

Legal Aspects of Combatting Corruption in Zimbabwe

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ABSTRACT

This paper examines the legal framework for combatting corruption in Zimbabwe. It argues that the existing legal framework has gross limitations and needs to be strengthened to make it more effective and efficient. The paper suggests that Zimbabwe's legislation on combatting corruption should be reviewed in a manner that addresses the collective nature of corruption in the country. This may be achieved through a wider definition of the concept of a public officer; expanding the scope of activities considered corrupt to include activities such as influence peddling and illicit enrichment; and enacting comprehensive legislation on protection of whistle blowers.

1. INTRODUCTION

Corruption is a widespread social problem and a contributor to poverty and inequality.¹ Its effects on the society have been well – documented, particularly its impacts on development of the society. Corruption distorts decision making on public spending.² Scarce funds and resources may be wasted on unnecessary projects which do not serve the needs of the society. It can also distract potential investors who may find the cost of doing business high, and this has a direct effect on the economic development and growth of a nation.

International efforts have been instrumental in drawing attention to a previously neglected problem of corruption, as well as promoting formal institutional and legal reform in a large number of developing countries. To date virtually all countries, including Zimbabwe, have laws that seek to prevent and combat corruption in one form or another. This paper seeks to examine the legal framework on combatting corruption in Zimbabwe. It will first provide the definition of corruption in general and specifically in Zimbabwe. This is followed by an

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¹ Kofi Atta Annan, *Foreword - United Nations Convention against Corruption*, (United Nations 2004) iii.

² Susan Rose-Ackerman, 'Corruption and democracy' [1996] 90 *Am. Soc'y Int'l L. Proc* 83; Pierre-Guillaume Méon and Khalid Sekkat, 'Does corruption grease or sand the wheels of growth?' [2005] 122 *Public Choice* 69-97

appraisal of relevant international instruments to which Zimbabwe is a party to and the extent of compliance of the country's domestic laws with these international instruments. It will then evaluate the relevant domestic legislations and wind up with conclusion and recommendations.

2. DEFINING CORRUPTION

Corruption, even if it is a global phenomenon, lacks a universally accepted definition. Defining corruption depends on the approach one takes. Approaches which inform the nature and basis of corruption include the moralist approach; revisionist approach; principal-agent approach and collective-action approach.³ A moralist approach views corruption as an immoral act and a violation of positive law.⁴ This approach further, *a priori*, condemns all non-Western and non-Christian societies and cultures as morally inferior, without attempting to understand the culture or traditions of these societies.⁵ Crucial questions that may arise from employing this approach include: what standard can one use to measure certain acts as immoral or not and are certain societies morally superior to others?

The revisionist approach emphasises that corruption is unavoidable at certain stages of development and contributes to the process of modernisation and development.⁶ It, however, defines corruption in terms of divergence from a specific norm of accepted behaviour.⁷ In line with this approach, Huntington⁸ defines corruption as 'behaviour of public officials which deviates from accepted norms in order to serve private ends.' This definition contextualises corruption to a given society by delimiting it to norms of that society. Social norms are shared understandings of actions that are obligatory, permitted, or forbidden within a society. If, for instance, honesty and transparency are societal norms, any deviation from them will be considered abominable. As regards corruption, if non-corruption is the prevailing norm in a

³ For a brief discussion on approaches to corruption, see Padideh Ala'i, 'The legacy of geographical morality and colonialism: A historical assessment of the current crusade against corruption' [2000] 33 *Vanderbilt Journal of Transnational Law* 877

⁴ Ala'I (n 3) 895.

⁵ Ala'I (n 3) 877.

⁶ Joseph Samuel Nye, 'Corruption and political development: a cost-benefit analysis' [1967] 61:2 *American Political Science Review* 417; Leff, 'Economic development through bureaucratic corruption' [1964] 8:2 *The American Behavioural Scientist* 8; Samuel Huntington, 'Modernization and Corruption' in Arnold Heidenheimer, Michael Johnson and Victor LeVine (eds) *Political Corruption. A Handbook*, (2nd edn, Transaction Publishers 1989).

⁷ Ala'I (n 3) 897.

⁸ Huntington (n 6) 377.

society, a violation of such generates a feeling of guilty which in turn deters such kind of behaviour and encourages compliance.⁹

The principal – agent approach is premised on two assumptions: first that there exist conflict of interests between principals and agents; and, second, that the agent has more information than the principals.¹⁰ Principals are a collective body of actors who delegate the performance of certain government tasks to another body of collective actors, known as agents. In this model corruption occurs when the agent acquires certain information about the task at hand and opts not to disclose it to the principal, and betrays the principal's interest by pursuing his self-interest.¹¹ Through these lenses, corruption can be 'solved' by drawing rules that *inter alia* promotes transparency and control the exercise of discretion to be exercised by the agent, providing incentives to the agent to modify behaviour and strengthening sanctions for those who flout these regulations.¹²

Significantly, under this approach, corruption is defined as 'the abuse of entrusted power for private gain.'¹³ A narrow definition of corruption is proffered by the World Bank, as 'the extent to which public power is exercised for private gain, including petty and grand forms of corruption, as well as "capture" of the state by elites and private interests.'¹⁴ This definition is narrow as it defines corruption by acts of the actors and not by the action itself.¹⁵

Zimbabwe laws do not define corruption, but enumerate practices which are considered as corrupt. The list of activities is mainly influenced by the principal – agent approach. For the purpose of this article, corruption is defined as thus proposed by Transparency International:¹⁶

⁹ Bin Dong, Uwe Dulleck and Benno Torgler, 'Social norms and corruption' in Antonio Ciccone (ed) *Proceedings of the European Economic Association and the Econometric Society European Meeting* (Barcelona Graduate School of Economics, Catalonia, Spain 2009).

¹⁰ Anna Persson, Bo Rothstein and Jan Teorell, 'Why anticorruption reforms fail—systemic corruption as a collective action problem' [2013] 26:3 *Governance: An International Journal of Policy, Administration, and Institutions* 452; Lindsey Carson and Mariana Mota Prado, 'Using institutional multiplicity to address corruption as a collective action problem: Lessons from the Brazilian case' [2016] 62 *The Quarterly Review of Economics and Finance* 56, 57; Heather Marquette and Caryn Peiffer, 'Corruption and collective action' [2015] *Research Paper 32, Developmental Leadership Program* 2.

¹¹ Persson, Rothstein and Teorell (n 10) 452; Susan Rose-Ackerman, *Corruption: A study in political economy* (Academic Press 1978) 6; Marquette and Peiffer (n 10) 2.

¹² Persson, Rothstein and Teorell (n 10) 452.

¹³ Transparency International, <<https://www.transparency.org/what-is-corruption/#define>> accessed 10 October 2017.

¹⁴ World Bank, < <http://info.worldbank.org/governance/wgi/pdf/cc.pdf>> accessed 10 October 2017.

¹⁵ Sharon Eicher, *Corruption in international business: the challenge of cultural and legal diversity*, (Ashgate Gower Farnham, England 2009) 3.

¹⁶ Transparency International, 'How do you define corruption?' at <https://www.transparency.org/what-is-corruption/#define> (accessed 10 October 2017)

‘Generally speaking as “the abuse of power entrusted for private gain” corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs.

Grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good. Petty corruption refers to everyday abuse of entrusted power by low- and mid- level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools or police departments and other agencies.’

This is broad and wide enough to capture many ways individuals abuse power and the public trust in pursuant of self-gain.

3. FORMS OF CORRUPTION IN ZIMBABWE

There is generally no consensus on types of corruption, but the prevalent categories would appear to include petty corruption;¹⁷ grand corruption;¹⁸ bureaucratic corruption;¹⁹ and political corruption.²⁰ These types of corruption are manifested in various ways, including: fraud and

¹⁷ Petty corruption refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies. <https://www.transparency.org/whoweare/organisation/faqs_on_corruption> accessed 10 October 2017.

¹⁸ Grand corruption is defined as corruption that involves heads of state, ministers, or other senior government officials and serves the interests of a narrow group of business people and politicians as criminal elements. See Susan Rose-Ackerman, ‘Democracy and ‘grand’ corruption’ [1996] 48 *International Social Science Journal* 365.

¹⁹ Bureaucratic corruption refers to “the use of public office with its paraphernalia of prestige, influence and power, in order to make private gains, which need not be monetary, ‘in breach of laws and regulations nominally in force”, see John Makumbe, ‘Bureaucratic Corruption in Zimbabwe: Causes and Magnitude of the Problem’ [1994] 19:3 *Africa Development / Afrique et Développement* 46.

²⁰ Political corruption arises when the behaviours of politicians and lawmakers deviate from the principles that guide politics and policies, adapting decisions with abuse of power. Public and common interests are displaced by private interests in decision making.

deceit;²¹ embezzlement;²² bribery; nepotism;²³ kleptocracy²⁴ and influence peddling.²⁵ All these forms or types of corruption appear to in Zimbabwe, resulting in it being considered as one of the most corrupt countries, ranked 154 out of 176 on the Corruption Perception Index (2016).²⁶ However, the extent of the occurrence of each type of corruption in Zimbabwe is an issue beyond the scope of this paper which is primarily concerned with the legal measures put in place for dealing with the corruption in its various forms.

4. LEGAL FRAMEWORK FOR PREVENTION AND COMBATting OF CORRUPTION IN ZIMBABWE

4.1 International Legal Framework

Zimbabwe is party to four international conventions aimed at combating corruption and corruption-related activities, namely: United Nations Convention Against Corruption (UNCAC); United Nations Convention against Transnational Organized Crime (UNTOC); African Union Convention on Preventing and Combating Corruption (AUCPCC) and Southern African Development Community (SADC) Protocol against Corruption.²⁷

The above international instruments carry the chief objective of prevention, detection and prosecution of corruption in the public and private sector. This has to be done through legislative and other measures in which acts of corruption are criminalised, investigated and

²¹ Fraud and deceit is ‘the offence of intentionally deceiving someone in order to gain an unfair or illegal advantage (financial, political or otherwise).’ In the public domain, a public official who commits fraud manipulates the flow of information for his personal profit. See <https://www.transparency.org/glossary/term/fraud> accessed 10 October 2017.

²² Embezzlement occurs ‘when a person holding office in an institution, organisation or company dishonestly and illegally appropriates, uses or traffics the funds and goods they have been entrusted with for personal enrichment or other activities.’ <https://www.transparency.org/glossary/term/embezzlement> accessed 10 October 2017).

²³ Nepotism is form of favouritism when officials favour relatives or close friends for positions in which they hold some decision-making authority. The choice is based on relationship not merit.

²⁴ Kleptocracy entails obsessive impulse to steal regardless of the economic needs. See J. Coolidge and Susan Rose-Ackerman, ‘High-level rent-seeking and corruption in African regimes: Theory and cases’ [1997] *The World Bank and Susan Rose-Ackerman, ‘Democracy and “grand” corruption’* [1996] 48 *International Social Science Journal* 365. In the context of Zimbabwe, see Kudzai Hodzi, ‘The roads to nowhere: Fighting corruption in Zimbabwe’ [1999] 16 *The Zimbabwe Law Review* 61.

²⁵ Willeke Slingerland, ‘The fight against trading in influence’ [2011] 10:1 *Public Policy and Administration* 53, 54 describes influence peddling as ‘entails a situation where a person misuses his influence over the decision-making process for a third party in return for his loyalty, money or any other material or immaterial undue advantage.’ See also the European Union’s Criminal Convention on Corruption, art 12.

²⁶ Transparency International <https://www.transparency.org/news/feature/corruption_perceptions_index_2016> accessed 10 October 2017.

²⁷ Zimbabwe ratified these instruments on 8 March 2007, 12 December 2007, 17 December 2006 and 8 October 2004, respectively.

prosecuted. They further provide that States should cooperate with one another in every aspect of the fight against corruption. The AUCPCC and UNCAC further enjoins States to proscribe the use of funds acquired through illicit and corrupt practices in financing of political parties.²⁸ Additionally, the SADC Protocol calls upon member States, to the extent possible, to develop and harmonize their policies and domestic legislation for the attainment of the purpose of the Protocol.²⁹

Zimbabwe is a dualist state. An international treaty which has been concluded by the President or under the President's authority does not bind Zimbabwe until it has been approved by Parliament, and does not form part of the law of Zimbabwe unless and until it has been incorporated into the law through an Act of Parliament.³⁰ Where international instruments are not domesticated, they create only an international obligation on Zimbabwe. However, courts and tribunals are enjoined to adopt any reasonable interpretation of domestic legislation that is consistent with any international treaty which is binding on Zimbabwe.³¹ On the question of which international treaties are binding on Zimbabwe, the High Court indicated in the case of *Minister of Foreign Affairs v Jenrich & Others*, that, once an international agreement is approved by Parliament, it becomes binding on Zimbabwe and can be used in interpreting domestic law.³²

4.2 National Legislation

Zimbabwe has numerous pieces of legislation dealing with corruption. The primary laws are the Constitution; Prevention of Corruption Act, (Chapter 9:16); Criminal Law (Codification and Reform) Act, (Chapter 9:23); Serious Offences (Confiscation of Profits) Act, (Chapter 9:17); and Anti-Corruption Commission Act, (Chapter 9:22). These laws are examined below.

4.2.1 The Constitution of Zimbabwe

The Constitution of Zimbabwe lists good governance as one of the national objectives that the State and all institutions and agencies of government must be guided by. Under this national objective, the State must adopt and implement policies and legislation that foster efficiency,

²⁸ UNCAC art 10 and AUCPCC art 7 (3).

²⁹ SADC Protocol against Corruption art 7

³⁰ Constitution of Zimbabwe, 2013 s 327 (2)

³¹ Constitution of Zimbabwe, 2013 s 327 (6)

³² *Minister of Foreign Affairs v Jenrich & Others* [2015] ZWHHC 232.

competence, accountability, transparency, personal integrity and financial probity in all institutions and agencies of government at every level and in every public institution.³³ Specifically, all appointments to public offices must be made primarily on the basis of merit and measures must be taken to expose, combat and eradicate all forms of corruption and abuse of power by those holding political and public offices.³⁴ This provision applies to all political and public officials. First, it empowers the Legislature to adopt laws that deal with corruption and secondly enjoins other organs of the States to adopt and implement anti-corruption policies such as Code of conduct.

Section 254 of the Constitution further provides for the establishment of the Zimbabwe Anti-Corruption Commission, as an independent body, with a wide array of powers and functions, including investigating and exposing cases of corruption; combatting corruption, theft, misappropriation, abuse of power and other improper conduct; and making recommendations to the Government and other persons on measures to enhance integrity and accountability and prevent improper conduct in the public and private sectors.³⁵ It can even direct the Commissioner-General of Police to investigate cases of suspected corruption and to report to the Commission on the results of any such investigation, and the former is mandated to comply with such a directive.³⁶ The Anti – Corruption Commission is further discussed below in reference to the specific statute under which it was established. .

National objectives relating to good governance in the Constitution must inform and guide interpretation and implementation of other specific laws dealing with corruption in Zimbabwe.

4.2.2 Prevention of Corruption Act

This Act is the primary legislation that deals with corruption in Zimbabwe. It is divided into four parts. Part I deals with preliminary issues, which include definitions. Part II covers the activities that are considered corrupt, offences committed by public officers in the course of exercising their duties and competent verdicts. Part III deals with investigation of claims arising from dishonesty or corruption. Part IV covers general issues, such as prevention of victimisation.

³³ Constitution of Zimbabwe, 2013 s 9

³⁴ Ibid

³⁵ Constitution of Zimbabwe, 2013 s 255 (1)

³⁶ S 255 (2)

4.2.2.1 Definitions

The definition section provides for the key actors in corruption, namely: 'agent'; 'principal' and 'public officer'. An agent means any person employed by or acting for another in any capacity. This includes: trustees, liquidator, executor of the estate of a deceased person and a public officer. Public officer mean a person holding or acting in a paid office in the service of the State, a statutory body or a local authority. These are colloquially called civil servants. Members of a corporate body are also recognised as agents but this excludes members of a statutory body or local authority.

A 'principal' is defined as the employer or other person for whom an agent acts on behalf of; a public officer who is a Vice-President and a Minister who is a member of the Cabinet and member of a council, board, committee or authority which is a statutory body or local authority.

The following things stand out from these definitions. First, the term 'public officer' is used both in relation to both principal and agent. In the first instance, political leaders such as Ministers are cast as the 'principals' tasked with monitoring actions of bureaucrats (agents), in order to keep them accountable. In the second instance, public officials (bureaucrats or politicians) are also conceptualized as 'agents', with citizens being 'principals'. The status of being an 'agent' or 'principal', therefore, is depended on the context in which corruption occurs and on who is seeking enforcement of anti-corruption laws. For example, if the public complains of corruption by a Minister, the public is the principal and the Minister is the agent. But if the Minister complains of corruption by other government officials, the Minister is the principal and the government officials are agents.

It is also notable that the list of officers recognised as public officers excludes the President, and the President is not mentioned either as an agent or as a principal. This means that the Act is not applicable to any acts and transactions carried out by or on behalf of the President. In simpler terms, corruption involving the President cannot be investigated. This places the President above the law, in total disregard of the principles of constitutionalism.³⁷ Additionally, such an omission may indicate lack of political will by leaders in combatting corruption. Political will is manifested by the degree of participation and inclusion of political

³⁷ Kudzai Hodzi, 'The roads to nowhere: Fighting corruption in Zimbabwe' [1999] 16 *The Zimbabwe Law Review* 67, 68.

actors in reform initiatives and implementation.³⁸ The exclusion of certain political actors from efforts to combat corruption is disappointing.

Additionally, a 'public officer' is defined in the context of a 'national' public office, thus excluding 'foreign' public officials and officials of a public international organisation. Article 2 of the UNCAC and its Legislative Guide recommends that the definition of a public officer should be wide enough to cover foreign public officers. The net effect of such exclusion is that corrupt activities by foreign public officials are not criminalised. *Per contra*, countries like New Zealand, United States of America and United Kingdom criminalise corrupt activities of foreign public officials.³⁹ Any serious effort to combat corruption should include foreign public officials⁴⁰ within Zimbabwe, in relation to their conduct of business or exercise of public duties.

It should further be observed that the consistent use of 'principal' and 'agent' throughout the Act suggests that corruption is viewed as a principal – agent problem, and that a principal – agent approach should inform methods of preventing and combatting corruption in Zimbabwe. This approach assumes that all the principals are 'principled' and willing to hold agents accountable for their actions. Sadly, studies have revealed that in numerous cases, it is the principals who are either directly involved in corruption or indirectly condone it by not taking action against agents. In Zimbabwe, the various corruption scandals⁴¹ that have rocked the country have seen some of the perpetrators being pardoned by the former President, Robert Mugabe and even appointed to higher government posts.⁴²

³⁸ Sahr Kpundeh, 'Political will in fighting corruption' in *Corruption & Integrity Improvement Initiatives in Developing Countries*, (UNDP, OECD 1998) 9.

³⁹ New Zealand Crimes Act of 1961; US Foreign Corrupt Practices Act of 1977 and the UK Bribery Act of 2011.

⁴⁰ UNCAC art 2 defines foreign public official 'as any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.' The term also extends to officials of public international organizations such as the World Bank. See also OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [1997], art 1.

⁴¹ For a list of corruption scandals in Zimbabwe since 1980 see Charles Laiton, 'The birth of corruption in Zimbabwe' *Newsday*, 8 February 2014 <<https://www.newsday.co.zw/2014/02/08/birth-corruption-zimbabwe/>> (accessed 27 July 2017). Notable corruption scandals involving government officials include: 1987 — ZISCOSTEEL Blast Furnace Scandal; 1988 — Willowgate Scandal; 1989 — ZRP Santana Scandal; 1994 — War Victims Compensation Scandal; 1995 — GMB Grain Scandal; 2001 — Harare Airport Scandal; 2008-2014 — Airport Road Scandal; and 2016 — ZIMDEF Funds.

⁴² The case of Frederick Shava is an example of this. Frederick Shava is the current President of United Nations Economic and Social Council. However, in the late 1980s Frederick Shava was Minister of State and was involved in the Willowgate Scandal. The scandal involved government officials buying Toyota Cressida vehicles from the government-controlled vehicle assembler, Willowvale Mazda Motor Industries and reselling them at highly-inflated prices. He was arrested, tried, convicted and jailed for perjury, but pardoned by the President without spending a night in jail. Other Ministers implicated included Callistus Ndlovu, (former Minister of industries); Enos Nkala, (former Minister of Defence); Maurice Nyagumbo, (Minister for Political Affairs and ZANU PF Administration Secretary; Mark Dube, (former Governor of Matabeleland South); and Enos Chikowore, (former Minister of Local Government and Urban Development). Only Nyagumbo and Nkala resigned and the others were pardoned by the President. See also Charles Laiton, (n 41).

4.2.2.2 Corrupt Practices

Part II of the Act provides for lists of activities that are considered as corrupt practices. These are bribery;⁴³ fraud and deceit;⁴⁴ arrangements by an agent with any seller of goods or service provider to secretly obtain a gift or consideration in connection with his principal's affairs or business;⁴⁵ secretly offering a gift or consideration by seller of goods or service provider to an agent for himself or for any other person in regard to the sale of the goods or to the employment of his services in connection with the affairs or business of the agent's principal;⁴⁶ and failure to disclose the full nature of any transaction to the principal by the agent, with an intent to deceive or to receive a consideration for himself or any other person.⁴⁷

What is conspicuous from the list of activities enumerated are the similarities with the duties and responsibilities of an agent at common law. The paramount duty of an agent is to act in good faith. An agent must at all times act or perform in good faith.⁴⁸ This requires that an agent must exclusively or primarily act in the interests of the principal. An agent must avoid acting in a manner bringing about conflict of duty towards the principal and personal interest. If there is a likelihood of conflict of duty and interest, this must be disclosed to the principal.⁴⁹ Disclosure should be frank and full, covering all the material facts and nature of transactions carried out in connection with the principal's business. It is essential for the agent to execute the mandate on behalf of his principal with a third party to the greatest advantage of his principal in the circumstances. When an agent receives a bribe to do something or refrain from doing something, he is acting contrary to the duty of good faith.⁵⁰

Acting in good faith also entails that an agent must not make any secret profit or acquire any benefit in the course of his agency without the knowledge and consent of his principal. This includes refraining from using the property of the principal to make profit for himself or even using his position as the agent to obtain a benefit. For instance, if an agent secretly

⁴³ Prevention of Corruption Act, 986 s 1 (a) and (b)

⁴⁴ S.1 (c).

⁴⁵ S. 1 (d).

⁴⁶ S 1 (e).

⁴⁷ S 1 (f).

⁴⁸ *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4; *Robison v Randfontein Estates GMC* [1921] AD 168; C. Nagel *eta al*, *Commercial Law* (5th edn, Lexis Nexis 2015) 187-189.

⁴⁹ *Zimre Reinsurance Company Limited and Another v National Real Estate Limited and Another* [2011] ZWHHC 228.

⁵⁰ Nagel (n 48) 188

receives a monetary benefit from a service provider for placing a purchase order with the supplier, he is in breach of this duty.⁵¹

Breach of the common law duties and responsibilities of an agent may thus be a civil or contractual matter, but it may also be a criminal matter. The Prevention of Corruption Act compliments civil law remedies available such as repudiation of a contract facilitated by bribery.⁵² The Act, however, overemphasizes the principal/agent approach in combatting corruption. Corruption is not only informed by principal – agent relationship, but it is also informed by general societal perceptions, termed as collective – action problem.⁵³ Carson and Prado⁵⁴ state:

'a collective action problem arises in a group setting when a strategy that is individually rational produces an outcome that is collectively inferior; for example, while society as a whole would be better off if everyone cooperated by behaving honestly, an individual may benefit personally by defecting and engaging in corruption.'

In other words where the society views corruption as the rule, not as an exception, individuals have less incentives to gain from not being corrupt themselves. Corruption may persist and efforts to combat may not be so effective where the majority, including principals and agents are insensitive to its deleterious impact.⁵⁵

Viewing corruption from the collective action lenses has significant policy implications, in particular, the need to fashion a different type of strategy meant to address corruption systematically. For example, instead of 'fixing the incentives,' the important thing may be to change actors' beliefs about what 'all other actors are likely to do so that most actors expect most other actors to play fairly.'⁵⁶ The Transparency International's Integrity Pacts are arguably a model example of collective-action anti-corruption approach.⁵⁷ These Pacts involve bringing all the actors together and making a formal agreement to refrain from corrupt

⁵¹ This duty is singled out in section 1 (d) of the Prevention of Corruption Act 1986

⁵² *Plaaslike Boeredienste v Chemfos Bpk* [1986] 1 SA 819 (A) 848B-E; *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* [1999] 2 SA 719 (A).

⁵³ Anna Persson, Bo Rothstein and Jan Teorell, 'Why anticorruption reforms fail—systemic corruption as a collective action problem' [2013] 26:3 *Governance: An International Journal of Policy, Administration, and Institutions* 452; Lindsey Carson and Mariana Mota Prado, 'Using institutional multiplicity to address corruption as a collective action problem: Lessons from the Brazilian case' [2016] 62 *The Quarterly Review of Economics and Finance* 56, 57; Heather Marquette and Caryn Peiffer, 'Corruption and collective action' [2015] *Research Paper 32, Developmental Leadership Program* 1, 2.

⁵⁴ L. Carson and M. M. *ibid* 56, 58.

⁵⁵ Persson, Rothstein and Teorell (n 53) 454 – 456.

⁵⁶ *Ibid* 464.

⁵⁷ H. Marquette and C. Peiffer, (n 53) 9

activities. This can only be successful if there are certain factors existing at the time of these pacts, such as transparency of information and ability of the actors to monitor each other and the political will of the government to be involved.⁵⁸ Therefore, any anti – corruption effort should reflect both approaches.

Another observation is that the Act covers both 'active bribery' and 'passive bribery'. Active bribery is the act of offering or granting a bribe whereas 'passive bribery' is the act of accepting a bribe. Therefore, it is a crime to solicit or pay a bribe and also to accept the bribe. This is commendable as the law punishes both supply and demand sides in bribery transactions. It is also recognised that bribery is a consensual crime, and both parties must consequently be punished. By recognising both 'active bribery' and 'passive bribery', Zimbabwe is also complying with her international obligations.⁵⁹

The Act also deals with the possibilities of a third party receiving the benefits of a corrupt transaction. While a typical bribery transaction has two parties, the Act envisages a situation where an agent solicits or receives a bribe on behalf of a third party. This is common where the briber or recipient wants to distance himself from the crime and increase his chance of evading justice. For instance, bribe payments may be channelled to the corrupt official through the official's friends.⁶⁰ Hence, in terms of the Act, corruption even occurs when a party did not directly benefit from the act or participated in the act. This is in line with the standards set out in relevant international instruments to which Zimbabwe has subscribed.⁶¹

It must also be noted, by way of criticism, that list of activities regarded as corrupt is too narrow. Outside the principal – agent duties, only two common activities are regarded as corrupt, that is fraud and bribery. Many activities, internationally recognised as corrupt, are not embraced by the Zimbabwe. Notable examples include influence peddling⁶² and illicit enrichment.⁶³ The principle of legality is part and parcel of the laws of Zimbabwe. A person

⁵⁸ Marquette and Peiffer (n 53) 9

⁵⁹ UN Convention against Corruption [2005], art 15 (a) and (b); SADC Protocol against Corruption [2001], art 3(1) (a) and (b) and AU Convention on Preventing and Combatting Corruption [2003], art 4(1) (a) and (b).

⁶⁰ For instance in the *Ephraim Masupha Sole v The Crown*, Lesotho Court of Appeals, Case (CRI) 5 of 2002, Judgment dated April 13, 2003 and *R v Mochebelele and Another* (C of A (CRI) 02/08) [2008] LSCA 30 bribe payments were channelled to the corrupt official through the official's friends and the friend's wife. See also *Attorney General of Zambia for and on behalf of the Republic of Zambia v Meer Care & Desai (a firm) and Ors* [2007] EWHC 952 (Ch.).

⁶¹ UNCAC, 2005 art 15(a) and (b); SADC Protocol against Corruption [2001], art 3(1) (a) and (b) and AU Convention on Preventing and Combatting Corruption [2003], art 4(1) (a) and (b).

⁶² SADC Protocol [2001], art 3(1)(f); AU Convention on Preventing and Combatting Corruption [2003], art 4(1)(f); UN Convention against Corruption [2005], art 18 and Council of Europe Criminal Law Convention on Corruption (European Treaty Series- No. 173) [1999], art 2.

⁶³ AU Convention on Preventing and Combatting Corruption [2003], art 8 (1); UNCAC, 2005 art 20

cannot under this principle be tried for activities not recognised as criminal offences under a law.⁶⁴

The act of influence peddling 'entails a situation where a person misuses his influence over the decision-making process for a third party in return for his loyalty, money or any other material or immaterial undue advantage.'⁶⁵ For example, where A offers his services to B, asserting that he is in a position to influence X, the CEO of a multinational company, to offer a managerial post to B in return for a holiday trip to Dubai for A's family. A classic case of influence peddling involves an intermediary who exerts influence over the decision making of a third person.⁶⁶ Influence peddling may entail using membership of the same denomination or political grouping to gain an undue advantage or favour. It is colloquially about 'who you know' and not 'what you know'. This is ostensibly common in Zimbabwe.⁶⁷ On the Willowgate scandal,⁶⁸ for example, the Sandura Commission Report revealed that Enos Chikowore, then Minister of Local Government and Urban Development had used his position to assist his secretary and her friend to buy two Nissan Sedans.⁶⁹

Influence peddling is distinct from bribery. In influence peddling the recipient of the advantage is not the decision-maker and is not expected to act, or refrain from acting, in breach of his/her duties (as in the case of bribery). The decision-maker may not be aware that he is committing a crime but rather granting a favour to a friend. In bribery, the two parties are aware that the act is illegal. Hence, the offence of influence-peddling 'targets not the decision-maker, but those persons who are in the neighbourhood of power and [who] try to obtain advantages from their situation by influencing the decision-maker.'⁷⁰

Illicit enrichment is the 'significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.'⁷¹ It is a well-known fact

⁶⁴ Constitution of Zimbabwe 2013 s 10 (1) (k) provides that: 'Any person accused of an offence has ... rights ... not to be convicted of an act or omission that was not an offence when it took place.'

⁶⁵ Slingerland (n 25) 54. See also, SADC Protocol 2001 art 3(1)(f); AU Convention on Preventing and Combatting Corruption, 2003 art 4(1)(f); UNCAC 2005 art 18 and Council of Europe Criminal Law Convention on Corruption (European Treaty Series- No. 173) 1999 art 2.

⁶⁶ Slingerland (n 25) 61.

⁶⁷ It is alleged for example that Intratrek Zimbabwe (Pvt.) Ltd, controlled by Wicknell Chivayo, relies on mutually beneficial political networks and influence peddling to corruptly get tenders without following procedures. See the story titled '...evidence of political cronyism, influence peddling' (*Zimbabwean Independent*, 19 August 2016) <<https://www.theindependent.co.zw/2016/08/19/evidence-political-cronyism-influence-peddling/>> accessed 2 August 2017.

⁶⁸ n 41 above.

⁶⁹ *Willowgate Scandal* <http://www.pindula.co.zw/Willowgate_Scandal/> accessed 2 August 2017.

⁷⁰ Organisation for Economic Co-Operation and Development *Corruption: A glossary of international standards in criminal law* (2018), 26.

⁷¹ UNCAC 2005 art 20. See also Inter-American Convention against Corruption 1997 art IX; African Union Convention on Preventing and Combating Corruption 2003 art 8 and ECOWAS Protocol on the Fight against Corruption 2001 art 6 (3) (a) .

that in Africa some politicians and public servants live beyond their means.⁷² Some politicians become noticeably wealthy not long after assuming political office. It may be required under some anti-corruption laws that such must account for such wealth. This may be contrary to axiomatic principles of criminal law that a suspect must be presumed innocent until guilt is established beyond reasonable doubt through evidence led by the prosecution.⁷³ Departures from axiomatic rules or principles of criminal law may however be justified in a country with rampant corruption, like Zimbabwe. In the alternative, proof of corruption through circumstantial evidence should be permissible under laws seeking to curb illicit enrichment. Countries such as Argentina, Colombia, Brazil, India, Egypt, Senegal, Sierra – Leone and Malawi⁷⁴ apparently have such laws.

4.2.2.3 Offences by Public Officers

The Act also contains a specific section for offences committed by public officers. In terms of section 4, it is an offence for a public officer, in the course of his employment, to do anything that is contrary to or inconsistent with his duty, or omit to do anything which is his duty, for the purpose of showing favour or disfavour to any person. The sanction for this offence is a fine not exceeding level ten⁷⁵ or imprisonment not exceeding five years or both.

One of the notable cases in Zimbabwe on corruption by a public officer is Paradza's case.⁷⁶ Paradza, a judge of the High Court of Zimbabwe, in the course of his employment, incited his colleague, Justice Cheda, to corruptly release the passport of his business partner, Labuschagne, who was facing murder allegations and whose passport was being held by the Registrar of the High Court Bulawayo as part of Labuschagne's bail conditions. Such a request was contrary to his duties as a public officer, and for purposes of showing favor or disfavor to

⁷² Indira Carr, 'Corruption, the Southern African Development Community Anti-corruption Protocol and the principal—agent—client model' [2009] 5:2 *International Journal of Law in Context* 160

⁷³ Ibid 160 -161

⁷⁴ In the Malawian case of *State v Mzumara* Criminal Case No 47/2010, the accused, a public officer in the Department of Immigration was charged with three counts of possession of unexplained property, contrary to the Malawian Corrupt Practices Act 1995, s 32 (2) (c), for *inter alia* having possessed between 1 January to 21 December 2008 assets in the sum of about US\$62 000, disproportionate to his known sources of income amounting to about US\$3 000. Accused was convicted on all accounts and sentenced to twelve months in prison.

⁷⁵ Currently level ten fines are equivalent to US\$700. See First Schedule to the Criminal Law (Codification and Reform) Act 2006.

⁷⁶ *S v Paradza* HC 2475/03.

any person, thereby contravening section 360(2) (b) of the Criminal Procedure and Evidence Act,⁷⁷ as read with section 4(a) of the Prevention of Corruption Act.

The court indicated that the mere act by a judge of approaching another judge to ask him to exercise his discretion in entertaining an application, coming before him or arranging for him to entertain an application which is not before him, coupled with a statement or expression that he will stand to lose if an unfavorable result should ensue, is no less than an urging or request for the other judge to exercise his discretion in a particular way which is inconsistent with his duties.⁷⁸ Justice Paradza was found guilty of corruption and sentenced to two-year term of imprisonment.⁷⁹

4.2.2.4 Penalties

Most laws on corruption provide mainly for criminal sanctions.⁸⁰ The inclination towards criminal sanctions is chiefly motivated by the corrosive nature of corruption on the society. As noted earlier, however, civil remedies may also be sought in some corruption scenarios. Corruption may involve a breach of trust and also cause losses for which damages could be recovered in civil action. Civil remedies may also be regarded as effecting restorative justice.⁸¹

In line with the above, the Prevention of Corruption Act provides for both criminal and civil sanctions. As regards criminal penalties, any person found guilty of corruption is liable to a fine not exceeding three times the value of the gift or consideration concerned or level fourteen, whichever is greater, or imprisonment for a period not exceeding twenty years or both.⁸² Further any gift unlawfully obtained can be forfeited to the State.⁸³

As regards civil sanctions section 3 (3) of the Act permits the court, in addition of passing a sentence, to give a summary judgment in favour of the convicted person's principal or former principal for an amount equal to the value of such gift or consideration, together with

⁷⁷ Criminal Procedure and Evidence Act 1927, s 360 (2) (b) reads: 'Any person who ... incites any other person to commit; any offence; whether at common law or against any enactment, shall be guilty of an offence ...'

⁷⁸ *S v Paradza* HC 2475/03 154.

⁷⁹ However, Justice Paradza fled the country shortly before his sentencing.

⁸⁰ Emile van der Does de Willebois, 'Using Civil Remedies in Corruption and Asset Recovery Cases' [2012] 45 *Case W. Res. J. Int'l L.* 615, 618.

⁸¹ Restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behaviour. It is aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender. Measures of restorative justice include reparation, restitution and community services. See United Nations Office on Drugs and Crime *Handbook on restorative justice programmes criminal justice handbook Series 7*(United Nations: New York, 2006); Emile van der Does de Willebois, *ibid* 615, 617.

⁸² Prevention of Corruption Act, 1986 s 3 (2).

⁸³ Prevention of Corruption Act 1986 s 3 (2) read Criminal Procedure and Evidence Act, 1927 s 62

interest that may have accrued thereon. This judgment has the same effect and is executed in the same manner as if it was given in a civil action instituted by the principal.

A defrauded principal is thus allowed to recoup some of the losses suffered as a result of the agent's corrupt activities. In some instances, embezzled State funds may be regarded as State property and could be subject to a proprietary claim by the State. The claim could even extend to profits derived from the stolen property or funds. The case of *Attorney General v. Reid*⁸⁴ is illustrative. The Attorney General of Hong Kong went all the way up to the Judicial Committee of the Privy Council in London seeking to recover portions of approximately HK \$12.4 million of bribe money that had been converted into immovable property.⁸⁵

Overall, the Act has relatively strong sanctions on corruption. However, for these to be more effective and deterrent, civil remedies to be awarded as compensation should be triple the value of the gift received, and not merely of 'equal value'. This is a settled practice in United States,⁸⁶ and Zimbabwe's Prevention of Corruption Act appears to recognise this practice in so far as criminal sanctions are concerned.⁸⁷ The same principle that motivated the criminal position can be extended to civil remedies. This will not only punish the offender but also deter others from similar misconduct. Zimbabwe might also be complying with its obligations under international instruments to adopt and maintain effective measures to combat its rampant corruption.⁸⁸

The Act can further be strengthened by including penalties that suspend companies and individuals charged with corruption from doing business with the government. The risk of loss of opportunity to deal with Government in Zimbabwe might be a more effective deterrent. The World Bank apparently employs a similar deterrent. Companies and individuals convicted of corruption are barred from participating in World Bank funded projects.⁸⁹

4.2.2.5 Whistle – blowers

⁸⁴ *Attorney General of H.K. v Reid* [1993] UKPC 36, 38 (P.C.) (N.Z.).

⁸⁵ For discussion on utilising civil remedies in combatting corruption see, Emile van der Does de Willebois, 'Using Civil Remedies in Corruption and Asset Recovery Cases' [2012] 45 Case W. Res. J. Int'l L. 615.

⁸⁶ van der Does de Willebois (n 84) 648.

⁸⁷ Prevention of Corruption Act 1986, s 3 (2) provides that:

“Any person who is guilty of an offence in terms of subsection (1) shall be liable to—

(a) a fine not exceeding three times the value of the gift or consideration concerned or level fourteen, whichever is the greater”

⁸⁸ UN Convention against Corruption [2005], art 5.

⁸⁹ World Bank 2017 <<http://pubdocs.worldbank.org/en/387181466627871302/World-Bank-Notes-on-Debarred-Firms-and-Individuals.pdf>> accessed 4 November 2017.

One of the key challenges in combatting corruption is detecting the corrupt activity itself, especially where there are no incriminating traces of the activity. One way of exposing corruption is through 'whistle-blowers'. In general a whistle-blower is a person who exposes wrongdoing within an organization.⁹⁰ For this sole reason, they face the risk of retaliation, victimisation and even the possibility of dismissal from employment.

There is no independent piece of legislation in Zimbabwe comprehensively addressing protection of whistle-blowers. Section 14 (2) of the Prevention of Corruption Act, however, attempts to protect whistle-blowers from victimisation. It makes it an offence for any person who without lawful excuse prevents or threatens or does anything calculated to deter a person from giving information concerning a corrupt practice, or does anything prejudicial to a person who has given information concerning a corrupt practice. Victimising a person because he has given information is, therefore, a criminal offence punishable by a fine or imprisonment for a term not exceeding two years, or both. The common 'lawful excuse' which is employed by Government to prevent and punish disclosure of information is the Official Secrets Act [Act 11:09], especially in relation to procurement and construction for the military.⁹¹

In addition, the Criminal Procedure and Evidence Act contains some aspects that can be relied upon in the protection of whistle-blowers. Part XIVA of the Act, for example, deals with the protection of vulnerable witnesses. Section 319B provides that if it appears to a court in any criminal proceedings that a person who is giving or will give evidence in the proceedings is likely to be intimidated, whether by the accused or any other person, so as not to be able to give evidence fully and truthfully, the court may, *inter alia*, direct that the person testify in a position or place, whether in or out of the accused's presence, that the court considers will reduce the likelihood of the person suffering stress or being intimidated. The application of this provision is restricted to court proceedings and may not fully address victimisation or reprisals that whistle-blower may receive after the case.

Some parts of the Revenue Authority Act⁹² further seek to provide incentives to whistle-blowers. Under section 34B (2), the Commissioner-General may, with the approval of the Minister, award to any person, not being an employee of the Authority, or a near relative of an

⁹⁰ David Schultz and Khachik Harutyunyan, 'Combating corruption: The development of whistleblowing laws in the United States, Europe, and Armenia' [2015] 1:2 *International Comparative Jurisprudence* 88.

⁹¹ The case of Edward Snowden illustrates the difficulties of drawing a line between legitimate whistleblowing and spying. Snowden was charged in US with theft of government property, unauthorised communication of national defence information and wilful communication of classified communications intelligence. See BBC News 2014 'Edward Snowden: Leaks that exposed US spy programme' <<http://www.bbc.com/news/world-us-canada-23123964>>

⁹² Revenue Authority Act 2001.

employee of the Authority, a monetary reward for information provided or any measure taken which results in detection of smuggling or any illegal activity and the recovery of revenue which would otherwise have been lost. A reward of 10% of the total tax revenue and penalties recovered as a result of whistle blower's information is given to the whistle-blower. This facility was, however suspended in 2015 upon discovery of abuse by the Revenue Authority officials, who were giving insider information to third parties who would in turn report a corrupt activity as if they stumbled upon the information.⁹³

The above Acts provide a piece-meal approach to protection of whistle-blowers. There is need for specific comprehensive legislation on the matter. This should *inter alia* cover malpractices for which whistle-blower protection would be provided; the person or entity to approach with any concerns; the procedures to circumvent that person, if need be; procedural steps involved in investigating any concerns and what steps may be taken should wrongdoing be established; and clarify that those who blow the whistle in good faith will not suffer any legal action even where the information turns out to be false. The same legislation should also criminalise malicious victimisation of all whistle blowers, including malicious allegations and other abuses of the whistle-blowing legislation.⁹⁴

4.2.3 Criminal Law (Codification and Reform) Act, Chapter 9:23

Chapter IX of the Criminal Law (Codification and Reform) Act deals with bribery and corruption. The principal – agent model is retained in this Act. Sections 169 – 175 add on to the offences outlined in the Prevention of Corruption Act. The specific additions include expansion of the definition of an agent to include a person who voluntarily manages the affairs or business of another person or takes care of the property of another person without the knowledge or consent of that other person.⁹⁵

Section 174 provides for the crime of criminal abuse of duty by a public officer. This provision reads like section 4 of the Prevention of Corruption Act. However, for avoidance of doubt, a public officer is deemed not to have abused his office if he exercises his duties for the

⁹³ Newsdesk, 'Whistle-blower fund abused' (*Financial Gazette*, 3 July 2014 <<http://www.financialgazette.co.zw/whistle-blower-fund-abused/>> accessed 14 September 2017.

⁹⁴ OECD, 'Whistleblower protection: encouraging reporting' (OECD, 2012), <<http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf>> accessed 14 September 2017.

⁹⁵ Criminal Law (Codification and Reform) Act 2006, s 169 (i).

purposes of advancing persons who have been historically disadvantaged by discriminatory laws or practices.⁹⁶

A notable case involving s174 is that of Elton Mangoma.⁹⁷ The State alleged that Mangoma had unlawfully abused his office as Minister of Energy and Power Development when he ordered his subordinates to procure five million litres of diesel from a South African company, NOAA Petroleum, without following tender procedures prescribed by law. And by doing so his purpose was to 'show favour to' PetroTrade company. In the alternative, he was accused of contravening section 30 of the Procurement Act as read with section 5 (4) (a) (ii) and section 35 of the Procurement Regulations SI 171/2002 in that he instructed PetroTrade to purchase 5 million litres of diesel from NOAA without going to tender. On these charges Mangoma was acquitted at the close of the State's case, as the State had failed to establish a *prima facie* case upon which a reasonable court might convict. Significantly, the Procurement Act permitted non-tender procurement procedures in times of emergency, like the one which was at hand and acknowledged by the state witnesses. The Minister's directive to by-pass the normal tender procedures was therefore legally justified.

4.2.4 Serious Offences (Confiscation of Profits) Act, Chapter 9:17

This Act provides for the confiscation of property or money used in or in connection with, or as proceeds from a serious offence. A serious offence is any offence which is punishable by imprisonment for a period of twelve months or by a more severe punishment; or the value of the property derived or obtained from the commission of which is or is likely to be not less than twenty thousand dollars or such greater or lesser amount as may be prescribed and includes specified offences.⁹⁸

The Act facilitates obtaining of forfeitures orders on tainted properties and a pecuniary penalty order against a person in respect of any benefit derived by the person from the commission of the offence. This is done through an application by the Attorney General not later than six months after the conviction of the person.⁹⁹ The Act has extra-territorial

⁹⁶ Criminal Law (Codification and Reform) Act 2006, s 174 (3).

⁹⁷ *S v Mangoma* [2011] ZWHHC 74.

⁹⁸ Serious Offences (Confiscation of Profits) Act 1991, s 2 defines a 'specified offence' as: (a) a serious narcotics offence; or (b) a money-laundering offence in relation to the proceeds of a serious narcotics offence; or (c) a prescribed offence; or (d) a conspiracy to commit or aiding, abetting, counselling or procuring the commission of an offence referred to in paragraph (a), (b) or (c); or (e) assisting another person to escape punishment for, or to dispose of the proceeds of, an offence referred to in paragraph (a); or (f) attempting to commit an offence referred to in paragraph (a), (b) or (c).

⁹⁹ Serious Offences (Confiscation of Profits) Act 1991, s 4.

application as regards pecuniary penalty orders, which apply to property that comes into the possession, or under the control of a person, whether within or outside Zimbabwe and benefits that accrue to a person whether within or outside Zimbabwe.¹⁰⁰

In reference to corruption, this Act is useful in recouping losses suffered by the principal as a result of the agent's corrupt activities. It complements the Criminal Code and the Prevention of Corruption Act by providing for confiscation of not only the property used in the commission of crime but also benefits derived from the commission of the crime itself. Proceeds of a crime taken outside the country may thus be tracked and be subject to forfeiture.

4.2.5 Anti-Corruption Commission Act, Chapter 9:22

This Act operationalises the Zimbabwe Anti-Corruption Commission (ZACC) which provided for under section 254 of the Constitution. The Commission has a Chairman and eight other members, all appointed by the President. The members of ZACC are chosen for their integrity and their knowledge of and experience in administration or the prosecution or investigation of crime or for their general suitability for appointment.¹⁰¹

In addition to the functions provided for in the Constitution, other functions the ZACC, as enumerated in the Act shall include: monitoring and examining the practices, systems and procurement procedures of public and private institutions; enlisting and fostering public support in combating corruption in society; educating the public on the dangers of corruption in society; instructing, advising and assisting any officer, agency or institution in the elimination or minimisation of corruption; advising on ways of strengthening anti-corruption legislation; and recommending to the Government that it ratify and domesticate relevant international legal instruments aimed at combating corruption.¹⁰² Most of these functions in the Act are merely meant to prevent the occurrence of corruption.

The Commission has powers, *inter alia*, to investigate and seize any travel documents or anything which is reasonably believed to contain evidence of the commission of an offence related to corruption. It, however, lacks arresting powers. It relies on the police to effect arrest and on the National Prosecution Authority for prosecution. This creates overdependence on other governmental departments in order to fulfil its mandate in combatting corruption. Such dependence can derail the efforts to combat corruption, which is widespread in Zimbabwe. The

¹⁰⁰ Serious Offences Act 1991, s 13.

¹⁰¹ Constitution of Zimbabwe 2013, s 254 (2).

¹⁰² Anti-Corruption Commission Act 2004, s12.

law does mandate the Commissioner General of Police to comply with the directives of ZACC, but the Commissioner General has in practice found ways of prevaricating and delaying compliance with such directives.

The parameters of ZACC's arresting powers came under scrutiny upon the arrest of the then Minister of Higher Education, Jonathan Moyo.¹⁰³ The Minister was arrested by a police officer on secondment to ZACC. Moyo challenged the arrest as unlawful on the basis that the police officer was a member of ZACC and could not have acted under the direction of the Commissioner General of Police while on secondment. Therefore, according to the Minister, the arrest was effected by the police officer under the direction of ZACC not the Commissioner General of Police, rendering it unlawful. The Constitutional Court dismissed the application and indicated that the challenge of the lawfulness of his arrest lacked constitutional merit to warrant attention of the Court. The matter could properly be addressed in the Magistrate's Court, including the question whether ZACC has arresting powers or not.

It is therefore uncertain under the law whether the ZACC has arresting powers. The legal position ought to be clarified. For better and efficient enforcement, it is commendable that ZACC be afforded arresting powers. Other anti-corruption agencies in the region such as the South African and Zambian agencies are empowered to arrest suspects and have special prosecuting authority.

5 CONCLUSIONS AND RECOMMENDATIONS

The paper has examined several pieces of Zimbabwe legislation dealing deal with corruption. It reveals that among other aspects the laws cover both passive and active bribery law thereby punishing the supply and demand side in bribery cases. The laws also provide for both criminal and civil sanctions and, through the Serious Offences Act, proceeds of crime can be tracked and forfeited to the State. In addition, the laws recognise use of intermediaries in corruption. Corruption occurs even when a party did not directly benefit from the act or participate in the act. Also significant is the fact that corruption in both private and public sector is explicitly covered. However, gross limitations exist in the legal framework, which need to be addressed to make the system more effective and efficient. Such limitations include narrow definitions;

¹⁰³ *Jonathan Nathaniel Moyo v (1) Sergeant Chacha; (2) The Zimbabwe Anti-Corruption Commission; (3) The Commissioner General Of Police, Zimbabwe Republic Police (4) The Prosecutor-General* Constitutional Court of Zimbabwe Harare, June 14 & September 20, 2017, <<http://news.pindula.co.zw/2017/09/20/jonathan-moyos-full-constitutional-court-judgement/#.WcysKLIjHcs>> accessed 17 November 2017.

limited scope of application of the laws; constricted list of activities that are regarded as corrupt and weak whistle-blower protection.

It is therefore recommended that the legislation and related framework on combatting corruption should be reviewed in the following manner. First, since corruption in Zimbabwe is principally a collective problem rather than an individual's problem, there is a need to adopt an approach that addresses all facets of corruption. For a start, the law should mandate both private and public organisations to have anti-corruption measures as a way of dealing with corruption collectively. Legislation should also direct the principal to put in place adequate measures and procedures designed to prevent persons associated with the principal from being corrupt. The UK Bribery Act may provide insight as to how this may be done.

Additionally, the definition of a public officer needs to be widened to cover the Head of State and foreign public officers. Currently the laws create the impression that the Head of State is above the law. Any serious effort to combat corruption should include liability on everyone who commits corrupt activities including the Head of State and foreign public officers. The list of corrupt activities should also be widened to include other activities such as influence peddling and illicit enrichment. These activities are internationally recognised and Zimbabwe has ratified some of the instruments that include them. Another way of strengthening the existing laws is to put in place legislative and related measure that provide for asset and income declarations of all public officials before taking office and an audit after leaving office.

Furthermore, there should be a comprehensive legislation that provides for the protection of whistle-blowers. These persons are instrumental in detecting corrupt activities and in some cases assist in securing convictions as State witnesses. Lastly the Anti – Corruption Commission should be strengthened by endowing it with arresting powers and special prosecutorial authority to enable it to fulfil its mandate independently and effectively, without being reliant on the benevolence of other government departments.