

THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

Foreign Aid and Corruption in Zambia

Thesis submitted in partial fulfilment of the requirements for the award of the LLM
degree



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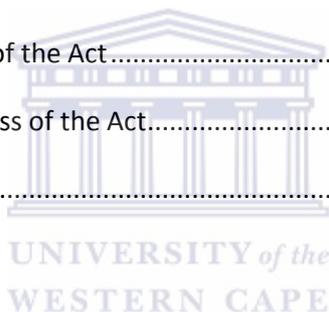
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KEY WORDS

Accountability

Anti-Corruption

Asset Recovery

Corruption

Criminalisation

Embezzlement

Foreign Aid

Transparency



DECLARATION

I, **Tangu Banda**, hereby declare that '**Foreign Aid and Corruption in Zambia**' is my own work, that it has not been submitted for any degree or examination in any other university or institution and that all the sources used, referred to or quoted have been duly recognised.

Student : Tangu Banda

Signature : _____

Date : _____



Supervisor : Prof Raymond A Koen

Signature : _____

Date : _____

DEDICATION

To my mother and sisters for their unconditional love and support and my daughter, for the time spent apart.



ACKNOWLEDGEMENTS

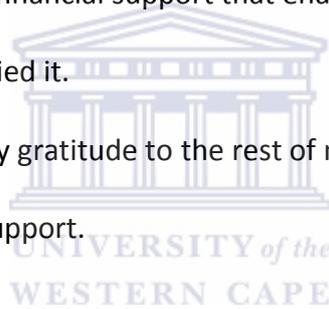
I express my gratitude to Almighty God for granting me the wisdom and tenacity to see this research to its completion.

I am grateful to my supervisor, Professor RA Koen, for his support and dedicated guidance in the writing of this paper. His meticulousness and useful comments have taught me invaluable researching and writing skills.

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Last but not the least, I extend my gratitude to the rest of my family and friends for their patience, emotional and moral support.



ABBREVIATIONS AND ACRONYMS

ACC	Anti-Corruption Commission
AU	African Union
CIDA	Canadian International Development Agency
CPI	Corruption Perceptions Index
CSO	Civil Society Organisation
DFID	UK Department for International Development
DPP	Director of Public Prosecutions
EU	European Union
FCPA	Foreign Corrupt Practices Act
GCB	Global Corruption Barometer
GDP	Gross Domestic Product
GDI	Gross Domestic Investment
MoH	Ministry of Health
MSL	Medical Stores Limited
IMF	International Monetary Fund
OECD	Organisation for Economic Co-operation and Development
OIG	Office of the Inspector General
PEPs	Politically Exposed Persons
SADC	Southern African Development Community
TFC	Task Force on Corruption
TI	Transparency International
UNCAC	United Nations Convention against Corruption
ZMK	Zambian Kwacha

ZNAN

Zambia National AIDS Network



CHAPTER ONE

Concepts and Definitions

1.1 Introduction

Zambia is a landlocked country in Southern Africa that has been fortunate enough not to have experienced civil conflict due to relatively peaceful transitions of government, from a three-decade autocratic one-party state to a democratic multi-party state.¹ At the time of Zambia's independence from Great Britain in 1964, it was classified as a middle income country, which made it the second wealthiest country in sub-Saharan Africa.² However, the status of being a middle income country did not last long and, like most countries in sub-Saharan Africa, Zambia slipped into poverty and underdevelopment.³ This state of affairs has led to it becoming one of the major recipients of foreign aid.⁴

Zambia has embarked on an economic diversification programme and has now attained the status of lower a middle income economy.⁵ Despite this turnabout, the economy still relies extensively on the mining industry and windfall gains from the copper mines,⁶ and Zambia remains one of the countries in sub-Saharan Africa that is heavily dependent on aid⁷ while having to cope with a serious problem of corruption.⁸

1 Rakner (2012) 1.

2 Werlin (2005) 518.

3 Rakner (2012) 3.

4 Beuran, Raballand & Revilla (2011) 5.

5 World Bank (2014).

6 African Development Bank Group (2014).

7 Carlsson *et al* (2000) 6.

8 Chêne (2014) 1.

The effectiveness of foreign aid in Zambia has been discussed by many scholars, either as an independent study⁹ or in relation to aid effectiveness in Africa,¹⁰ but linking the effectiveness of foreign aid in Zambia with problem of corruption has not been explored fully.

This paper seeks to examine the relationship between foreign aid and corruption in Zambia. Drawing from the analysis of the two, it then explores whether the existing legal instruments are adequate and effective to combat corruption in the aid context.

1.2 Structure of the Paper

This paper is divided into four chapters. This Chapter constitutes the introduction, discusses the concepts of foreign aid and corruption and proposes definitions of both terms. It further provides an overview of these concepts in relation to Zambia and briefly discusses the anti-corruption legal framework.

Chapter Two reviews the literature on the nexus between foreign aid and corruption. It focuses on the relationship between the two in Zambia. The debate on aid effectiveness is discussed also.

Chapter Three discusses the current anti-corruption legal instruments in Zambia and analyses their effectiveness and inadequacies in tackling the problem of grand corruption in foreign aid. Regional and international instruments to which Zambia is a State Party will be discussed here also.

9 See generally Beuran, Raballand & Revilla (2011) and Situmbeko & Zulu (2004).

10 Werlin (2005).

Chapter Four will provide concluding observations and recommendations drawn from the research.

1.3 Foreign Aid: Meaning and Scope

The concept of foreign aid is not a novel one. In the 1940s, the Marshall Plan aimed to revive Europe in the aftermath of World War II (WWII) and prevent the growth of communist influence through the provision of foreign aid.¹¹ The number of countries in need of aid dramatically increased with decolonisation and the needs of these underdeveloped countries differed significantly from those of post-WWII Europe.¹² The shift from colonialism to independence resulted in changes in the ideas of development for underdeveloped countries. This, in turn, led to a change in the quantity of foreign aid that is provided, the providers of aid, the recipients, the modalities, as well as the purposes to which aid is put.¹³

Thus, from the 1950s, foreign aid and development ideas focused on improving investment capabilities and gross domestic product (GDP) *per capita* by building up the national savings rates of the underdeveloped countries.¹⁴ In the 1980s, the focus shifted to alleviating the heavy debt burden incurred through loans by underdeveloped countries.¹⁵ Contemporary foreign aid, since the 1990s, focuses on structural adjustment and poverty alleviation.¹⁶

Foreign aid has been described as the voluntary international transfer of financial resources, goods or services from governmental, non-governmental, multinational and non-profit

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- 11 Hjertholm & White (2000) 81.
 - 12 Bean (2010) 787-788.
 - 13 UNDP (2010) 147.
 - 14 Thorbecke (2004) 22.
 - 15 Moyo (2009) 19.
 - 16 Thorbecke (2004) 19-45.

organisations for the benefit of a recipient country or its population.¹⁷ There are three primary types of aid, namely, humanitarian aid, charitable aid and development aid.¹⁸ Whereas the past six decades have seen more than \$2.5 trillion expended on all forms of aid,¹⁹ the focus of this research is on development aid.

The largest amount of foreign aid is development aid, made directly to receiving governments through government to government transfers (bilateral aid) or through transfers from multinational organisations to governments (multilateral aid). Development aid involves the transfer of financial resources in the form of concessional grants and loans and is administered in the form of official development assistance (ODA). More than \$106 billion in net ODA was disbursed in 2005²⁰ and by 2013 this figure had increased to \$134 billion.²¹ ODA contributes heavily to net capital inflows for most countries in sub-Saharan Africa, making it the largest single source of capital inflow.²² Consequently, for purposes of this research the term “foreign aid” refers only to ODA.

1.4 Zambia and Foreign Aid

Zambia has been receiving foreign aid since attaining independence in the mid-1960s.²³ Aid was provided initially in the form of technical support for government-sponsored projects.²⁴ However, the Zambian economy experienced a poor performance when the global economic depression of the 1970s caused the price of copper, which was Zambia’s main

17 Andvig *et al* (2000) 10.

18 Moyo (2009) 7.

19 Bean (2010) 782.

20 OECD (2006).

21 OECD (2014).

22 Sundberg & Gelb (2006).

23 Beuran, Raballand & Revilla (2011) 5.

24 Beuran, Raballand & Revilla (2011) 5.

economic pipeline, to decline.²⁵ The falling price of copper contributed to a trade deficit, rendering Zambia unable to meet its balance of payments obligations and causing it to amass huge debts.²⁶ This bad debt record made it impossible for the country to borrow externally and the government turned to foreign aid in order to revive the economy.²⁷ Zambia borrowed heavily from the World Bank to sustain the copper mines, and improve the agriculture, education, infrastructure and health sectors.²⁸ Its ineligibility to borrow at concessionary rates meant the loans from the World Bank were priced at commercial rates, which were very steep.²⁹

Another consequence of the decline in the price of copper and debt servicing was the considerable shortages of foreign exchange earnings.³⁰ Foreign aid provided Zambia with inflows of foreign exchange which enabled it to raise the capital investment needed to maintain the copper industry.³¹ Thus, the reasons for providing aid to Zambia shifted from assisting government projects to sustaining the economy.

Foreign aid has evolved “from a small trickle to become a virtual flood”.³² In 1992, 67% of export earnings and 77% of total public expenditure came from ODA.³³ Foreign aid financed almost 80% of all of Zambia's capital expenditure.³⁴ ODA *per capita* continued to trend upwards through the 1990s, reaching a high of more than \$220 in 1995, which was almost

25 Saasa (2002) 66.
26 Devarajan, Dollar & Holmgren (2001) 540.
27 Rakner (2012) 3.
28 Devarajan, Dollar & Holmgren (2001) 540.
29 Biz/ed (2001).
30 Biz/ed (2001).
31 Biz/ed (2001).
32 Carlsson *et al* (2000) vi.
33 Devarajan, Dollar & Holmgren (2001) 540.
34 Biz/ed (2001).

seven times the sub-Saharan average.³⁵ ODA *per capita* levelled off from the mid-1990s to the mid-2000s due to reduced aid inflows, but it spiked again in 2006 to approximately \$121 following an increase in aid disbursements.³⁶ Zambia currently receives foreign aid bilaterally from various donors, including Canada, Denmark, Finland, Japan, China, the Netherlands, Norway, Sweden, the UK and the USA, and multilaterally from the World Bank and the International Monetary Fund (IMF).

ODA is susceptible to manipulation through the principle of conditionality which holds that certain policy conditions expressing donor ideologies must be met first. The loans obtained from the IMF and the World Bank in the 1970s and 1980s to support Zambia's balance of payments difficulties were subject to strict conditions of macroeconomic stabilisation and structural adjustment.³⁷ The government of the time boycotted the conditions which required it to privatise the economy, stop subsidies and restructure the social sector.³⁸ Some bilateral donors questioned the stringency of the conditions and increased their assistance when the IMF and World Bank imposed conditionality.³⁹

Recurring balance of payments difficulties in the 1990s shifted the focus to supporting balance of payments deficits.⁴⁰ The aid was used to counter the balance of trade deficit and to repay Zambia's external debt that had grown considerably since the 1970s. Servicing Zambia's debt accounted for 80% of the balance of payments support that it received from its donors in the mid-1990s, despite considerable debt cancellation and rescheduling from

35 Beuran, Raballand & Revilla (2011) 6.
36 Beuran, Raballand & Revilla (2011) 6.
37 Rakner (2012) 3.
38 Saasa (2002) 66.
39 Biz/ed (2001).
40 Saasa (2002) 69.

donors such as the grouping known as the Paris Club.⁴¹ The Paris Club agreed to write off 67% of the debt and reschedule the remaining 33% on more concessional terms at the end of the 1990s.⁴²

Foreign aid over the last two decades has been tied to the implementation of economic policy reform.⁴³ Bilateral donors stipulated liberalisation of external trade and payment systems, good governance, democratic government and human rights as conditions for granting foreign aid. Aid that was aimed at supporting the balance of payment deficits was being used as a tool to bring about political and economic change to such an extent that concerns about abuses of democracy led donors to withhold aid between 1996 and 1998.⁴⁴

These policies, however, have done nothing to improve the economic situation in Zambia.

An example is the disastrous effect of trade liberalisation on Zambia's manufacturing industry. The textile industry is nearly non-existent since it was unable to compete with imports of cheap second-hand clothes from industrialised countries that hit the market after the removal of tariffs on used clothes.⁴⁵ Privatisation of state-owned entities led to plundering of resources, job losses due to retrenchment, and poverty.⁴⁶

Besides entrenching poverty, another major problem caused by foreign aid is the culture of aid dependency that it has caused to take root in Zambia.⁴⁷ Aid, as a percentage of the Gross Domestic Product (GDP), has been exceptionally high and the ratio of Zambia's Gross

41 Biz/ed (2001).

42 Biz/ed (2001).

43 Biz/ed (2001).

44 Biz/ed (2001).

45 Ndulo & Mudenda (2010) 293.

46 Situmbeko & Zulu (2004) 7.

47 Carlsson *et al* (2000) 6.

Domestic Investment (GDI) to aid is four times the average for sub-Saharan Africa.⁴⁸ Foreign aid in relation to GDP has reduced markedly in recent times;⁴⁹ however, there has been no increase in productivity in Zambia despite a drop in aid as a percentage of GDP.⁵⁰ Callaghy writes that foreign aid dependency is simply a continuation of Africa's economic marginalisation and dependence on the Western-dominated world economy.⁵¹ Also, foreign aid dependency has been identified as an impediment to economic and political growth because:

The current aid system wastes much national energy and political capital in interacting with donor agencies, and distracts ... governments from domestic debate and consensus building.⁵²

Foreign aid dependency has been perpetuated by attached conditions which undermine Zambia's democracy and prevent the government from introducing development policies that are appropriate to the national situation.⁵³

Even though recent years have seen a decline in foreign aid to less than 5% of the national budget,⁵⁴ Zambia still is dependent on aid in social sectors such as health and education. However, one can ask whether foreign aid really has been effective, considering the fact that 65% of the population continues to live below the poverty line.⁵⁵

48 Carlsson *et al* (2000) 7.

49 Rakner (2012) 2.

50 Carlsson *et al* (2000) 7.

51 Callaghy (1991) 44.

52 Kunbar (2000) 419.

53 SAPRIN (2004).

54 Lusaka Times (2013).

55 Carlsson *et al* (2000) 9.

1.5 Foreign Aid: Donor Intentions

The question today is why aid is being given still, despite its apparent ineffectiveness. In fact, there have been calls for more aid to be given to Africa.⁵⁶ One argument is that donors feel morally obligated to help the less fortunate.⁵⁷ Another is the idea of neo-colonialism: powerful countries use aid as a route to controlling Africa and its natural resources.⁵⁸

It would be naïve to believe that foreign aid is given for purely developmental reasons.

According to Hjertholm & White:

Developmental objectives of foreign aid have been distorted by the use of aid for donor commercial and political advantage.⁵⁹

That aid is used as a weapon by donor countries for their own interests is no secret, as can be seen in former US President Nixon's pronouncement in 1968 that:

The main purpose of aid is not to help other nations but to help ourselves.⁶⁰

Most aid has been tied to the condition of importing goods from the donor country or implementing policies that favour citizens of donor countries conducting business in the recipient country.

1.6 Corruption: Meaning and Scope

Corruption is a deep-rooted global phenomenon but defining it is not an easy task, given the complex and multi-faceted ways in which it manifests itself. Rose-Ackerman notes that

56 See generally Sachs (2005).

57 Anslow (2012).

58 Hayter (1971) 7.

59 Hjertholm & White (2000) 25.

60 Cited in Kapoor (2008) 85.

“corruption is a term whose meaning shifts with the speaker”.⁶¹ In terms of Zambian

legislation:

Corruption means the soliciting, accepting, obtaining, giving, promising or offering of a gratification by way of a bribe or other personal temptation or inducement, or the misuse or abuse of a public office for advantage or benefit for oneself or another person.⁶²

This definition seems to be in line with the World Bank’s approach, which defines corruption as “the abuse of public office for private gain”.⁶³

Corruption takes many forms, including bureaucratic and grand corruption. This paper focuses on corruption in the foreign aid context. Thus, the focus here is on grand corruption, that is, the embezzlement, theft and diversion of substantial funds by government officials responsible for administering aid.⁶⁴

Like cancer, corruption spreads and stifles economic growth, and commonly is associated with poverty, inequality and social instability. In the 1990s, corruption was estimated to cost

African economies a sum total of \$148 billion.⁶⁵ An international convention states that

corruption:

Represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the proper and fair functioning of market economies.⁶⁶

61 Rose-Ackerman (2004) 1.

62 Section 3 of the Anti-Corruption Act 3 of 2012.

63 Tanzi (1998) 8.

64 Mugarura (2012) 126-127.

65 Kimenyi & Mbaku (2011) 31.

66 Preamble to the Council of Europe Civil Law Convention on Corruption, 1999.

1.7 Corruption in Zambia

Sub-Saharan Africa has been named as one of the most corrupt regions in the world, despite having ample legal instruments to fight corruption.⁶⁷ Like most of the countries in the region, corruption remains one of Zambia's biggest challenges, after the cost of living and inflation.⁶⁸ It is a problem with which Zambia has grappled since independence, but the prevalence of corruption was exceptionally high during the period 1991 to 2001.⁶⁹

1.7.1 Causes of Corruption

According to Mbao, the present day frenzied looting of national wealth literally was unheard of in the early days of post-colonial Zambia.⁷⁰ However, no empirical evidence exists on the causes and drivers of corruption in Zambia.⁷¹ Privatisation of state owned companies has been cited as a source of the high-level corruption cases that are prevalent today.⁷² It is agreed that liberalisation in the 1990s introduced a new culture of corruption into Zambia.⁷³ In the 2013 worldwide Corruption Perceptions Index (CPI), Zambia ranked 83 out of the 177 countries polled, with an index of 38 points out of 100.⁷⁴ This shows that Zambia is not the most corrupt nation in the world, but corruption in the country is believed still to be widespread.⁷⁵ Nearly half of the households surveyed in the Global Corruption Barometer (GCB) of 2013 perceived the levels of corruption in Zambia to have increased over the last

67 TI CPI (2013).

68 NORAD Report (2011) xv.

69 Mbao (2011) 261.

70 Mbao (2011) 268.

71 NORAD Report (2011) xv.

72 NORAD Report (2011) 14.

73 NORAD Report (2011) 14.

74 TI CPI (2013).

75 Chêne (2014) 4.

three years.⁷⁶ Zambia saw an increase in reports of corruption from 1571 to 2075 between the years 2005 and 2009.⁷⁷

The causes of these high levels of corruption are many and varied, ranging from low salaries for public officials, through lack of transparency and accountability in political processes and poor governance to cultural factors, lack of an independent and effective media and lack of an independent and effective judiciary.⁷⁸

1.7.2 Forms of Corruption

The types of corruption in Zambia range from petty or administrative cases of bribery to grand or political corruption entailing the plundering of public resources mainly by senior public officials. Favouritism or nepotism is also prevalent in Zambia.

Petty corruption in the form of bribes is widespread and the most obvious form of corruption in Zambia.⁷⁹ Citizens have to pay bribes in order to obtain basic services such as passports or birth certificates from government departments. According to the 2012

Transparency International (TI) Zambia Bribe Payers Index, people in positions of influence or authority do not perceive any inhibition on accepting bribes for doing what they are employed to do. It is a common occurrence to obtain medicines by bribing corrupt officials because diversion of public resources has led to a scarcity of medicines.

Political corruption is also rampant in Zambia.⁸⁰ Increased political competition has given rise to vote-buying during election time. Public resources are abused by the ruling party to

76 Transparency International GCB Report (2013).
77 Anti-Corruption Commission Reports (2005-2009).
78 Mbao (2011) 261.
79 NORAD Report (2011) 12.
80 NORAD Report (2011) 14.

finance campaigns such as purchasing new vehicles and bicycles.⁸¹ Government leaders make donations to schools, community projects, community-based organisations and faith-based groups during election campaigns.⁸² Food and clothing are distributed to potential voters when elections have been called.⁸³ Former President Rupiah Banda distributed food and subsidised fertilizer to the electorate when he was campaigning for the presidency in 2008.⁸⁴

Grand corruption in respect of public resources by public officials and politically connected individuals is endemic in Zambia. The prominent actors and network of plunderers are documented well in the case of *Attorney-General for Zambia v Meer Care and Desai*.⁸⁵ The alleged theft of an estimated \$52 million by former President Chiluba is another example of grand corruption.⁸⁶ His wife, Regina Chiluba, allegedly received gifts to the value of \$352 000.⁸⁷ She was convicted of theft and sentenced to three-and-a-half years' imprisonment for illegally receiving these gifts from her husband while he served as president. The conviction was overturned by the Lusaka High Court and the prosecution declined to appeal the case.⁸⁸

The consequences of corruption in Zambia are plain to see and range from bad roads and dilapidated schools with few qualified teachers and no textbooks, to run-down hospitals which are overflowing with patients but have few qualified doctors and no medicines and equipment.

81 Mbao (2011) 262.

82 Mbao (2011) 262.

83 Simutanyi (2010) 4.

84 Simutanyi (2010) 6.

85 *Attorney-General for Zambia v Meer Care and Desai and Others* HC04CO3129 [2007] EWHC 952.

86 Simser (2010) 323.

87 Mbao (2011) 262.

88 US Department of State Human Rights Report: Zambia (2009).

1.7.3 Corruption Cases

A number of corruption cases involving bribery and kickbacks have been reported and prosecuted. For instance, the Lusaka High Court upheld the judgment of a lower court in the case of the former permanent secretary at the Ministry of Health (MoH), Kashiwa Bulaya. He was charged with abuse of office and theft, convicted in 2007 and sentenced to five years' imprisonment.⁸⁹ Bulaya allegedly had disregarded tender procedures when he granted a tender to a Bulgarian firm called Butico A1 for the supply of a drug at a cost of more than Zambian Kwacha (ZMK) 4 billion. Bulaya was alleged to have received more than ZMK11 million from Butico A1's chief executive officer as an inducement or reward for engaging the company to supply the drug to the MoH, and a sum in excess of ZMK9 million for supplying the drug.⁹⁰

The High Court also reviewed a case in which a former military commander, found guilty on two counts of corruption, was given a two-year suspended sentence on account of ill health and was ordered to repay the state the ZMK111 million (\$30 000) that he received as a kickback from the British company engaged to supply uniforms to the Zambia National Service. The High Court overturned the order and sentenced the accused to nine months' imprisonment with hard labour.⁹¹

89 Lusaka Times (2008).

90 OECD Working Group on Bribery, Phase 3 Report on Bulgaria (2011).

91 Lusaka Times (2008).

Bribery has been reported also in multilateral aid projects. The World Bank debarred two subsidiaries of Alstom, a power and transport systems firm, for bribing a Zambian public official concerning operations in Zambia for a project financed by the World Bank.⁹²

1.8 Combating Corruption

The complex nature of corruption has not made the identification and implementation of effective anti-corruption strategies easy. This multifaceted character of corruption dictates that the efforts employed to fight it be multifaceted also. Legal and non-legal methods need to be used to deter the commission of corruption and to prevent offenders from enjoying their criminal proceeds where the offence is committed.

The international donor community, including the World Bank, the International Monetary Fund (IMF), as well as intergovernmental institutions such as the United Nations (UN), the African Union (AU), and the Organisation for Economic Co-operation and Development (OECD), recognised that any aid programme that does not make anti-corruption efforts a priority is doomed to fail, and thus introduced numerous measures to combat and prevent corruption. These included tying aid to conditions that require the recipient country to pass domestic anti-corruption laws and encouraging recipient countries to ratify international treaties such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UN Convention against Corruption (UNCAC).

Zambia has a range of laws and designated institutions for enforcing anti-corruption measures. A Corrupt Practices Act has existed in Zambia since 1980.⁹³ The Act established the Anti-Corruption Commission (ACC) which is charged with the prevention, investigation

92 All Africa (2012).

93 Corrupt Practices Act 14 of 1980.

and prosecution of corruption. The government has made some attempt to strengthen the anti-corruption legal framework, including revising the procurement laws to increase transparency, and there is some good practice regarding the criminalisation of bribery and money laundering, protection of whistleblowers, and mutual legal assistance. For example, the Anti-Corruption Act 3 of 2012 was enacted to repeal the main anti-corruption law, the Anti-Corruption Act 38 of 2010, in order to comply with UNCAC. Another law enacted to reflect compliance with UNCAC is the Forfeiture of Proceeds of Crime Act 19 of 2010, which creates mechanisms for complying with Chapter V of UNCAC on asset recovery. The Public Finance Act 15 of 2004 designates all forms of aid as public funds to be paid into the Treasury Account for the credit of the Consolidated Fund.⁹⁴ Zambia is also a state party to the African Union Convention on Preventing and Combating Corruption (AU Convention) and the Southern African Development Community Protocol against Corruption (SADC Protocol).



Zambia is said to have made progress in the fight against corruption under the leadership of the late President Mwanawasa, whose measures included the formation of the Task Force on Corruption (TFC) in 2002. The TFC investigated abuse of authority, mismanagement of public funds, theft of government resources, money laundering and corruption between 1991 and 2001 and it also investigated the ruling government officials.⁹⁵ President Mwanawasa's successor, Rupiah Banda, ordered all ministries and public agencies to be audited and launched the National Anti-Corruption Policy.

94 Section 28(1) of the Public Finance Act 15 of 2004.

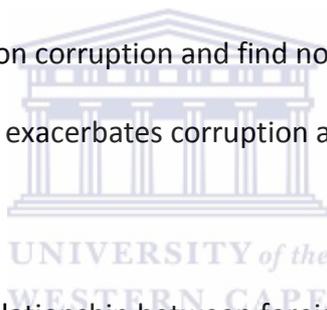
95 NORAD (2011) 15.

Most of these efforts, however, have fallen prey to the overwhelming power of the executive branch. The TFC was disbanded after Mwanawasa's death by the new President. The Zambian President, by law, has the power singlehandedly to appoint the Commissioners of the ACC, its Director General and the Deputy. Cases that do manage to reach the courts are not dealt with adequately. Whether these laws can be said to be sufficient to tackle the problem of grand corruption in foreign aid is what this study seeks to investigate.

1.9 Foreign Aid and Corruption

Corruption in recipient countries is used often as a reason to cut aid flows, but the debate on foreign aid and corruption is a controversial one. Those advocating for aid argue that it does not have a negative impact on corruption and find no relationship between the two. Opponents are of the view that it exacerbates corruption and the very problems it is intended to solve.

The next chapter considers the relationship between foreign aid and corruption and the debate on aid effectiveness.



CHAPTER TWO

The Nexus between Foreign Aid and Corruption

2.1 Introduction

Individually, foreign aid and corruption, as subjects, have garnered lots of interest among academics, resulting in a wealth of literature. Recent times have seen renewed interest in corruption, which has led donor countries to pay more attention to cases in which aid funds have been diverted from their intended purposes.¹ Hence, it is surprising that relatively few works have investigated the nexus between them. On the one hand, academic papers that address the general causes of corruption tend to focus on standard economic, political and social factors,² with foreign aid receiving little attention. On the other hand, studies on the effectiveness of foreign aid have failed to explore fully the impact of corruption on aid effectiveness.

This chapter analyses the theories on foreign aid and corruption, using Zambia as a case study. The debate on aid effectiveness will be discussed in the course of the analysis.

2.2 Impact of Foreign Aid on Corruption

According to Ampratwum, policies are confounded by measures that should be undertaken to prevent corruption from distorting government expenditure.³ This issue now forms the

1 Ampratwum (2008) 81.

2 See generally Treisman (2000) and Serra (2004).

3 Ampratwum (2008) 83.

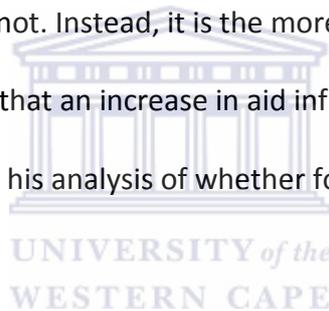
main concern of donors about the possible misuse of aid funds.⁴ Ampratwum argues that foreign aid facilitates corruption because it is fungible.⁵ Foreign aid funds are easily stolen, redirected or extracted because:

The marginal increase in public expenditure in response to aid inflows is not the expenditure towards which the aid was targeted.⁶

Foreign aid has been cited as a facilitator of corruption because:

“Foreign aid increases the size of resources fought over by interest groups [and] delays the adoption of policy reforms”.⁷

Alesina & Weder examine whether the less corrupt governments receive an increase in foreign aid and find that they do not. Instead, it is the more corrupt governments that receive more aid.⁸ They also find that an increase in aid inflow tends to increase corruption and not assist in its reduction.⁹ In his analysis of whether foreign aid corrupts, Tavares points out the following:



Foreign aid provides a ripe territory for corruption [since] aid disbursements are typically handed free to local authorities that then distribute them, with considerable discretion, among their fellow citizens.¹⁰

In contrast to Alesina & Weder, Tavares uses conditionality effect and liquidity effect to conclude that aid decreases corruption.¹¹

4 Ampratwum (2008) 83.
5 Ampratwum (2008) 83.
6 Ampratwum (2008) 83.
7 Alesina & Weder (2002) 3.
8 Alesina & Weder (2002) 3.
9 Alesina & Weder (2002) 1128.
10 Tavares (2003) 101.
11 Tavares (2003) 104.

Donors allege that democratisation is a channel for addressing corruption and insist on it as a condition for granting aid.¹² The argument is that democratisation facilitates greater transparency and accountability in government proceedings which can be used to tackle and contain corruption.¹³ However, the study by Alesina & Weder illustrates that donors do not pay attention to institutional quality or corruption considerations in their aid allocation decisions. This is corroborated by Alesina & Dollar who provide evidence that aid inflows by bilateral donors do not follow concerns over good governance in the recipient country but rather are dictated by the cultural and historical ties between donor country and recipient country.¹⁴ In other words, colonial history, as opposed to political institutions or economic policies of the recipient governments, is the determinant of more aid allocation.¹⁵ Alesina & Dollar also find that some bilateral donors, who are free from specific political pressure because they do not have colonial ties, do show a tendency to discriminate in favour of less corrupt governments, but they remain the exception rather than the rule,¹⁶ and international organisations such as the IMF and the World Bank that dispense multilateral aid do not show any discriminatory tendencies regarding corruption in the recipient country.¹⁷

Thus, the indiscriminating nature of aid allocation has a direct impact on governance through its tendency to perpetuate existing corruption in recipient countries. Foreign aid appears to increase the size of funds at the disposal of corrupt government officials and kleptocratic elites, considering the fact that the largest recipients of ODA in sub-Saharan

12 Ampratwum (2008) 82.

13 Williams & Beare (2000) 123.

14 Alesina & Dollar (2002) 36.

15 Alesina & Dollar (2002) 45-46.

16 Alesina & Dollar (2002) 50.

17 Alesina & Dollar (2002) 56.

Africa rank very low globally in areas of governance and, particularly, corruption. This effect is corroborated by Knack who examines the relationship between foreign aid and good governance and finds that higher aid levels cause recipient countries to have low accountability, more rent-seeking opportunities and corruption as authorities fight over control of aid funds.¹⁸

Ali & Isse find that foreign aid is correlated positively with corruption to a significant extent. They argue that ODA “strengthens the predatory power of the government and thus undermines the emergence of the private sector”.¹⁹ Foreign aid usually translates into greater government consumption due to its fungibility. Foreign aid “creates opportunities for the government to proliferate, which in turn increases corruption”.²⁰ In the same vein, Lane & Tornell, in their study on foreign aid and corruption, argue that corruption in governments is encouraged by foreign aid.²¹ Okada & Samreth, however, hold the view that ODA reduces corruption. By using quantile regressions, they find that the reduction in corruption is “larger in countries with low levels of corruption”.²²

According to Moyo, Africa flounders in a never-ending cycle of corruption because of aid.²³ She writes that “foreign aid props up corrupt governments, providing them with usable cash”.²⁴ The problem with such corrupt governments is that:

They interfere with rule of law, the establishment of transparent civil institutions and the protection of civil liberties making foreign and domestic investment unattractive ... which continues the downward spiral of poverty.²⁵

18 Knack (2001) 313.

19 Ali & Isse (2003) 460.

20 Ali & Isse (2003) 460.

21 Lane & Tornell (1996).

22 Okada & Samreth (2011) 4.

23 Moyo (2009) 7.

24 Moyo (2009) 49.

In her opinion, Africa should be weaned off foreign aid and international markets should be opened up. Supporting her proposition is Kenyan economist Shikwati, who argues that foreign aid finances bureaucracies and promotes corruption and complacency.²⁶ According to him, development aid is one of the reasons for Africa's problems and therefore should be eradicated out entirely.²⁷ Former Ghanaian President Kufuor strongly disagrees with this contention. He argues that aid is necessary and it works.²⁸ He opines that donors rather should monitor aid spending on a case-by-case basis.²⁹

Foreign aid can give rise to corruption if funds are not handled properly. Despite foreign aid being given for good intentions, no dramatic improvements have been made in reducing corruption. It is not a coincidence that recipient countries remain the poorest and the most corrupt despite billions in development aid having been spent on them. This is because foreign aid provides funds that are readily available and easily accessible for embezzlement by corrupt public officials. Most of the funds will not be accounted for and, in instances where they are, the responsible officials will go to great lengths to make an effort to falsify the records in order to create the impression that the funds are being used for their intended purposes corruption in foreign aid is exacerbated. Thus, the funds are stolen in a systematic manner for personal gain. Admittedly, not all aid fosters corruption but it is true that the bulk of aid has provided plunder opportunities for the elite to enrich themselves at the expense of the ordinary citizen.

25 Moyo (2009) 49.

26 Cited in Spiegel (2005).

27 Cited in Spiegel (2005).

28 Cited in Schenkel (2009).

29 Cited in Schenkel (2009).

2.3 Impact of Corruption on Foreign Aid

Corruption can have a significant impact on foreign aid. It is agreed generally that development aid is diverted from its intended purposes, with an estimated \$130 billion lent to developing countries by the World Bank being used for corrupt purposes.³⁰ Incentive misalignments mean that aid money does not reach its desired destination always; corrupt government officials line their pockets with money intended for development projects. This diversion of aid away from its intended purposes and beneficiaries directly weakens the realisation of its rationale.

Corruption can have an indirect impact also on aid effectiveness by promoting inappropriate uses of aid. It erodes the effectiveness of foreign aid by impeding its proper allocation.³¹ The reduction of poverty, which is the aim of foreign aid, is undermined by the active corruption of public officials entrusted with development resources.

Development aid allocated for education and skills enhancement, the building of regulatory and self-sustaining institutions, and improving the livelihoods of the poor is compromised in environments where corruption is pervasive and economic survival and opportunities are dependent on a system of bribe giving and taking. Corruption has been identified as a challenge in aid-funded development programmes. Studies have shown that there is a nexus between the quality of governance in recipient countries and the effectiveness of foreign aid.³²

Bean, however, points out that:

30 Moyo (2009) 52.

31 Schudel (2008) 510.

32 See Knack (2000).

Empirical research has not found that corruption is a major impediment to the effectiveness of economic development aid.³³

He concludes that:

There is no persuasive evidence that corruption in the form of diversion or embezzlement accounts for the failure of aid.³⁴

The debates on the effectiveness of foreign aid, governance and corruption have been informed by the considerable aid funds that have reached beneficiaries free of corruption, as well as by the experience with corruption.³⁵

2.4 Foreign Aid and Corruption in Zambia

Calculations based on the World Bank's theoretical models show that if predictions had been correct, foreign aid transfers, which began in the 1960s, should have pushed Zambia's *per capita* annual income to more than \$20 000 today.³⁶ In practice, however, Zambian income *per capita* has stagnated at around \$600 for years. There is no evidence of a positive relationship between aid and economic development, despite structural adjustment programmes and policy reforms being undertaken. Instead, Zambia has grown an insurmountable debt that it has been struggling to repay, and aid inflows continued even though the government failed to meet the conditions set out for granting the aid. Saasa & Carlsson have pointed out that:

33 Bean (2010) 790.

34 Bean (2010) 800.

35 Transparency International Policy Paper (2007).

36 Abuzeid (2009) 17.

Aid was primarily being used to repay money owed to largely the same countries and institutions that [were] providing the aid.³⁷

Thus, about 65% of the Zambian population has lived and continues to live below the poverty line, unable to cope with the constraints brought about by the trade liberalisation, investment deregulation, privatisation and abolition of subsidies demanded by donors.

Zambia provides a stark example of the failure of foreign aid in sub-Saharan Africa, in spite of arguments that aid to Africa has been successful because it encourages investment.³⁸

Moyo refers to Africa's "insidious aid culture" as an "unmitigated political, economic and humanitarian disaster"³⁹ and Bean illustrates that aid has failed to produce sustainable economic growth.⁴⁰ Has the rampant corruption in Zambia been the cause of this failure?

The recent corruption scandals that have dominated news headlines in Zambia are not a new phenomenon. Corruption scandals have rocked Zambia since independence.⁴¹ Most of these corruption cases have involved the grand theft of foreign aid meant for developing Zambia and improving the livelihoods of the people. One example is the Kanyama Flood Disaster Fund scandal. In 1978, President Kaunda set up the Disaster Relief Fund in response to floods caused by unusually high rainfall countrywide. The Fund received more than \$750 000 in supplementary funds from the US government, other donor governments, private individuals and local organisations.⁴² An increase in the floods in 1979 that caused immense damage to homes and property in Kanyama Township prompted the President to establish the Kanyama Flood Disaster Fund (KFDF) to assist the Kanyama flood victims. The

37 Saasa & Carlsson (1996) 160.

38 Loxley & Sackey (2008) 190.

39 Moyo (2009) xix.

40 Bean (2010) 801.

41 See Chapter One where general corruption scandals have been discussed.

42 USAID Report (1979) 2.

KFDF was financed by funds from the Disaster Relief Fund. Scandal rocked the KFDF in 1980 when it was discovered that senior government officials had misappropriated money from the fund and materials donated to the victims.⁴³ Other reported incidents of corruption in the Foreign Service involved diplomats demanding kickbacks from aid that was earmarked for Zambia.⁴⁴ Former Finance Minister, the late Ronald Penza, once refused to release constitutional development funds amidst concerns that the funds were being pocketed by Members of Parliament and not reaching the intended beneficiaries.⁴⁵ The government showed its intolerance of corruption by dismissing senior government officials and civil servants charged with corruption.⁴⁶

In 1998, Medical Stores Limited (MSL), the government agency tasked with storage and distribution of drugs and medical equipment, including those funded by donors, was commercialised via tender. Donors raised concerns about the tendering process, regarding it as irregular due to lack of transparency in the awarding of the tender and the high fee involved. Consequently, Sweden withdrew its support for the supply of health centre drug kits and the UK Department for International Development (DFID) funded an alternative storage and distribution system.⁴⁷

As noted above, Zambia has a history of corruption involving the embezzlement of donor-given financial aid. More recently, in 2010, the widespread allegations of grand theft in the Ministry of Health (MoH) sparked an international outcry against the high corruption levels in public office in Zambia. An inquiry by the Auditor General led to the discovery of

43 Chikulo (2000) 163.
44 Chikulo (2000) 163.
45 Chikulo (2000) 170.
46 Chikulo (2000) 175.
47 Vibe *et al* (2013) 64.

misappropriation of funds in excess of \$7 million.⁴⁸ More than \$3 million of the misappropriated funds were given to Zambia in grants by the Global Fund organisation to fight HIV/AIDS, malaria and tuberculosis.⁴⁹ The grant aims to strengthen Zambia's health system, pay for diagnostics and for the purchase of mosquito nets, HIV/AIDS anti-retroviral drugs and treatment of tuberculosis. A separate investigation by Global Fund discovered that there were certain irregularities and poor financial management not only in the ministry but also in three other organisations that received grants from the Fund. It was ascertained that the missing funds in the ministry amounted to more than \$10 million.⁵⁰ The Global Fund investigation revealed that the financial mismanagement included the purchase of vehicles for personal use, salaries that were above market value and disbursements to sub-recipients who failed to provide auditors with financial records.⁵¹ This prompted Global Fund to suspend more than \$300 million in grants.⁵²

The ACC announced that it was investigating these allegations of embezzlement involving 32 ministry officials.⁵³ In 2010, the government reportedly arrested seven MoH officials in connection with the alleged embezzlement, including the former Human Resource Manager, Henry Kapoko.⁵⁴ Kapoko and eight other employees from the MoH subsequently were charged with the crimes of theft by public servant, theft and money laundering. They were alleged to have intended to defraud the MoH of ZMK1.9 billion by falsely pretending to have ordered and shipped 50 000 mother-baby kits, when in fact they had not.⁵⁵ Most of

48 Irin News (2011).

49 Irin News (2011).

50 Irin News (2011).

51 Irin News (2011).

52 BBC News Africa (2010)

53 Lusaka Times (2010).

54 US Department of State Human Rights Report: Zambia (2009)

55 Post Newspaper (2012).

the prosecutions have led to acquittals, while other officials, including senior management, were suspended or dismissed.⁵⁶

Another prominent embezzlement case that forced several donor countries to suspend aid in the same period was the grand theft of funds from the Canadian International Development Agency (CIDA) that occurred also within the MoH. In November 2010, it was reported that CIDA had lost \$880 000 as a result of corruption.⁵⁷ The embezzled funds were meant to develop and improve the capacities and livelihoods of the people in rural and remote areas who did not have easy access to proper health care services. The corruption scandals in the MoH caused several donors to suspend aid commitments in other sectors. The European Union (EU) and Denmark suspended \$65 million in aid meant for the development of Zambia's road infrastructure.⁵⁸ The Ministry of Finance and National Planning had to reimburse donors for misapplied or unaccounted funds meant for public service reform.



The Zambia National AIDS Network (ZNaN) was appointed to be a principle recipient of aid funds from Global Fund in 2003 and funds from other donors were organised also. ZNaN promotes liaison, collaboration and co-ordination among non-governmental organisations (NGOs) and CSOs who are involved in the prevention and treatment of HIV/AIDS. ZNaN provides sub-grants to these organisations. An audit in 2009 revealed fraud and misappropriation at the sub-recipient level of funds totalling \$1.6 million. In some cases, ZNaN salaries surpassed the salaries of similar organisations by 150% and management was provided with personal cars. ZNaN sponsored participation in international conferences that

56 Zambia Daily Nation (2012).
57 Probe International (2010).
58 Probe International (2010).

was not budgeted for and trips that did not relate to the organisation's work. Also, the tendering process was marred by severe irregularities. The audit recommended that all missing monies be refunded to Global Fund. No individuals were held accountable for this misappropriation.⁵⁹

Foreign aid has provided a means for elite government officials to transform themselves from struggling citizens into instant millionaires. The case of former President Chiluba brings corruption in government to the fore.⁶⁰ In a 2002 parliamentary address, the incumbent President, Levy Mwanawasa, alleged embezzlement and theft of up to \$80 million by former President Fredrick Chiluba during his tenure.⁶¹ Yet aid inflows during that period were increased.⁶² Chiluba subsequently was charged with abuse of office and embezzlement of public funds in the sum of \$500 000. However, his prosecution resulted in an acquittal on all counts, because the court found that the prosecution had failed to prove that the funds in question were from the National Treasury.⁶³ Surprisingly, his co-accused in the matter, Faustin Kabwe and Aaron Chungu, were convicted of embezzlement and sentenced to five years' imprisonment each.⁶⁴

Another co-accused, former permanent secretary in the Ministry of Finance and National Planning (MoFNP), Stella Chibanda, was arrested and charged with being in possession of unexplained wealth amounting to ZMK2 billion.⁶⁵ Chibanda, who was an agent for the

59 OIG Report (2010) 59-63.

60 *The Attorney General v Fredrick Titus Jacob Chiluba and Others*, 2007/HP/HC 004.

61 See Moyo (2009) 53. Chiluba held office from 1991 to 2001.

62 Moyo (2009) 53.

63 Mbao (2011) 266.

64 Dugger (2009).

65 Kayumba (2002).

Zambia Intelligence Services (ZIS),⁶⁶ was approached by former Chief of Intelligence, Xavier Chungu, to ensure that the debts of the previous regime are cleared by including them in the external debt servicing. He assured her that international financial institutions and donors who monitored public finances, such as the IMF, would not notice this.⁶⁷ Chibanda testified that she was paid for services rendered to the ZIS and bank statements revealed that Chibanda had received monies from the infamous ZAMTROP account.⁶⁸

Most of these embezzled funds are siphoned back to Western banks by these corrupt leaders, negatively affecting the effectiveness of the aid. Reportedly \$620 671 were transferred to foreign banks between 1995 and 1996.⁶⁹ The civil case against Chiluba revealed the transfer of embezzled funds to accounts in London, Geneva, Brussels and the Channel Islands.⁷⁰

Corruption in foreign aid has dire consequences for the general population and for Zambia as a whole. The grand theft of aid funds has meant that their intended purpose is not addressed. Resources are directed to issues of lower priorities that are of no economic value, such as purchase of government vehicles, and diverted from areas that badly need aid, such as a clean water supply, hospitals, good and safe roads, and schools. For example, misappropriation of aid intended to develop roads has left Zambia with poor road infrastructures that flood every rainy season.⁷¹ The flooding of Kanyama Township is now so common an occurrence that its residents have come to expect it when it rains. The MoH

66 AllAfrica (2009).

67 van Donge (2009)81.

68 Kayumba (2002).

69 Chikulo (2000) 167.

70 *The Attorney-General v Frederick Jacob Titus Chiluba and Others*, 2007/HP/HC 004.

71 Probe International (2010). The EU suspended aid for road construction amid allegations of corruption.

case is another example of the negative impact of corruption on aid effectiveness. The grand theft of money meant to enhance the health care system pertaining to HIV/AIDS, malaria and tuberculosis, led to shortages of drugs used in the treatment of these diseases, causing deaths that could have been prevented.⁷² Development aid meant for the training of personnel has lined the pockets of those in charge and led to a shortage of skilled personnel in critical sectors.⁷³ Implementation of policies has become redundant because money is used for other purposes.

Misappropriation of aid has caused the price of goods and services to soar in Zambia. This is because aid is channelled to unproductive projects or it is used for personal enrichment. The transformation of public funds into personal property has led to employment in the public sector now being the ultimate goal, because people see such employment as a means of transforming their lives. Thus, the vicious cycle of poverty is perpetuated as aid effectiveness is undermined by the pursuit of employment in government in order to benefit from aid funds. The already agonisingly slow pace of service delivery will become worse, compromising the day-to-day welfare of ordinary Zambians.⁷⁴

Sweden, the Netherlands and Canada condemned these incidents of grand theft and were among several donor countries that suspended foreign aid to Zambia in response. It is clear that donors refuse to be associated with a country where foreign aid meant for development and poverty reduction is embezzled for personal use by those tasked with its disbursement, and in some cases their subordinates. Zambia was urged to crack down on corrupt leaders and strengthen its anti-corruption regime. The question that arises is

72 Irin News (2011).

73 Canada's aid to Zambia was intended to help train and recruit more staff for hospitals and health programmes.

74 Irin News (2011).

whether the anti-corruption laws in place are adequate and effective. The next chapter addresses the legal instruments available for combating corruption in the aid context.



CHAPTER THREE

Foreign Aid and Anti-Corruption Law

3.1 Introduction

The problem of corruption “is undeniably associated with development aid”.¹ This is the case because foreign aid makes up the majority of public funds that are embezzled, misappropriated or diverted. The question that arises is how to address the problem of grand corruption in respect of foreign aid. One way of doing this is through legislation. According to Bean, countries with low levels of perceived corruption have enacted and enforced laws that limit corruption.² Ndulo states that:

The need to effectively curb corruption through legislation and effective institutions goes without saying because of the threat corruption poses to good governance, democracy and the rule of law and ultimately, it’s potential to hinder economic, social and political development.³

The role that the law plays in fighting corruption is underscored by the excerpt below.

If lawyers could draft laws that prevent corrupt behaviour, there would be no problem with corruption.⁴

In the light of this, donors have called for more stringent efforts to combat corruption, including the improvement of legal regimes in recipient countries.⁵

1 Bean (2010) 800.

2 Bean (2010) 789.

3 Ndulo (2014) 7.

4 Pope (2000) 269.

5 See, for example, Ministry for Foreign Affairs of Finland (2003) 6.

This chapter analyses the existing anti-corruption instruments of Zambia in an attempt to determine their adequacy and effectiveness as a response to corruption in foreign aid.

3.2 International and Regional Anti-Corruption Instruments

Whereas corruption used to be regarded as a domestic matter, it has become a problem of global concern.⁶ The Foreign Corrupt Practices Act (FCPA), enacted in the US in 1977, is credited with having initiated the global anti-corruption movement.⁷ Its enactment prompted the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁸ The FCPA and the OECD Convention changed the traditional approaches to combating corruption by criminalising it. However, these instruments were limited in scope and did not apply to corruption in bilateral and multilateral aid.⁹ This prompted the international community to advocate and adopt broader reaching anti-corruption instruments, including the United Nations Convention against Corruption (UNCAC), the African Union Convention on Preventing and Combating Corruption (AU Convention) and the Southern African Development Community Protocol against Corruption (SADC Protocol). These instruments require states parties to take measures, including legislative and administrative measures, to ensure the implementation of their provisions.¹⁰ According to Lubinda:

These multilateral instruments not only provide opportunities for regional, sub-regional and global responses to corruption, they also provide a critical framework for local or national policy making.¹¹

6 Williams & Beare (1999) 115.

7 Williams & Beare (1999) 136.

8 Williams & Beare (1999) 136.

9 Bean (2010) 802.

10 See Article 65(1) of UNCAC, Article 5 of the AU Convention and Article 7 of the SADC Protocol.

11 Lubinda (2011) 5.

Zambia is a State Party to these instruments. It is necessary therefore to examine the international legal framework as a yardstick against which the anti-corruption laws of Zambia may be evaluated.

3.2.1 The United Nations Convention against Corruption

The United Nations Convention against Corruption (UNCAC) is the first anti-corruption agreement which is binding legally on a global scale. It was adopted formally in 2003 and entered into force in 2005. Unlike the FCPA and the OECD Convention, the provisions of UNCAC are broad enough to cover grand corruption because they extend to forms of corruption other than bribery.¹² UNCAC is based on four pillars: prevention, criminalisation, international co-operation and asset recovery.¹³

The discussion below focuses on specific provisions of UNCAC that extend the notion of corruption to grand corruption in foreign aid.

3.2.1.1 Preventing Corruption in Foreign Aid

Most measures taken to fight corruption are reactive rather than proactive. Corruption has to happen first before action is taken. Prosecuting corrupt public officials therefore is given more preference than prevention. However, the active prevention of corruption is more effective than reacting to allegations of corruption as they arise.¹⁴ Prevention of corruption in foreign aid is necessary to deny public officials the opportunity to embezzle aid funds and cut off corruption before it can take root. The adage that prevention is better than cure

12 Hechler *et al* (2011) 11.

13 Babu (2006) 8.

14 Doig (2012) 3.

holds true for corruption in foreign aid due to the challenges presented by its clandestine character and the difficulties of prosecuting high-level officials.

UNCAC recognises the important role that prevention has to play and opens with it. Chapter I states that UNCAC aims to prevent and combat corruption by promoting and strengthening international co-operation, integrity, accountability and good management of public property.¹⁵ These principles are needed to promote a fairer and more effective public sector. They can assist in the fight against grand corruption in foreign aid by ensuring that public officials conduct themselves professionally and honestly and therefore will not embezzle public funds received through aid.

Chapter II, which is dedicated to prevention, mandates states parties to develop and implement or maintain effective and co-ordinated anti-corruption policies that promote the participation of civil society and ensure the existence of integrity, accountability and transparency among their public officials.¹⁶ Measures to be taken under this chapter include requiring public officials to disclose assets and alternative sources of income.¹⁷ A system of disclosure would provide key evidence in a prosecution or for asset forfeiture purposes. Furthermore, it ensures transparency and accountability in public officials' handling of public funds and acts as a deterrent to theft of aid.

The establishment of independent anti-corruption bodies is another preventive measure provided for under this chapter.¹⁸ The role that such bodies can play in preventing theft of foreign aid cannot be overstated. According to Brunelle-Quraishi, these bodies "are the

15 Article 1(a)-(c) of UNCAC.

16 Articles 5 & 8 of UNCAC.

17 Article 8(5) of UNCAC.

18 Article 6 of UNCAC.

intermediary between government and public opinion”.¹⁹ The campaigns to raise awareness and educate the public on corruption undertaken by these bodies can go far to prevent corruption in foreign aid.

Civil society can play a role also in preventing corruption in foreign aid by exerting pressure for political commitment against corruption and fulfilment of obligations under the Convention.

3.2.1.2 Criminalisation of Corruption in Foreign Aid

Criminalisation is an integral part of the anti-corruption strategy that complements the other efforts aimed at combating corruption.²⁰ It serves the function of deterring would-be offenders from acting corruptly and punishing persons who engage in corrupt acts. Chapter III requires states parties to establish a number of offences in their domestic law, either by enacting new laws or amending existing laws, if the conduct in question has not been criminalised already in their domestic law.²¹ The conduct criminalised is wide enough to cover grand corruption.²² The offences created, which can address corruption in foreign aid, can be divided into two categories namely, crimes to deal with the theft of aid funds and crimes to deal with attempts to hide stolen aid funds or hinder investigations.

The previous chapter illustrated that grand corruption in foreign aid is perpetrated mostly through embezzlement. Corrupt public officials line their pockets with funds that are meant for development, collude with private third parties for workshops and training that are not conducted, or divert the funds to other lesser priorities. UNCAC mandates states parties to

19 Brunelle-Quraishi (2011) 108.

20 See Carr (2007) 231.

21 Babu (2006) 9.

22 Hechler (2011) 11.

criminalise the embezzlement, misappropriation or other diversion of public funds by government officials.²³ Extending the notion of corruption to include embezzlement of public funds is a step forward in addressing corruption in foreign aid. This is because it casts a wider net to catch conduct relating to foreign aid that is criminal but fails to meet the requirements of other offences.

Corrupt public officials are able to engage in corruption in foreign aid due to the access that their position grants them. The public official is granted authority, by virtue of his office, to disburse aid funds with considerable discretion. The public official uses his position as handler of aid funds to benefit himself during the discharge of his duties. An example is the public official who uses his position to award a contract through irregular tender procedures. Since the public official uses power that he would not ordinarily have but for his position, criminalising the abuse of authority of office is a potent tool for fighting grand corruption in foreign aid. It targets serious misconduct in the handling of aid monies which cannot be addressed satisfactorily by other offences. Disappointingly, UNCAC merely encourages states parties to criminalise the abuse of functions.²⁴

The clandestine character of corruption poses many challenges to its detection and investigation. Persons who can be witnesses often are involved in the commission of the crime,²⁵ thus it remains confidential among the parties concerned with no one to report it. However, an official having property which is well beyond his lawful income is easily noticeable. Article 20 provides for the criminalisation of illicit enrichment and defines it as:

23 Article 17 of UNCAC.

24 Article 19 of UNCAC.

25 Perdriel-Vaissiere (2012) 4.

A significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

This offence helps in the fight against corruption in aid by circumventing the challenge of gathering evidence presented by the clandestine character of corruption. This offence does not require proof that the unexplained wealth is a result of corruption, because UNCAC presumes that unexplained wealth is derived from corrupt activities.²⁶ In other words, it will be assumed that if property, held by a public official charged with handling aid funds cannot be justified by his lawful income was acquired through corrupt practices such as embezzlement of aid money. If assets of a public official dealing with aid funds are not commensurate with his lawful earnings, he would have to justify his unexplained wealth. The offence of illicit enrichment is a formidable tool against corruption in aid.

Once foreign aid funds have been embezzled or acquired through the abuse of authority, corrupt public officials will attempt to conceal or disguise the illegal origins of the funds. This can be done by transferring the funds to offshore accounts, purchasing property such as houses and clothes, or investing the money in a cash-intensive business. Money laundering puts a safe distance between the stolen aid funds and the corrupt public officials, enabling them to enjoy the fruits of their crime. Empowering authorities to investigate and prosecute money laundering that is related to corruption enables them to trace, seize and confiscate property derived from corruption in foreign aid. Anti-money laundering preventive measures, such as reporting suspicious transactions by public officials or conducting enhanced customer due diligence for politically exposed persons (PEPs), can be leveraged also to fight corruption in foreign aid by preventing the legitimisation of corruptly obtained

26 Babu (2006) 15.

funds. Money laundering, as one of the offences committed in support of corruption, is criminalised by UNCAC.²⁷

The obstruction of justice, after theft of aid has been exposed, acts as a barrier to fighting corruption in aid effectively. Corruption in foreign aid normally is committed by high-ranking officials because they are the people entrusted with the power to handle aid. Investigation and prosecution of such public officials is not an easy task because they have a tendency to use their influence to tamper with witnesses or evidence, and with the judiciary or law enforcement officials. Cases of corruption involving foreign aid therefore would not be investigated or prosecuted because of the power wielded by these persons. In the event that they somehow do go to trial, offenders likely would be acquitted even if there is overwhelming evidence that millions in aid money have been stolen. Thus, criminalising the obstruction of justice can ensure that corruption in foreign aid is investigated and prosecuted properly and thoroughly, thereby ensuring that officials who embezzle foreign aid funds do not escape punishment. The threat of punishment for engaging in aid corruption can serve to deter would be offenders. The obligation on states parties to create this offence is mandatory.²⁸

Corrupt public officials do not conceal stolen aid funds through money laundering only, but also make use of family and friends. Accounts can be opened in the names of relatives or friends or the funds simply can be deposited in their existing personal accounts. UNCAC encourages the criminalisation of intentional concealment or continued retention of

27 Article 23 of UNCAC.

28 Article 25 of UNCAC.

property derived from corrupt acts with the knowledge of its illegal source.²⁹ This offence is meant really to reach third parties who did not partake in the embezzlement of the foreign aid but who knowingly hide or keep the embezzled funds. The threat of punishment might have a deterrent effect on friends and relatives that the corrupt official seeks to rely on and might prevent corruption in aid if the official is afraid of the risks involved in other means of concealment, such as money laundering.

UNCAC provides for liability for inchoate offences of corruption.³⁰ Inchoate liability, in contrast to liability for predicate offences, requires the criminalisation of conduct that has embarked on a path to cause harm but in fact has not caused the harm. A public official can incur criminal liability even though the embezzlement of foreign aid or abuse of authority to benefit from aid funds has not been completed.³¹ The conduct of the public official is deemed criminal without actual harm being done because the harm that would have occurred is that which the law aims to prevent.³² For example, a Minister who in 1996, had disregarded tender awarding procedures for a government printing contract was dismissed after he attempted to cash a cheque worth more than K200 million written out in his name rather than the name of the printers.³³

3.2.1.3 Co-operating against Corruption in Foreign Aid

UNCAC provides for promoting and strengthening international co-operation for effective law enforcement. States parties are encouraged to co-operate with one another in every

29 Article 24 of UNCAC.

30 Article 27(3) of UNCAC.

31 Strader (2006) 13.

32 Burchell (2013) 517.

33 See Momba (no date).

area of the fight against corruption, including prevention, investigation and prosecution.³⁴

Article 44 provides for the extradition of offenders. This ensures that individuals who engage in corruption in foreign aid are no longer able to escape their home country and live abroad without fear of prosecution. Renwen & Ju point out that UNCAC goes a long way in trying to advance co-operation by creating substantial relationships amongst the states parties.³⁵ International co-operation can be a vital tool in combating grand corruption in foreign aid, considering the fact that underdeveloped countries often lack the resources to conduct investigations and gather evidence in the countries where embezzled funds have been stashed. Given this transnational character of grand corruption, the encouragement of international co-operation is commendable and could reduce the absolute amount of grand corruption in aid.

3.2.1.4 Recovering Foreign Aid Lost to Corruption

As discussed in the previous chapter, most of the aid that is stolen is stashed away in overseas accounts or invested in property abroad. UNCAC provisions on asset recovery were ground-breaking because for the first time it became possible to rely on international anti-corruption law to recover stolen assets.³⁶ States parties should:

[A]fford one another the widest measure of cooperation and assistance in this regard.³⁷

34 Article 43 of UNCAC.

35 Renwen & Ju (2010) 271.

36 Babu (2006) 22.

37 Article 51 of UNCAC.

Collaborative asset recovery can go a long way to help fight grand corruption in foreign aid by ensuring that stolen funds are returned to their rightful owners and that the perpetrators do not continue to enjoy the fruits of their crime.

States parties should require financial institutions to conduct enhanced customer due diligence in respect of persons who are public officials or have been entrusted with public functions, as well as persons close to them.³⁸ In order to assist countries to recover assets stolen by corrupt government officials, the United Nations Office of Drugs and Crime (UNODC) and the World Bank have developed the Stolen Asset Recovery (StAR) Initiative.³⁹

States parties are obligated to take measures that ensure the protection of witnesses⁴⁰ and are encouraged to provide protection for whistleblowers.⁴¹

3.2.2 The African Union Convention on Preventing and Combating Corruption

The African Union Convention (AU Convention) is a regional instrument which was adopted in 2003 and which entered into force in 2006. The objectives of the AU Convention are to prevent, punish, and detect corruption in both the public and private sectors, and to promote international co-operation.⁴² This accords with measures advocated by the global anti-corruption movement. It requires states parties to combat corruption by ensuring transparency and accountability in public affairs.⁴³

38 Article 52(1) of UNCAC.

39 StAR (2007).

40 Article 32 of UNCAC.

41 Article 33 of UNCAC.

42 Article 2 of the AU Convention.

43 Article 2 of the AU Convention.

Most of the offences criminalised under the AU Convention are similar to those contained in UNCAC. These include abuse of authority,⁴⁴ illicit enrichment,⁴⁵ concealment⁴⁶ and money laundering.⁴⁷ The Convention also deals with diversion of property. The diversion could be the channelling of the property to purposes for which it was not intended or using it to benefit the official himself or third parties.⁴⁸ The AU Convention also prohibits use of funds acquired through corruption to finance political parties,⁴⁹ unlike UNCAC which contains a weaker optional version.⁵⁰ Diverting public funds to finance political parties, especially during elections, always has been a problem in Zambia. Powerful politicians use public funds, which mostly constitute foreign aid, to finance political campaigns and party expenses. The AU Convention contains a similar provision to UNCAC on inchoate offences.⁵¹ States parties agree that public officials declare their assets at the time of assumption of office, during and after their term of office.⁵² States parties are obligated to ensure the right of access to any information that may be required to assist in the fight against corruption.⁵³ Other measures include mutual legal assistance and regional co-operation,⁵⁴ asset recovery,⁵⁵ whistle-blower and witness protection⁵⁶ and extradition of offenders.⁵⁷

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- 44 Article 4(c) of the AU Convention.
45 Article 5(1) & 8(1)(2) of the AU Convention.
46 Article 4(1)(h) of the AU Convention.
47 Article 6 of the AU Convention.
48 Mwenda (2007) 24.
49 Article 10 of the AU Convention.
50 Article 7(3) of UNCAC.
51 Article 4(1)(i) of the AU Convention.
52 Article 7(1) of the AU Convention.
53 Article 9 of the AU Convention.
54 Articles 18 & 19 of the AU Convention.
55 Article 16 of the AU Convention.
56 Article 5(5) of the AU Convention.
57 Article 15 of the AU Convention.

The provisions of the Convention are not limited to bribery, but extend to acts related to grand corruption. This makes it possible to address corruption in foreign aid. Traditionally, dishonesty in relation to aid was not regarded as corruption and thus could not be prosecuted. The potential to confront corruption in foreign aid effectively is strengthened by the fact that all the offences discussed, with the exception of illicit enrichment, are mandatory.

3.2.3 The Southern African Development Community Protocol against Corruption

The Southern African Development Protocol against Corruption (SADC Protocol) was adopted in 2001 and entered into force in 2005. The objectives of the SADC Protocol are to promote and strengthen development of anti-corruption mechanisms; to promote, facilitate and regulate co-operation among states parties to ensure effectiveness of anti-corruption measures; and to foster development and harmonisation of policies and domestic legislation of states parties relating to anti-corruption measures.⁵⁸ The acts that constitute corruption are very broad and include the diversion of property by public officials,⁵⁹ abuse of authority,⁶⁰ and concealment of property derived from corruption.⁶¹ Attempts and conspiracies to commit any of these crimes are prohibited also.⁶² The SADC Protocol requires states parties to have measures that can be used to trace and freeze assets and to confiscate them where necessary.⁶³ In instances where assets have been transferred to another location, the Protocol requires states parties to offer one another mutual

58 Article 2 of the SADC Protocol.

59 Article 3(d) of the SADC Protocol.

60 Article 3(c) of the SADC Protocol.

61 Article 3(g) of the SADC Protocol.

62 Article 3(h) of the SADC Protocol.

63 Article 8(1)(a) & (b) of the SADC Protocol.

assistance.⁶⁴ Corruption under the SADC Protocol is an extraditable offence,⁶⁵ making it difficult for corrupt government officials to find refuge in other SADC countries.

Provision is made for the most common form of corruption in foreign aid and extended to encompass other acts that are related to grand corruption. The provisions restrict the opportunities to conceal stolen aid funds, strengthening international co-operation to detect and prevent this. Measures to profit from embezzlement of aid can be thwarted through asset recovery and extradition of offenders. The provisions under this Convention are adequate to address corruption in foreign aid.

3.3 Anti-Corruption Legislation in Zambia

Gillespie applauds the conclusion of the various international anti-corruption instruments but concludes that the issues of corruption will be settled by states that have committed themselves to confronting the problem and not by some international forum.⁶⁶

International instruments provide only the minimum standards to fight corruption in foreign aid, but it remains up to Zambia to implement these standards. Domestication of these instruments is a step towards their implementation.

Zambia is recognised as having made considerable progress in the fight against corruption.⁶⁷

The legal and institutional framework in Zambia is said to have been strengthened⁶⁸ and designated authorities have been investigating and prosecuting corruption cases

64 Article 8(4) of the SADC Protocol.

65 Article 9 of the SADC Protocol.

66 Gillespie (2004) 120.

67 Chêne (2014) 1.

68 Chêne (2014) 1.

relentlessly, including those involving high-ranking officials in spite of a low conviction rate.⁶⁹

3.3.1 Background

Anti-corruption efforts in Zambia go back far. Prior to independence from Great Britain, the principal anti-corruption law in Zambia was the Prevention of Corruption Act of 1916, which was read together with the Public Bodies Corrupt Practices Act of 1889 and the Prevention of Corruption Act of 1908.⁷⁰ The Penal Code⁷¹ was the first post-independence law on corruption. The Code contains a provision criminalising the abuse of functions.⁷² However, this law was restricted to the public sphere and did not cover corruption cases in the private domain. In order to cure this defect, the Corrupt Practices Act⁷³ was passed, making corruption an offence in both the private and public spheres and providing for the establishment of an Anti-Corruption Commission (ACC) which was to spearhead the fight against corruption. This Act was repealed in 1996 by the Anti-Corruption Commission Act⁷⁴ which transformed the ACC into an independent body mandated to prevent and combat corruption in Zambia.

In 2009, President Rupiah Banda launched the National Anti-Corruption Policy (NACP) to create a corruption-free nation, preserve public resources and ensure that all public and private institutions adopt a code of ethics.⁷⁵ An extensive legislative review to strengthen the legal framework in Zambia was initiated in 2010 as part of the implementation of the

69 The prosecution of former President Rupiah Banda is one example.
70 National Anti-Corruption Policy (2009).
71 Penal Code Act, Cap 87 of the Laws of Zambia.
72 Section 99 of the Penal Code Act.
73 Corrupt Practices Act 14 of 1980.
74 Anti-Corruption Commission Act 42 of 1996.
75 National Anti-Corruption Policy (2009).

NACP. The following legislation was passed to this end: the Anti-Corruption Act (to replace the 1996 Act), the Public Interest Disclosure (Protection of Whistleblowers) Act, the Forfeiture of Proceeds of Crime Act, and the Prohibition and Prevention of Money Laundering (Amendment) Act.

3.3.2 The Anti-Corruption Act 3 of 2012

Corruption in Zambia now is proscribed by the Anti-Corruption Act 3 of 2012. This Act succeeded the Anti-Corruption Act of 2010. One of the objectives of the current Act is to bring the law into conformity with the provisions of the regional and international instruments to which Zambia is a party.⁷⁶ Zambia therefore meets its obligations to implement these instruments through domestication of their provisions.

3.3.2.1 Prevention of Corruption in Foreign Aid

The 2012 Act continues the existence of the Anti-Corruption Commission (ACC) that was created under the 1980 Act.⁷⁷ The ACC is an autonomous body tasked with preventing corruption in public and private institutions, investigating allegations or instances of corruption and other offences, and educating the public on corruption.⁷⁸ The ACC is vested also with prosecutorial powers.⁷⁹ Employees of the ACC are the only civil servants subject to asset declarations.⁸⁰ As the body spearheading the fight against corruption in Zambia, the activities of the ACC are crucial to combating corruption in the aid context. For example, the ACC encourages whistleblowing which is essential to the discovery of corruption in foreign

76 Preamble of the Anti-Corruption Act, 2012.

77 Section 4 of the Anti-Corruption Act, 2012.

78 Section 6(1) of the Anti-Corruption Act, 2012.

79 Section 6(1)(b)(ii) of the Anti-Corruption Act, 2012.

80 Section 14 of the Anti-Corruption Act, 2012.

aid and has set up an online reporting mechanism to facilitate anonymous reporting of corruption.

3.3.2.2 Criminalisation of Corruption in Foreign Aid

Part III of the Act contains corrupt practices which are offences in Zambia. The discussion that follows focuses on those corrupt practices that are relevant to combating corruption in the aid context.

The Anti-Corruption Commission Act, 1996 provided for the crime of abuse of authority of office. In 2010, a new Anti-Corruption Act repealed this offence. The arguments used to justify removal of this offence were that it violated the presumption of innocence and that the Penal Code covers this offence adequately. However, the Anti-Corruption Act of 2012 restores the abuse of authority of office clause. In terms of the section, if a public official takes a decision or action in any matter in which he or a third party has a direct or indirect interest, he is presumed to have misused or abused his office.⁸¹

This offence serves to punish public officials who use their position to embezzle public funds. One might ask why have the crimes of embezzlement and abuse of authority when the two seemingly are the same? The difference between embezzlement and abuse of functions is that for the former the public official is in lawful possession of the foreign aid which he embezzles because it was entrusted to him, whereas for abuse of authority the public official is not entrusted with the aid and therefore does not have lawful possession of it but has access to it because of his position. The offence of abuse of authority thus covers instances where a public official embezzles, misappropriates or diverts foreign aid but

81 Section 21(2) of the Anti-Corruption Act, 2012.

cannot be charged with the crime of embezzlement because his conduct does not meet its requirements of lawful possession of the aid funds and a trust relationship with the public to safeguard its interests in the aid.

The Act also criminalises the possession of unexplained property. A public official whose lifestyle or property in his possession or under his control exceeds his legitimate income or who receives the benefit of services suspected to emanate from corruption is presumed to be guilty of this offence.⁸² A similar provision in the 1996 Act was the subject of debate and ultimately ended up being repealed by the 2010 Act. It was argued that the section was unconstitutional in so far as it reversed the burden of proof and placed it on the accused.

The burden of proof is reversed by requiring the accused to explain how the excess wealth was acquired legitimately as opposed to merely requiring him to adduce evidence in explanation.⁸³ It was argued that its presumption of liability upon proof of excessive wealth violated the presumption of innocence which is entrenched constitutionally in Zambia.⁸⁴

Repealing the section was not the right thing to do because this offence is a formidable tool in the fight against corruption in foreign aid. It boosts asset recovery by addressing the difficulties of proving that the funds or property that a public official has in his possession are products of corruption in aid. In addition, the Zambian Constitution recognises that laws can be enacted which place the burden of proof on the accused.⁸⁵ Furthermore, there are similar provisions in a host of other Zambian statutes that allow for the reversal of the burden of proof.⁸⁶

82 Section 22 of the Anti-Corruption Act, 2012.

83 Pope (2000) 272.

84 Section 18(2)(a) of the Constitution of Zambia, 1996.

85 Section 18(12) of the Constitution of Zambia, 1996.

86 See, for example, Sections 85, 97 & 99 of the Penal Code Act and Section 4 of the Parliamentary and

Another argument against the crime of unexplained wealth was that it violated the right to silence. Professor Mvunga considers that if the accused chooses to exercise this right, he would fail to meet his burden of proof, which would lead to his conviction.⁸⁷ However, Ndulo argues that this right is not absolute and that the accused's silence in instances which clearly call for an explanation from him should be factored into the persuasiveness of the prosecution's evidence.⁸⁸

There is clearly a relationship between money laundering and corruption. Foreign aid money that has been embezzled or acquired through abuse of authority usually is laundered in attempts to legitimise it or hide its source. In addition to criminalising corruption in foreign aid through offences such as embezzlement, it is therefore also necessary to criminalise acts in support of corruption, such as money laundering. This improves the chances of combating corruption in foreign aid by reducing the opportunities of profiting from stolen aid funds. Money laundering is covered by the Act under the crime of concealment of property.⁸⁹

Embezzlement of foreign aid usually involves high-ranking public officials in positions of influence or with connections to influential people and these officials will use their influence or connections to impede the interests of justice. There are numerous reports of high-level officials interfering with the course of justice in cases of corruption in aid. In 2004, donors condemned the instruction from George Kunda, who was the Attorney General at the time, to the DPP not to prosecute the former MoH permanent secretary, Kashiwa Bulaya, who

Ministerial Code of Conduct Act 35 of 1994.

87 Lusaka Times (2010). See also *Thomas Mumba and Others v The People* which struck down section 53(1) of the Corrupt Practices Act as a violation of the right to silence.

88 Ndulo (2014) 43.

89 Section 36 of the Anti-Corruption Act, 2012.

was charged with abuse of office relating to the awarding of a tender contract for the supply of HIV/AIDS nutritional supplements without following tender procedures.⁹⁰ The MoH budget relies heavily on donor funds which partly cover the purchase of HIV/AIDS drugs. Obstruction of justice can result in corrupt public officials looting aid funds with impunity because they know that prosecution is unlikely. Corrupt public officials who steal aid funds and evade justice will continue to enjoy the proceeds of their crime. It is thus necessary to criminalise obstruction of justice to combat corruption in foreign aid. Section 31 of the Act does just that.

Foreign aid must be accounted for to donors, and all transactions must be documented.

When audits are carried out, accounting records must tally with bank statements. In order to avoid getting caught, public officials will go to great lengths to hide their involvement in embezzlement of foreign aid monies. The Act thus makes it a crime to conceal an offence by tampering with or omitting information from paper or electronic documents and electronic devices.⁹¹ This provision tries to ensure accountability and transparency in the handling of aid funds, thereby fighting corruption in aid.

Witnesses can provide important information about corruption in aid, based on what they observed or because they have direct knowledge of the theft, misappropriation or diversion of aid funds. Such information can assist to prove intent to embezzle foreign aid or intent to obtain a benefit from the abuse of authority relating to the administration of foreign aid.

Witnesses can be experts in forensic accounting also and thus can provide information about accounting for aid funds, unlike lay people. According to Henning & Radek, witness

90 Donge & Leenstra (2014).

91 Section 38 of the Anti-Corruption Act, 2012.

testimony as to the defendant's knowledge of impropriety of the transaction is perhaps more essential in public corruption cases than in any other white collar crime.⁹² Fighting corruption in foreign aid can be hindered if witnesses are induced to give false testimony on behalf of the accused or against the accused or abscond from the trial. Corruption of witnesses is a criminal offence under section 25 of the Act.⁹³ Furthermore, witnesses who themselves bribe an accused in return for their testimony are also liable under this section. Perhaps this can be dealt with under the offence of obstruction of justice, but in instances where misconduct which is manifestly criminal does not meet the requirements of obstruction of justice, such as lack of active or passive gratification, then it can be dealt with under this offence.

The harmful effects of corruption in foreign aid have been discussed in Chapter Two. Attempts and conspiracies to embezzle foreign aid or to abuse authority in order to benefit from the administration of foreign aid are criminalised also because it is this harm that would have occurred that the law aims to prevent.⁹⁴ It should be noted that conspiracy is deemed to be interchangeable with or linked to the offence of preparation that is provided for under UNCAC. Thus, merely preparing for corruption in aid, such as opening an offshore bank account in which to deposit the aid funds after embezzling them, is criminalised.

3.3.2.3 Adequacy of the Act

The provisions criminalising corruption in the Anti-Corruption Act are very robust. The Act covers the controversial crimes of abuse of functions and illicit enrichment which allow the anti-corruption authorities to act against public officials who pocket aid money. The value of

92 Henning & Radek (2011) 378.

93 Section 25 of the Anti-Corruption Act, 2012.

94 Section 39(1) & (2) of the Anti-Corruption Act, 2012.

these crimes cannot be overstated. They make it possible to prosecute a public official suspected of having enriched himself or herself corruptly in situations where witnesses or whistleblowers are unwilling or unable to come forward and provide information which could be used as evidence.

The provision on asset disclosure is inadequate in-so-far as it pertains only to the ACC. Zambia is in breach of its obligation under the AU Convention to enact a law prohibiting the use of illegal or corruptly obtained funds to finance political parties.

The terms embezzlement, diversion or misappropriation do not appear anywhere in the Anti-Corruption Act. The Act criminalises the corrupt acquisition of public property or revenue instead.⁹⁵ This section is as close as the Act comes to criminalising the diversion, embezzlement or misappropriation of public funds. This is the position because it has been held that no separate crime of embezzlement exists in Zambia.⁹⁶ Embezzlement is said to be covered under the offence of theft by public servant contained in the Penal Code.⁹⁷ The Act is inadequate in-so-far as it does not provide for a separate offence of embezzlement, diversion or misappropriation despite this being the most common mode of corruption in aid.

3.3.2.4 Effectiveness of the Act

Earlier versions of the provisions that have been discussed were effective in prosecuting some corruption cases, such as that of former army commander, Geojago Musengule, in 2009. Musengule and his co-accused, Amon Sibande, were convicted for irregularly

95 Section 34 of the Anti-Corruption Act, 2012.

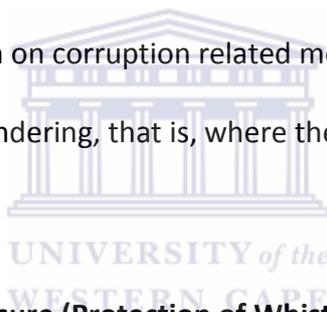
96 *Paul Watson Katembele vs The People* (1977) Z.R. 90 (S.C)

97 *Paul Watson Katembele vs The People*.

awarding several business contracts to Base Chemicals. Musengule was sentenced to four years' imprisonment with hard labour while Sibande received three years' imprisonment. The duo had been charged with seven counts of abuse of authority of office, corrupt practices by a public officer and corrupt practices with a public officer contrary to the Anti-Corruption Commission Act 42 of 1996. The Lusaka High Court dismissed an appeal in 2012 and upheld the conviction on all counts.⁹⁸

The provision relating to asset declarations is merely decorative and has not proved to be effective. The five-year gap between declarations is so long that it defeats the purpose of having such a measure.

The effectiveness of the provision on corruption related money laundering is undermined by the lack of recognition of self-laundering, that is, where the corrupt public officials launders the stolen aid himself.



3.3.3 The Public Interest Disclosure (Protection of Whistleblowers) Act 4 of 2010

This Act provides protection for persons who disclose conduct adverse to the public interest.⁹⁹ Section 63 of the Anti-Corruption Act provides that individuals who blow the whistle on corruption are to be dealt with under this Act. The Public Interest Disclosure Act, in turn, specifies that its provisions apply to government agencies, private or public companies, institutions, any organisation, body or organ registered, established or

98 Lusaka Times (2012).

99 Preamble to the Public Interest Disclosure (Protection of Whistleblowers) Act.

incorporated by any law.¹⁰⁰ Its objective is to provide a framework within which public interest disclosures can be dealt with independently and rigorously.¹⁰¹

The Act stipulates procedures in terms of which employees may disclose information regarding unlawful or irregular conduct of employers or fellow employees.¹⁰² In addition, clauses in contracts of employment which contradict the provisions of the Act are prohibited. The Act explicitly provides that such agreements would be null and void.¹⁰³ Furthermore, employers are prohibited from subjecting employees to any occupational detriment on account, or partly on account, of the employee having made a protected disclosure or a public interest disclosure.¹⁰⁴ Witnesses and whistleblowers are covered sufficiently by entitling them to anonymity, compensation, relocation and employment reinstatements.

The Act covers not only disclosures that are made formally but also disclosures that are revealed in the course of another case. Section 5 provides that where information that could amount to a public interest disclosure is divulged in the course of any proceedings of a court or tribunal, such court or tribunal is required to refer the information to an interested authority.¹⁰⁵ It secures effective protection in this regard by ensuring that disclosures that are made to an investigating authority¹⁰⁶ and anonymous disclosures¹⁰⁷ fall within the category of protected disclosures. When making an anonymous disclosure, a whistle-blower must identify him or herself to the head of an investigating authority and request that his or

100 Section 10 of the Public Interest Disclosure (Protection of Whistleblowers) Act.

101 Preamble to the Public Interest Disclosure (Protection of Whistleblowers) Act.

102 Ndulo (2014) 45.

103 Section 4 of the Public Interest Disclosure (Protection of Whistleblowers) Act.

104 Section 42 of the Public Interest Disclosure (Protection of Whistleblowers) Act.

105 Section 5 of the Public Interest Disclosure (Protection of Whistleblowers) Act.

106 Section 11 of the Public Interest Disclosure (Protection of Whistleblowers) Act.

107 Section 12 of the Public Interest Disclosure (Protection of Whistleblowers) Act.

her identity be kept confidential by said authority.¹⁰⁸ This might appear to detract from anonymity, but the Act prohibits the investigating authority from disclosing the whistleblower's identity.¹⁰⁹

The Act makes provision for disclosures concerning corrupt conduct. The whistle-blower makes this disclosure to the ACC in accordance with the Anti-Corruption Act and the disclosure must show the occurrence of corruption or its likelihood.¹¹⁰

3.3.3.1 Adequacy of the Act

Requiring the whistle-blower to show the occurrence of corruption or its likelihood places an onerous burden on him or her and might discourage disclosures. The Act ought to have made provision for disclosures based on *prima facie* evidence or suspicions. However, the use of the general term "irregular conduct" could make up for this as it "may be able to provide a holistic approach" and casts a wide net that can catch various conduct which might amount to corruption.¹¹¹

The provisions in respect of employees ensure that unlawful or irregular conduct is disclosed regardless of whether it was committed by high-level officials or employers or other employees at the whistleblower's place of work. This is enhanced by entitling employees to compensation and employment reinstatement if they suffer any detriment due to the disclosure.

The Act encourages whistleblowers to come forward and report corrupt or suspicious conduct without fear of repercussions by keeping their identity confidential through

108 Section 12(3) of the Public Interest Disclosure (Protection of Whistleblowers) Act.

109 Section 44 of the Public Interest Disclosure (Protection of Whistleblowers) Act.

110 Section 26 of the Public Interest Disclosure (Protection of Whistleblowers) Act.

111 Ndulo (2014) 46.

anonymous disclosures. This serves to curb the unequal bargaining power of the employer as weighed against that of the employee, which inequality would discourage the employee from making a disclosure for fear of potential repercussions, such as a lawsuit for breach of contract.

3.3.3.2 Effectiveness of the Act

Data was unavailable as to the implementation of the Act therefore, its effectiveness cannot be assessed.

Whistleblowers are necessary to unmask corruption which is clandestine in nature. It is difficult if not impossible to discover corruption without the assistance of whistleblowers. However, there was no protection for whistleblowers prior to the enactment of this Act. Individuals, therefore, had no assurances when making public disclosures and perhaps this contributed to the lack of discovery of corruption in aid. Offering protection to persons who disclose embezzlement of foreign aid will encourage individuals to come forward without fear of persecution. Protecting whistleblowers will promote transparency and accountability in the handling of foreign aid because the public will demand it when corruption in aid is brought to light. Whistleblowing has proved an effective tool in exposing and fighting corruption in aid, such as in the Ministry of Health scandal, where the theft of millions of aid funds was revealed through whistleblowing.¹¹²

3.3.4 Forfeiture of Proceeds of Crime Act 19 of 2010

The confiscation and forfeiture of proceeds of crime in Zambia is regulated in a number of legislative enactments. The Forfeiture of Proceeds of Crime Act (FPOCA) is the most

112 See Chapter Two for a discussion of this scandal.

comprehensive of them and provides for the tracing and confiscation any proceeds, benefit, or property derived from the commission of any serious offence, and to facilitate the tracing of any proceeds, benefit, and property derived from the commission of any serious offence.¹¹³ The Act is the domestication of the provisions relating to the forfeiture of proceeds of crime contained in the United Nations Convention against Corruption.¹¹⁴ In terms of section 68 of the Anti-Corruption Commission Act, the provisions of the FPOCA will apply to corruption offences.

The procedures for tracing, seizing and preserving property that is liable to confiscation or forfeiture are contained in Part III of the Act. The police are empowered to apply for a warrant to search any premises and seize any tainted property or object reasonably believed to be of evidentiary value.¹¹⁵

The Act provides for judicial restraining orders to preserve property that is liable to forfeiture or confiscation whether located domestically or abroad.¹¹⁶ The court may grant the order prior the charging of the suspect.¹¹⁷ Also, a restraining order made abroad may be registered in Zambia pursuant to this Act.¹¹⁸

The court can issue production and inspection orders which compel a person to produce any property-tracking documents that are in his or her possession, notwithstanding any law prohibiting disclosure.¹¹⁹

113 Preamble to the FPOCA.

114 Preamble to the FPOCA.

115 Sections 35 & 37 of the FPOCA.

116 Section 42 of the FPOCA.

117 Sections 38(3) & 51(1)(a) of the FPOCA.

118 Section 53 of the FPOCA.

119 Sections 57-63 of the FPOCA.

The Act stipulates that restraint, forfeiture and confiscation procedures are to be executed through civil procedure, barring offences which are dealt with under criminal law.¹²⁰

The Act empowers the prosecutor to apply for confiscation or forfeiture orders against a person convicted of a serious offence.¹²¹ The prosecutor can apply also for a forfeiture order in an instance where the suspect has absconded.¹²² The court is empowered to issue such orders¹²³ or direct that the convict pays an amount which is equivalent to the value of the property.¹²⁴ The court may infer that property is tainted if the convict acquired it after the commission of an offence. This inference may be made where the increase in value of the convict's property is not commensurate with his lawful sources of income.¹²⁵ Forfeiture and confiscation orders issued by foreign courts may be registered in Zambia.¹²⁶

3.3.4.1 Adequacy of the Act

The FPOCA makes comprehensive provision for both conviction and non-conviction based forfeiture. Investigative authorities thus are given enough power to prevent corrupt public officials from concealing or disposing of assets.

The extension of the notion of property to include the proportionate value of any property into which the proceeds have been converted or intermingled provides a potent tool for recovering proceeds of corruption.¹²⁷

120 Sections 33 & 78 of the FPOCA.

121 Section 4(1) of the FPOCA.

122 Section 9(1) of the FPOCA.

123 Sections 17 & 19 of the FPOCA.

124 Section 15 of the FPOCA.

125 Section 10(2)(c) of the FPOCA.

126 Sections 18 & 26 of the FPOCA.

127 Definition of proceeds of crime under Section 2 of the FPOCA.

This Act is an adequate tool in the fight against public officials who derive economic profit from theft of foreign aid funds.

3.3.4.2 Effectiveness of the Act

The negative consequences of corruption in foreign aid discussed in Chapter Two show the importance of recovering stolen aid funds. The FPOCA is relatively new still but the effectiveness of having provisions for asset forfeiture can be seen already. For example, in August 2014, the ACC seized properties owned by Henry Kapoko, a former public official in the MoH, who allegedly was implicated in the corruption scandal involving foreign aid.¹²⁸

Despite laws that criminalise corruption and provide lengthy prison sentences for offenders, corrupt public officials engage in corruption in foreign aid still and enjoy their ill-gotten gains. It is therefore necessary to reach the funds that are stolen and the assets that are generated by corrupt practices. According to Ndulo, the financial incentives which encourage and sustain corruption are diminished by forfeiture.¹²⁹ The threat of confiscation of the proceeds of corruption contained in one of the objectives of the Act, should serve deter to public officials who are tempted to embezzle aid funds.¹³⁰

The acquittal of Kapoko and his co-accused highlight the pitfalls of conviction based procedures. Failure to obtain a conviction results in corrupt public officials profiting from criminal acts and continuing to embezzle aid funds because conviction based procedures are dependent on the conviction of the accused. It is therefore a welcome relief that the Act includes non-conviction based (civil) asset forfeiture procedures. This can assist in fighting

128 Lusaka Times (2014).

129 Ndulo (2014) 73. See Chapter Two.

130 Ndulo (2014) 72.

corruption in aid and recovering funds that have been embezzled because the procedure does not depend on the conviction of the accused, as has been shown by the confiscation of Henry Kapoko's property despite his acquittal. Reported instances of corruption in foreign aid show perpetrators to be high-level officials who are too influential or powerful to prosecute successfully. Thus civil forfeiture proceedings deal also with the problem that prosecuting such offenders presents.

The crimes contained in the Act could be very effective in combating corruption in foreign aid, but they need to be supplemented by diversion and money laundering in the context of corruption.

3.3.5 Prohibition and Prevention of Money Laundering Act 14 of 2001

The Prohibition and Prevention of Money Laundering Act (PPMLA) is the principal statute dealing with money laundering in Zambia. Section 7 of the PPMLA prohibits money laundering. The PPMLA initially defined money laundering in relation to proceeds of illegal activity¹³¹ which in turn was defined as any activity carried out anywhere at any time that is recognised as a crime in Zambia.¹³²

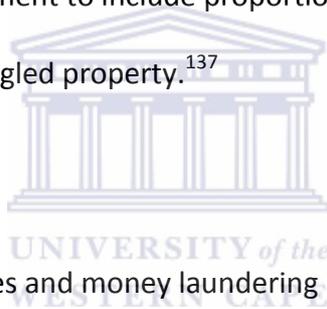
According to Mwenda, this definition of money laundering in relation to proceeds of illegal activity meant the PPMLA regarded all crimes as predicate offences for money laundering.¹³³ Embezzlement of foreign aid or corrupt practices involving foreign aid would then be covered under this Act because corruption is recognised as crime in Zambia.

131 Section 2 of the PPMLA.

132 Section 2 of the PPMLA.

133 Mwenda (2005).

The PPMLA was amended in 2010 and the definition of money laundering was replaced. The amended PPMLA defines money laundering in relation to proceeds of crime.¹³⁴ The Amendment Act replaces the definition of proceeds of crime which it defines as property or benefit derived from the activities involving a crime and includes property derived from an illegal activity whose form is later changed.¹³⁵ It is submitted that the arguments of Mwenda apply to these amendments and, therefore, that the Act is still capable of fighting corruption in aid because corruption remains a crime in Zambia. Persons who make disclosures in compliance with this Act are protected under the Public Interest Disclosure (Protection of Whistleblowers) Act.¹³⁶ The definition of property provided under section 2 of the PPMLA has been widened by the amendment to include proportional value of property to substitute for missing or intermingled property.¹³⁷



3.3.5.1 Adequacy of the Act

The link between corrupt practices and money laundering is undeniable. Corrupt public officials are able still to transact with the world even if there is overwhelming evidence that their wealth was obtained illicitly, thereby enabling them to hide or profit from corrupt practices related to foreign aid. This can be seen through the provision of private banking services to politically exposed persons (PEPs) in places such as Switzerland, the Isle of Man or the Cayman Islands, which enables these kleptocrats to stash away embezzled funds. Corrupt public officials also embezzle aid funds through the purchase of property or investment in cash-intensive businesses. The case of Henry Kapoko discussed earlier provides an example of this. Kapoko was charged with money laundering in addition to a

134 Section 3(b) of the Prohibition and Prevention of Money Laundering (Amendment) Act 44 of 2010.
135 Section 3(c) of the Prohibition and Prevention of Money Laundering (Amendment) Act.
136 Section 14 of the Prohibition and Prevention of Money Laundering (Amendment) Act.
137 Section 3(d) of the Prohibition and Prevention of Money Laundering (Amendment) Act.

number of corruption offences. He is alleged to have laundered the money through the purchase of five properties which included a lodge.¹³⁸

The court in the case of *Stella Chibanda* stated that the aim of the Act was to keep dirty money dirty.¹³⁹ The provisions of the Act regarding preventing, detecting and deterring the transfer of funds that are derived from crime are robust enough to cover this. Thus the Act can assist in combating corruption in foreign aid by preventing the legitimization of foreign aid funds that are stolen or acquired through corrupt practices. The inclusion of proportional value of property to substitute for missing or intermingled property will act to ensure that aid funds that have been converted into another form are restored.

3.3.5.2 Effectiveness of the Act

The effectiveness of the principal anti-money laundering statute was captured in the Kapoko case, where the prosecution relied on the provisions of the PPMLA to obtain a confiscation order from the court.¹⁴⁰



3.4 Observations

The indicators used to determine whether UNCAC addresses grand corruption apply to Zambian anti-corruption laws since UNCAC serves as yardstick against which they are measured. The first indicator is the recognition that corruption is not limited to bribery but extends to the offences identified above, which incorporate elements of grand corruption. Zambia provides for most of these offences, thus the law can be said to be adequate and

138 Post Newspaper (2012).

139 *Stella Chibamba and Nico Farms Ltd v The Commissioner, Drug Enforcement Commission and the Attorney General and Stanbic Bank Zambia Ltd* 2003/HP/0242.

140 Lusaka Times (2014).

have the potential to address effectively grand corruption in foreign aid. Unfortunately, the effectiveness of the law is weakened by the lack of a separate offence of embezzlement.

The second indicator is the recognition of the importance of asset recovery. This addresses grand corruption in two ways. Firstly, international co-operation in preventing, detecting and deterring the transfer of illicitly acquired funds limits the opportunities for public officials to stash away corruptly acquired aid monies. Secondly, international co-operation in extraditing offenders and repatriating stolen aid funds limits the gains from corruption and increases the risks involved in engaging in corrupt practices.¹⁴¹

The laws addressing the problem of corruption are robust and Zambia does a good job of implementing the other provisions relating to grand corruption, such as establishment of an autonomous anti-corruption body. However, the rare conviction of high-ranking officials or even the non-serving of sentences in instances where they are convicted, acts as a barrier to the effectiveness of these laws. Furthermore, the law does not provide a procedure for donors to require or force Zambia to prosecute senior government officials even where it is clear that they have stolen millions in aid funds.

141 Hechler *et al* (2011) 12.

CHAPTER FOUR

Conclusion and Recommendations

4.1 Conclusion

The study was conducted to examine the relationship between foreign aid and corruption in Zambia. There is a causal relationship between foreign aid and corruption. Foreign aid provides breeding ground for corruption by freeing up resources or creating new ones which exacerbates existing corruption. Corruption negatively impacts on aid by diverting resources from their rationale. Foreign aid is considered to be an important source of revenue and resources in Zambia and it has been provided with a view to alleviating extreme poverty in the country. However, foreign aid has provided public officials with opportunities to plunder the nation's resources that have been freed up by aid funds and this has perpetuated the existing corruption. Large sums of aid not only have exacerbated existing corruption, but also have bred it by providing public officials with readily available funds for which they do not have to account. Aid disbursements have served only to encourage dependency, decrease accountability and reduce creativity.

Providing foreign aid to alleviate poverty is a noble goal, but controversy exists as to whether aid has been effective in bringing economic and social development to Zambia. Despite mechanisms such as conditionality being put in place to ensure its success, foreign aid disbursed in Zambia to foster conditions that will promote long-term, self-sustaining economic growth has not been particularly successful in eliminating or even reducing poverty. This has been proved by the decline in GDP *per capita* even as aid was being delivered, and the situation has not improved much in recent times. Donors have struggled

to safeguard against the misuse of foreign aid and ensure that aid funds are spent wisely. Rather than alleviating poverty, aid has contributed to keeping 60% of the population below the poverty line by perpetuating and exacerbating corruption. Thus, foreign aid may be a worthwhile endeavour but simply donating money is not in itself a solution.

Despite various studies demonstrating that it has not been particularly productive, Zambia continues to receive billions in foreign aid. Such aid has minimal positive effects and permits a handful of senior officials to enrich themselves at the expense of ordinary citizens. Grand corruption in the form of diversion, embezzlement and misappropriation of aid has been recognised as having a negative impact on aid effectiveness due to the fungibility of the resources provided. Donors have resolved to tackle the problem of corruption in aid. They have paid more attention to cases in which aid funds have been misused and have not reached their intended recipients, unlike in the past when donors simply disregarded corruption by senior public officials in favour of political considerations.

The legal framework for fighting grand corruption in foreign aid is mostly in place in Zambia, although there are some gaps and implementation challenges that still exist. Providing laws that have a broad reach is commendable, but the limits of the law must be recognised. Fighting corruption in aid necessitates the use of multifaceted measures which require political will and leadership.

4.2 Recommendations

4.2.1 Pre-emptive Measures

Passionate declarations about zero tolerance of corruption in themselves are not sufficient to tackle the problem. A holistic approach that goes beyond political slogans and moral

campaigns is needed to fight grand corruption in aid. Furthermore, the commitment required from political leaders and key stakeholders needs to be long term to prevent the possibility of co-ordination failure. The will to see strategies through to their completion or to sustain co-ordination among stakeholders often is lacking.

Investigating and prosecuting heads of state and senior government officials who are responsible for the theft of aid funds will remain a challenge as long as the decision to prosecute rests in the hands of those very officials. A reform of the entire judiciary is necessary to ensure its independence and efficiency.

Whistleblowers apparently brought allegations of corruption to the attention of donors before the MoH scandal broke. Donors allegedly requested proof from the whistleblowers before they could follow up on the allegations. Donors rather should have followed up on the allegations or requested the ACC to do so. There must be systematic follow up of corruption allegations made by whistleblowers, if any headway is to be made in the fight against corruption in foreign aid.

There is a dearth in the information available on grand corruption in foreign aid. Statistics on corruption cases involving foreign aid should be collected and published as well as other information pertaining to foreign aid.

Civil society plays an important role in increasing awareness of corruption in the administration of aid. It can ensure that public officials are accountable to the people they serve and that there is transparency in handling of aid funds. Thus there is a need to improve the relationship between government and civil society when it comes to information sharing.

Most of the staff mandated to investigate and prosecute grand corruption in foreign aid lack the requisite investigative and prosecution skills. Provision should be made for effective and efficient training of officials involved in anti-corruption activities.

Foreign aid is still used as a means to further donor interests and thus little has been done to tighten aid standards to reduce grand corruption. Donors are preoccupied with ensuring that Zambia adopts economic and political policies that they espouse, rather than serving the needs of the people and the Zambian economy. Rethinking the ways in which aid is administered and delivered can play a significant role in the reduction of grand corruption in the aid context.

4.2.2 Anti-Corruption Laws

The crime of embezzlement is essential in cases of grand corruption in foreign aid. Zambia needs to introduce a separate offence of embezzlement in fulfilment of its international obligations.

The lack of legislation on access to information affects levels of transparency and accountability. Government has been promising to enact a law dealing with this, but yet has to do so. There is a need to speed up the process of adopting a law on access to information. This law will assist in fighting corruption in foreign aid by increasing the levels of transparency and accountability in its management.

The recent scandals of corruption that have dominated news reports have been perpetrated by a host of different public officials and persons linked to public officials. The legal provisions on asset declarations in the Anti-Corruption Act and the Parliamentary and

Ministerial Code of Conduct Act are inadequate. Asset declarations must be extended to all public officials and politically exposed persons.

Political corruption is rampant in Zambia. Often, public funds are used to finance the ruling political party's expenditures. The prohibition of the use of illegal or corruptly obtained funds to finance political parties must be included in Zambia's anti-corruption laws.



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