Council case of *Minister of Home Affairs (Bermuda) v Collins McDonald Fisher* [1980] AC 319 at 328. See also *Bush v Gore* 531 US 98 (2000).

⁴⁴ See further ‘Rupiah and Chiluba are birds of a feather’ *The Post* 14 September 2010 where the authors observe that President Rupiah Banda’s closeness to Chiluba has rendered him impotent in the fight against corruption, available at: <http://www.postzambia.com> (last accessed on 14 September 2010).

the road network, public buildings and the public health system, are crumbling. The lukewarm approach adopted by the Zambian government flies in the face of the country's regional and international law obligations, as articulated above, which solemnly enjoin state parties to hold corrupt persons in the public and private sectors accountable and to take appropriate steps against the culture of impunity.⁴⁵

LEGAL AND POLICY INTERVENTIONS

Origin of the law and institutional framework on corruption

Zambia has an impressive array of statutory instruments and policy interventions aimed at preventing corruption. The earliest juridical framework relating to corruption is to be found in the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1916, and after independence, in the Penal Code which penalised corruption in the public sector through the ordinary law enforcement agencies.

The frenzied looting of the present was literally unheard of in the early days of post-colonial Zambia. This could be attributable to the relatively buoyant nature of the Zambian economy in the first ten years of independence and President Kaunda's often-repeated threats to deal 'ruthlessly with all economic saboteurs'.⁴⁶ The most draconian step taken by Kaunda was to extend the laws of detention without trial, inherited from the erstwhile colonial authorities, to cases involving, *inter alia*, money laundering, illegal foreign currency dealings, and drug-running.⁴⁷

Cases involving allegations of abuse of power and maladministration fell within the jurisdiction of the Commission for Investigation, headed by the Investigator-General or Ombudsman. Under the Constitution and the enabling Act, the Investigator-General had jurisdiction to investigate allegations of maladministration and to report these to the President, in the

⁴⁵ See the SADC Protocol against Corruption, 2001; the African Union's Convention on Preventing and Combating Corruption 2003 and the United Nation's Convention against Corruption 2003.

⁴⁶ VJ Mwaanga *The other society: a detainee's diary* (1987); S Wina 'An open letter to the 5th Zambia National Convention, held in Lusaka, 14–16 March 1990'; A Sardanis *Africa: another side of the coin* (2003).

⁴⁷ See Government of the Republic of Zambia, 'Essential Supplies and Services Regulations' *Statutory Instrument No 38 of 1988*. See also M Mbaio 'Law and practice of preventive detention in Zambia' in A Harding & J Hatchard (eds) *Preventive Detention and Security Law: A Comparative Survey* (1999) 279–292. See also [1989] 33/1 *Journal of African Law* 116–125.

form of non-binding recommendations.⁴⁸ The Commission itself was not autonomous from the civil service. The Commission's recommendations were never made public. Because of this lack of institutional autonomy and operational independence, it is generally accepted that the Commission was still-born or moribund from the very beginning.

In 1980, Zambia became one of the few countries in the British Commonwealth of Nations to enact a specialised piece of legislation to spearhead the fight against corruption – the Corrupt Practices Act.⁴⁹ This Act marked a major milestone by extending criminal sanctions to corrupt practices in the private sector, a major *lacuna* in the ordinary criminal law as contained in the Penal Code. Corrupt practices were broadly defined to include:

- bribery;
- all forms of gratification in exchange for favours and discharge of public functions;
- incidents of abuse of power and possession of wealth not commensurate with emoluments and the possession of unexplained property.⁵⁰

In cases of possession of wealth not commensurate with one's earnings, there was a presumption of corruption, with the suspect bearing the onus of rebuttal. This was a major departure from the traditional common law position under which the state bore the onus of proving its case beyond reasonable doubt. The major understanding then was that corruption was an insidious evil, calling for extraordinary measures.⁵¹

⁴⁸ Constitution of Zambia, 1973; Chap 1 of the laws; Commissions for Investigations Act, Chap 39 of Laws of Zambia. See also Justice FM Chomba 'The Commission for Investigations: its role, impact and effectiveness' (an address to administrative law students 18 May 1981, (unpublished)).

⁴⁹ Act 14 of 1980, Chap 91 of the Laws of Zambia. Hong Kong is generally regarded as the first country in the Commonwealth to enact an anti-corruption law. See further, George Chellah 'Chongwe urges Rupiah to reconsider his position on abuse of power' *The Post on Line* 8 November 2010 (last accessed on 2 February 2011).

⁵⁰ The Corrupt Practices Act, 14 of 1980, repealing ss 94 and 95 of the Penal Code and ss 5(2) and 10(1)(c) of the 1980 Act on the definition of corruption.

⁵¹ This shifting of the onus of proof was borrowed from Hong Kong's anti-corruption legislation. See Chellah n 49 above at 2.

In a major reversal of policy, the current Banda administration has introduced legislation in the National Assembly to expunge section 37 of the Anti-Corruption Commission Act 1996, which criminalises abuse of office.⁵²

Critics of the government's move to remove the offence of abuse of office from the statute book, have cogently argued that it was

shameful that in the midst of abject poverty, the Zambian government seemed to be pre-occupied with protecting corrupt political leaders instead of stemming the abuse of public resources through outright embezzlement and misappropriation of public resources.⁵³

Anti-Corruption Commissions

The Corrupt Practices Act 1980, provided for the establishment of an anti-corruption agency, the Anti-Corruption Commission, headed by a Judge of the Supreme Court. The functions of the Commission were to

- investigate and prosecute incidents of corruption in both the private and public sectors;
- prevent incidents of corruption in both the public and private sectors by examining the practices and procedures of both public and private agencies and advising them on systematic reforms in policies and procedures designed to reduce their susceptibility to corruption; and
- carry out public education campaigns on the evils of corruption.⁵⁴

The Commission lacked prosecutorial independence in that prosecutions in corruption cases required leave of the Director of Public Prosecutions.⁵⁵ Given the lack of institutional autonomy, coupled with the lack of prosecutorial independence, it was inconceivable for the Commission to

⁵² Government Bill 41 of 2010. See further the High Court decision *in Re: Implied Amendment of the Constitution; In Re: Corrupt Practices Act* (HNR 4381984) [1984] *Mumba v The People* holding that an accused person charged under the Corrupt Practices Act could not be compelled to give evidence on oath if he/she elected to make an unsworn statement as provided for in the Constitution, in particular, art 20(7).

⁵³ See Chibaula Silwamba, quoting Transparency International Zambia President, Reuben Lifuka, *The Post* 27 September 2010; 'Rupiah and Kunda are fighting for their right to be corrupt' *The Post* Editorial 1 October 2010; Silwamba, 'RB will be haunted for removing abuse of office clause' *The Post* 30 September 2010 1–4, and George Chellah 'Chongwe urges Rupiah to reconsider his position on abuse of office' 8 November 2010. *Cf* art 18 (12) of the Constitution 1996.

⁵⁴ Act 14 of 1980, in particular s 10 (1)(c) of the Act.

⁵⁵ Article 56 of the Constitution.

investigate and prosecute all incidents of corruption, especially those involving the well-connected politically.⁵⁶

Thus, although the Commission achieved some modest gains in investigating and prosecuting cases of petty corruption, most of the major transgressors got off scot-free.⁵⁷

When President Chiluba came to power in 1991, one of the major campaign themes of his party was to establish 'a new culture', founded on the rule of law and 'clean' government. In 1996, the Corrupt Practices Act 1980 was repealed and replaced by the Anti-Corruption Commission Act 1996.⁵⁸ This Act was intended to achieve far-reaching reforms in the institutional framework spearheading national anti-corruption efforts by making the Anti-Corruption Commission autonomous of the public service. The Act provides for the appointment of commissioners to provide political and strategic leadership. There is also a Director-General as Chief Executive to the Commission.

In line with international best practices, institutional autonomy and operational independence are key to the success of anti-corruption agencies.⁵⁹ In the case of Zambia, this key requirement is sorely lacking. The Commissioners are appointed by the State President and are answerable to him/her, thus making it inconceivable for the Commission to investigate and prosecute corrupt practices in the highest ranks of state power, or individuals who are politically well-connected. The Director-General of the Commission, who is responsible for the operational efficacy of the Commission, is also appointed by the State President and is the answerable to his/her office. Furthermore, although the Commission has its own investigators and prosecutors who have the necessary powers to investigate and prosecute wrongdoers, such powers are subject to the control of the Director of Public Prosecutions, a civil servant, appointed and answerable to the President. Although the Constitution insulates the DPP from outside interference or control in the discharge of his/her functions, the Chiluba saga clearly demonstrates that the coercive power of the state can be abused in

⁵⁶ CR Matenga 'Corruption is it endemic in Zambia?' (paper presented to the Citizens Forum Discussion, Lusaka, Zambia, available from the Electronic Publications from the University of Zambia, Lusaka at: <http://www.fiuc.org/iaup/sap>). See also Chanda, n 19 above at 1-49.

⁵⁷ Matenga n 56 above.

⁵⁸ Act 42 of 1996.

⁵⁹ See authorities cited at n 11 above and those in n 63 below.

shielding corrupt elements in society and in targeting political enemies, real or imagined.⁶⁰

A perusal of the annual reports of the Commission confirm the old adage that in the strange alchemy of law and politics or realpolitik, only small flies get caught but the big villains get off scot-free.⁶¹ A number of reasons have been advanced for the dismal success rate in the prosecution of corruption cases, including the fact that some of these complicated cases are tried by magistrates who are ill-equipped to handle them; complications in obtaining evidence, exacerbated by the lack of experienced anti-corruption investigators, and in some cases, political interference in criminal prosecutions.⁶² In order to enhance prosecutorial independence for the anti-corruption investigators and prosecutors, it is recommended that the Director of Public Prosecutions delegate his/her powers to the Commission so that in the final analysis, the Commission will have the ultimate power to institute or discontinue prosecutions.⁶³ This recommendation is informed by international best practice and the norms adumbrated in international and regional anti-corruption instruments referred to above.

The next section analyses recent reforms aimed at decentralising responsibility for preventing and combating corruption to integrity committees.

⁶⁰ See further Matenga n 56 above at 7 where the author cites several cases involving serious allegations of corruption by some senior ministers which were not pursued with the requisite vigour. See also George Chellah 'RB's sympathy for thieves has cost us donor support' *The Post* 23 December 2009 at 1.

⁶¹ Republic of Zambia, Annual Reports, Anti-Corruption Commission, Lusaka: Government Printers, 2005, 2006, 2007, 2008, 2009. See further, Matenga n 56 above at 1–17; Chanda n 19 above 1–12 at 7; <http://www.acc.gov.zm>; see also 'The matrix of plunder' *The Post* 25 June 2002 1–4; 'Analysis of Zambia's world of theft and abuse of public resources' 7–14, 12 July 2002. *Alexander Oil and Gas Connections* at: <http://www.gasandoil.com>.

⁶² 7–14, 12 July 2002 <http://www.gasandoil.com>. *The Economist*; 'Less poor, less free' and 'The President is making the country's well wishers anxious', <http://www.economist.com/world> (last accessed on 12 August 2009); Patson Chilemba, 'Posterity will judge LAZ on DPP's Office' *The Post* 11 December 2009 at 1–4; Matenga n 56 above at p15; George Chellah; 'R.B.'s sympathy for thieves has cost us donor support' quoting Michael Sata, Leader of the Opposition Patriotic Front *The Post* 23 December 2010 at 1.

⁶³ Cf's 5 of Act 42 of 1996; art 56 (7) of the Constitution of Zambia; 1996. See further, A Doig & J Moran 'Anti-corruption agencies: the importance of independence for the effectiveness of national integrity systems' in C Fignault & L Huberts (eds) *Corruption and Law Enforcement* (2002).

DECENTRALISATION OF PREVENTATIVE MEASURES TO INTEGRITY COMMITTEES

Historically, Zambia has never been short of pious declarations and slogans about clean governance and zero tolerance for corruption. A casual visitor to the country will immediately notice billboards and posters exhorting people to report all incidents of corruption. In this milieu, the Anti-Corruption Commission has been at the forefront of articulating institutional reforms for making the Commission the leading agency of a broad sector alliance focused on combating corruption on all fronts. These efforts culminated in the unveiling of the ‘new’ national anti-corruption policy and strategy 2009.⁶⁴ As pointed out in the introductory section, the main thrust of this policy is to prevent and combat corruption in a more coordinated, inclusive and sustainable manner.⁶⁵

The responsibility for this harmonised and streamlined system has been devolved to integrity committees as focal point players in public and private bodies. These committees will in future be responsible for developing and implementing anti-corruption prevention programmes in their respective organisations and report on these, on a quarterly basis, to the central government. Thus, every ministry, department of state, public sector agency and private sector entity will have its own integrity committee with the broad mandate of preventing corruption in its respective institutions. The role of the Anti-Corruption Commission will be that of an over-sight institution with the added responsibility of providing training and technical assistance to the members of integrity committees.⁶⁶

In order to achieve these reforms and objectives, a comprehensive list of measures is proposed, including major reforms at the legal, institutional and social levels. These measure will entail a major review of anti-corruption laws and regulations, including the domestication of the country’s international and regional obligations in this field; streamlining the work of

⁶⁴ *Government of the Republic of Zambia, National Anti-Corruption Policy* Lusaka Government Printers 2009.

⁶⁵ Government of the Republic of Zambia n 66 below, in particular the Foreword by President RB Banda at I of the document. See further, Government of the Republic of Zambia, Anti-Corruption Commission, Concept Note on Prevention of Corruption and Other Malpractices in Organisations in Zambia using Integrity Committees at: <http://www.acc.gov.zm> (last accessed on 22 January 2010). See also Kayobo N’gandu ‘The National Corruption Prevention Policy and Strategy – Zambia, panacea to curb corruption’ at: <http://www.iaac.org.ht/> (last accessed on 18 November 2009).

⁶⁶ Republic of Zambia, Concept note n 67 below.

existing institutions dealing with corruption; developing, co-ordinating and implementing social mechanisms for combating corruption; developing and implementing mechanisms for enhancing transparency in the exercise of state power; the promotion of paperless or e-governance so as to streamline cumbersome, bureaucratic and complex procedures in public service delivery, thus reducing opportunities for corruption, and mainstreaming and integrating anti-corruption and integrity values into the schooling system.⁶⁷

This is a very tall order. At the time of writing (late 2010 to early 2011), the government was yet to articulate mission elements and deliverable targets. It suffices to point out that without the necessary political will and fortitude to follow through on the promises embedded in this policy, very little, if any, will be achieved in real terms.

CONCLUDING REMARKS

This paper has been concerned with legal and institutional reforms aimed at combating the increase in corruption in Zambia within the context of international, regional and national imperatives. It has proceeded from the premise that corruption is not unique to Zambia but is a universal social evil whose far-reaching ramifications are more pronounced in poor, least developed countries such as Zambia.

Through an historical and comparative approach, the paper has traced the origin and development of the laws and institutions dedicated to preventing and combating the prevalence of corruption. What emerges from this discussion, is that it is not enough to come up with laws, institutions and high-sounding slogans on corruption, as is clear from Mbonu's observation in the introductory part of this paper that 'corruption always fights back'.⁶⁸ It is therefore essential that the enunciation of national policies and strategies should be buttressed by the requisite follow-through and political will at the very top, to close the gap between declarations of intent and actual achievement. With the adoption of the national policy and strategy with its emphasis on detection and prevention rather than prosecution, an important milestone has been reached. In the final analysis, the ultimate test will be in the actual implementation of the package of measures introduced in 2009.

⁶⁷ Republic of Zambia, National Anti-Corruption Policy n 64 above.

⁶⁸ Mbonu n1 above at 5.