CHAPTER THREE

CHAPTER FOUR

CHAPTER FIVE

CHAPTER ONE

1.0 INTRODUCTION

Background to the study.

It is not a secret that corruption in Zambia is widespread and the problem is getting worse and pervasive each year since the 1990's[1]. Corruption is not a problem which is only restricted to Zambia, but world over and, for this reason this study would also examine the corruption fight in other jurisdictions. Central to this study has been Government's removal of section 37 of the Anti-Corruption Commission (ACC) Act number 42 of 1996 amid opposition from various sections of society.

Three categories of corruption have been so far identified in Zambia, namely "grand corruption" committed mainly by bureaucrats involving large amounts of money through procurements, misappropriation of public funds, kick backs from privatization of state enterprises and on government agreements or contracts. This is also called "bureaucratic corruption" because it involves mainly, bureaucrats or public servants[2]. The second category is 'political corruption' involving politicians when they bribe electorates in return for votes.

"Petty corruption" is the third category and most visible and encountered by ordinary citizens in their everyday lives, for instance when acquiring a passport, National Registration Card, and also when encountering Road traffic patrols and so forth[3].

In order to combat the ever-growing corruption, Zambia has come up with legislation and other rules, beginning from the reign of President Kenneth Kaunda. During the first Republic, that is, 1964 to 1972, it is said that there was political and economic stability, and corruption was unheard of. However, the statement that corruption was unheard of

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1 A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page101

[2] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page101

[3] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page101

can not be taken to mean that Zambia was a corruption free society. Probably, the reality could be that there was no much awareness of the vice.

Corruption started growing between 1973 and 1990, the period dubbed as the second Republic. Copper prices had collapsed, major companies, industries and mines were nationalized[4].

The period 1991 to 2001 when Frederick J Chiluba was in power at the helm of the Movement for Multi Party Democracy (MMD), it is said that corruption had reached higher heights[5].

During the period when corruption was relatively low, it was treated like any other crime under the Penal Code[6]. Furthermore, only corruption in the public service was recognized. President Kenneth Kaunda introduced the Leadership Code which was even enshrined in the Republican and Party Constitutions.[7] The Code restricted leaders from earning extra income or owning more than one piece of land[8]. The Code also forbade a leader from directly or indirectly solicit or accept any property or other material benefit for himself or any other person on account of anything done, to be done or omitted to be done by him in the discharge of his duties, nor give or accept any gifts, save bonafide gifts.[9] This shows how the Kaunda regime, despite being a one party state had tried to maintain discipline in the preservation of national wealth. Leaders had to be accountable for their activities in public office.

In 1980, the United Nations Independence Party (UNIP) Government under the leadership of President Kenneth Kaunda enacted the first legislation to fight corruption. This was the Corrupt Practices Act, which had a broad definition of corruption to include

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[4] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page101

[5] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page101

[6] Cap.87 of the Laws of Zambia

[7] The One Party Constitution, part iv

[8] The Leadership Code, 1st schedule, regulation 4

[9] 1st schedule, regulation 6

the private sector[10]. The Act even established for the first time, the Anti-Corruption Commission which was given powers to investigate and prosecute corruption cases through the traditional courts of law[11].

During the period 1990 and 2001 a lot of legislation was enacted. First was the Parliamentary and Ministerial Code of Conduct Act[12] in 1994 and the Anti-Corruption Commission Act in 1996[13]. The Prohibition and Prevention of Money Laundering Act[14] was also enacted in 2001. All these enactments were as a result of the pressure from donors and civil society who were demanding for good governance. Despite the urge behind enactment of these laws, it was however a way in the good direction for Zambia's fight against graft.

Of all the legislation mentioned above, the Anti-Corruption Act number 42 of 1996 was very important. This piece of legislation had proved its efficacy as far as combating corruption was concerned. During its tenure, high profile cases were successfully prosecuted. For instance, in the case of Anti-Corruption Commission v Barnnet Development Limited (2008)[15], the Supreme Court agreed with the submission that section 37 of the Act was so broad that it allowed the appellant to question title to property, which was reasonably suspected to have been dubiously acquired by a public officer abusing or misusing his office, position or authority to obtain such property. This was in the case where Richard Sakala, former press aide to then president Frederick Chiluba, and chairman of the Industrial Development Corporation Estates, was said to have abused his office by corruptly facilitating transfer of property to the Respondent company through various stages by using companies and individuals as shields and undervaluing the said property. This case gives a good illustration on how effective section 37 of the ACC act of 1996 was. For instance, despite the clandestine activities in

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[10] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page101
[11] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page103
[12] No.35 of 1994
[13] No.42 of 1996
[14] No.14 of 2001
[15] SCZ No. 5

which Sakala was involved by hiding behind some company, he was easily linked to the corrupt transactions.

The law on abuse of office really proved its efficacy in that a lot of prominent officers who served under the former president Frederick Chiluba government were arrested and effectively prosecuted. A former military commander, General Wilford Funjika, was arrested and charged with corruption for allegedly engaging in illegal business deals while serving under former president Chiluba. General Funjika, former commander of the Zambia National Service (ZNS), was arrested, prosecuted and convicted for abuse of office. Chiluba was arrested himself and faced various charges of corruption, abuse of office and theft charges amounting to about $45-million, allegedly stolen from government. Funjika was the second-highest-ranking former security chief from the Chiluba era to be arrested and charged with corruption and abuse of office.
Zambia's former intelligence boss Xavier Chungu was also convicted on charges of stealing government vehicles, abuse of office and corruption allegedly committed during his 10 years in the post. Chiluba's former press aide Richard Sakala was jailed for five years for theft of government vehicles and properties, abuse of office and corruption.[16]

Other prominent figures to be convicted were former air force commander, Christopher Singogo and former army commander Geojago Musengule. Singogo was jailed for six years and later for four years in two separate corruption cases. Musengule was jailed for four years for corruption while he headed the military under former President Frederick Chiluba. He was convicted on 12 counts of graft and abuse of office for handing his business ally Amon Sibande a lucrative contract to supply fuel to the army without following government tender procedures.

Western donors and international agencies praised Zambia's government for tackling corruption in a crackdown introduced by late President Levy Mwanawasa. Musengule was sentenced up to four years in prison on each of the charges, with the sentences running concurrently.[17]

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[16] Former military commander arrested in Zambia'http://www.iol.co.za/news/africa Accessed on 19/04/11

[17] http://dalje.com/en-world/zambia-jails-former-army-commander-over-graft/239179

It was saddening that despite the high profile convictions as stated above, which were as a result of section 37 of ACC Act[18], Government of the Republic of Zambia nevertheless found it prudent to repeal the law on abuse of office offence. All these cases mentioned were unreported at the time of this research.

On the 24th September, 2010, government presented a Bill in Parliament entitled 'the Anti-Corruption Commission Bill number 41 of 2010' that sought to amend section 37 of the ACC Act number 42 of 1996, which gave power to the Director General or any Officer of the Commission authorized in writing by him, to investigate any public officer where there were reasonable grounds that such a public officer had abused his or her office.

The Ant-Corruption Bill was preceded by much public debate, for instance, the Executive, who were opponents of section 37 of the Act, argued that the Act was a barrier to public officers as far as decision making was concerned[19]. Furthermore, they argued that the said provision in the Act was a mere duplication of other legislation and worse still, that it was unconstitutional. On the other hand, those who had opposed the amendment to the law argued that removing the clause would amount to watering down the fight against corruption[20]. For instance, Bob Sichinga, a prominent politician, called on the opposition Members of Parliament and backbenchers to oppose Government moves[21]. Sichinga was of the view that Government's intention to remove the section was meant to protect certain individuals against prosecution. Furthermore, the proponents for maintaining section 37 in the Act were of the view that those in Government wanted to repeal the law because it targeted them, and that if such a move succeeded, then corrupt activities by public officials would be perpetuated without any need to account.

However, despite much opposition against repeal of the law on abuse of office offence, the Bill was passed in parliament and assented into law by the President on the 14th

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Accessed on 19/04/11

[18] No. 42 of 1996

[19] Post News Papers, Thursday, 29 July 2010

[20] Post News Papers, Thursday, 29 July 2010

[21] Sunday Post,26 September 2010

November,2010.The question, therefore, is 'can Government's reasons for amending the law be justified?'

The purpose of this study, therefore, is to analyse the existing laws on Zambia's fight against corruption and, whether these laws are adequate to cover the gap left behind by the repealed law on abuse of office offence.

The specific objectives of the study are as follows:

- To trace various legislation on the fight against corruption in Zambia since independence
- To examine how the war on corruption is waged in other jurisdictions and how such knowledge can assist Zambia in her efforts against graft.
- To examine whether the repeal of section 37 of the ACC Act number 42 of 1996 and the law replacing it was within the spirit of aligning the resulting law with international standards, for instance, within the spirit of the United Nations Convention on Corruption, more especially articles 19 and 20.
- To examine whether Government had proved their point for amending the law on abuse of office offence.

This study is important because, in the first place, it is a partial fulfillment to the award of the Bachelor of laws Degree. Secondly, the study on corruption is topical today. Abuse of office has meant that those who are entrusted with wealth of the nation are instead illegally enriching themselves with public funds. There is, therefore, need to enact laws which could make it easy to prosecute and prove acts of corruption. Policy makers need proper advice based on research if they are to be rational in their legislative task. They need to be well informed on the importance of the available laws. This study would, therefore, add to the existing body of knowledge on corruption.

At this point I wish to introduce the proceeding chapters of the study. Chapter two looks at various laws and other anti-corruption codes which Zambia has generated since independence in 1964. As already alluded to, the problem of corruption is not only

unique to Zambia, but cuts across countries. This study, therefore, has been structured in such a way that chapter three has been dedicated to exploring the legal framework on corruption in at least two other jurisdictions. Chapter three would further analyse the International Instruments on corruption fight. Chapter four will make up the presentation and analysis of the findings, while chapter five raps up the study by conclusions and recommendations.

CHAPTER TWO

2.0 ZAMBIA'S CORRUPTION FIGHT SINCE INDEPENDENCE

As observed by the African Capacity Building Foundation, corruption in Zambia has evolved over three (3) phases[22]. The first phase is the period between 1964 and 1972. During this period, there was political and economic stability such that corruption was generally unheard of or shunned if any[23]. The economy was still strong during this period.

The second phase is 1973 to 1990, during which period the economy saw its decline. It was during this period that incidents of corruption started emerging and, as a consequence, attempts to combat the vice[24]. During this period a lot happened on the negative side of the economy. Copper prices, a major economic activity, collapsed, major companies, industries and mines were nationalized, there was an abortive agricultural reform, and increased support to liberation movements in Southern Africa coupled with the influx of refugees, and a one party state was declared, with the United Nations Independence Party (UNIP) as the sole party legally[25].

The third phase is 1991 to 2001 during the Frederick Chiluba reign[26]. It is said of this period that Zambia had experienced widespread corruption, and most state enterprises were privatized but, the process was not carefully planned and executed because it did not create a competitive private sector.

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[22] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page101

[23] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page101

[24] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page101

[25] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page101

[26] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page101

Practices Act borrowed its main features from the Corrupt Practices legislation in Hong Kong, including the current section 37 (now repealed by the Zambian legislature), that is the central idea to integrity legislations across the member states of the Common Wealth.[34]One case is known to have been litigated under the CPA. In Re Implied amendment of the Constitution; Re: Corrupt Practices Act v The People[35],The High Court ruled that section 53(1) of the CPA was in contravention to the Constitution of Zambian. The said section required that were an accused person elected to say something in defense, he had to say it on oath only (thus excluding the option to an unsworn statement).

Zambian governments from the beginning had no comprehensive strategy or plan to combat corruption. The approach has been piecemeal[36]. The first known instrument to curb corruption was the Leadership Code introduced by the UNIP Government under the leadership of Dr Kenneth Kaunda in 1973. The Code was made part of the Republican Constitution[37], and it covered all persons in the Party, Government, local authorities, statutory corporations, institutions of higher learning, any commissions established by law, Zambia Congress of Trade Unions and its officials[38]. The Code forbade leaders from owning real property outside Zambia or owning more than one piece of land not exceeding ten (10) acres in Zambia. Those covered by the Code were required to declare their assets within three (3) months of assuming office. By virtue of the Code, leaders were not allowed to receive gifts or abuse their office, or to use information acquired while in office for private gain[39]. Any failure to comply with the requirements of the code had fatal consequences; it even led to dismissal from office[40].

The UNIP Government had also set up an investigative team on corruption. The team was dubbed the "Special Investigation Team on the Economy and Trade" (SITET), which

[34] The Post Newspapers, Monday, 8th September, 2010
[35] (1984) Z.R
[36] Chanda A. W, Regional Integrity Systems, Country Study Report, Zambia,2002 pgage57
[37] One Party Constitution, part iv
[38] The Leadership Code,1st schedule, Regulation 2
[39] The Leadership Code,1st schedule, Regulations 3,4,6,7,8,9

[40] The Leadership Code,1st schedule, Regulation 13

is said to have been the forerunner of the Anti-Corruption Commission[41]. The SITET did not make any meaningful impact.

In 1991, after multi- party elections, UNIP lost power to the Movement for Multiparty Democracy (MMD) led by President Frederick Chiluba. The MMD Government scrapped the Leadership Code and, as a result, public leaders were now allowed to own and run businesses while in office[42]. Since the Leadership Code was scrapped, all its restrictions disappeared with its demise. It is said that under the Chiluba reign, corruption had become more of an easily acceptable practice. Most literature had likened it to corruption in Hong Kong of the 1960's where the ordinary citizens had three (3) options, viz, either "getting into the bus" (actively participating in corruption) or "running along the bus" (being a by-stander who did not interfere with the system) or standing in front of the bus" (reporting or resisting corruption), although the latter was not one for the ordinary citizen[43]. This is what happens when leaders are devoid of any commitment to the graft fight. They even weaken laws which seem to be a threat to their illegal activities.

2.2 Anti-Corruption Legislation during the Second Republic

This part of the paper has been divided into two periods, namely the Chiluba era and the Mwanawasa era. The rationale here is that it is during these periods that much took place as regards high corruption and later successful prosecutions.

2.2.1 The Frederick Chiluba era

A lot of anti- corruption related legislation was enacted during the Chiluba reign. It is said most of this legislation was supply driven, that is, it was forced on the Executive by the donor community who tied their financial aid to good governance and other

[41] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page103

[42] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page104

[43] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page104

b) Maintained a standard of living above that which was commensurate with his present or past official emoluments;
c) Was in control or possession of pecuniary resources or property disproportionate to his present or past official emoluments; or
d) Was in receipt of the benefit of any devices which he may reasonably be suspected of having received corruptly or in circumstances which amounted to an offence under the Act.

If such a public officer was found wanting as above, unless he gave a reasonable explanation, had to be charged with the offence thereby. If no reasonable explanation was given to the court, such a public officer was to be guilty of an offence. Under the section, "Official emoluments" included a pension, gratuity or other terminal benefits. On the instigation of the Civil Society and the Donor Community, the MMD government in 1996 also adopted the Electoral Code of Conduct Regulations, meant to reduce corruption in the electoral process[50]. The Code forbids the use of public resources for election campaigns and also provides calls for balanced and fair coverage of election campaigns by the media. It is noted that the Code does not have an enforcement mechanism and, none of the investigative organs accepts responsibility for enforcing the Code.[51]

2.2.2 **The Levy Mwanawasa era**

In 2001, the MMD ushered in a new government led by Mr. Levy P Mwanawasa. The MMD under Mwanawasa rode on the back of Anti-corruption crusade, and was generally claimed to be committed to anti-corruption fight[52]. In his demonstration of what he termed as zero tolerance to corruption, President Mwanawasa established an institution dubbed, 'The Task Force on Corruption'.[53]The Task Force on corruption was an Inter-

[50] TIZ, Government Machinery for Accountability, page 28

[51] TIZ, Government Machinery for Accountability, page28

[52] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page105

[53] Zambia: Moves Against Corruption; Pambazuka News; http// www.pambazuka news.org , accessed on 20/12/10

agency body consisting of various representatives of law enforcement and regulatory institutions.

It was during this period that a lot of high profile convictions as alluded to under chapter one of this study were made. To show his commitment towards the fight against corruption, president Mwanawasa started by asking parliament to remove his predecessor's presidential immunity so that the latter could stand trial for abuse of office offences leveled against him. This move was hailed and justified even by the courts of law. For instance, the High Court upheld parliaments move when Chiluba challenged the decision. Judge Anthony Nyangulu said that the then Zambian President, Frederick Chiluba could be stripped of his immunity and face prosecution on corruption charges.

Judge Nyangulu said parliament had acted within its powers when it voted last to strip Mr. Chiluba of the presidential immunity he enjoyed during his decade in office.

Several Chiluba-era officials were charged with corruption as part of a major crackdown on graft ordered by his successor, President Levy Mwanawasa. The ruling followed a legal challenge against the vote by Chiluba supporters.[54]

Passing out the judgment Judge Nyangulu said the National assembly was the only body under the Zambian constitution with authority to remove immunity of the President to answer to charges committed in both his public and private life.

"I find that there was no inappropriate in the National Assembly's removal of Chiluba's immunity the High Court can not require that a power be exercised in any particular manner, but can only require that a discretion lying behind the decision to exercise the power be used lawfully," Judge Nyangulu said.

More anti-corruption related legislation was enacted during the Mwanawasa era. In 2001 the Prohibition and Prevention of Money Laundering Act[55] was enacted. The Act created the Anti-Money Laundering Authority and an Anti-Money Laundering Investigations

[54]High Court upholds lifting of Chiluba's immunity
http://www.zamnet.zm/newsys/news/viewnews.cgi?category
Accessed on 19/04/11
[55] TIZ, Government Machinery for Accountability, page 28

Unit. The Act's major objective is the prohibition, prevention and detection of Money Laundering in the Republic of Zambia[56].

Again, on the 12th April, 2010, the Public Interest Disclosure (Protection of Whistleblowers) Act[57], was enacted. According to its preamble, the Act is meant to provide for disclosure of conduct adverse to the public interest in the public and private sectors. To be protected by the Act, a disclosure by a public officer to the Anti-Corruption Commission has to be made in accordance with the Anti-Corruption Commission Act, and be a disclosure of the information that shows or tends to show that a government agency or another public officer has engaged, is engaging or intends to engage in corrupt conduct[58].

Another legislation to be enacted in the recent times is the Forfeiture of Proceeds of Crimes Act[59] which was assented into law on 13th April 2010. In its preamble, the Act is meant to provide for the confiscation of the proceeds of crime; provide for the deprivation of any person of any proceed, benefit or property derived from the commission of any serious crime; facilitate the tracing of any proceed, benefit and property derived from the commission of any serious offence; provide for the domestication of the United Nations Convention against Corruption; and provide for matters connected with, or incidental to the foregoing. Section 71(1) of the Act , provides that after commencement of the Act, a person who receives, possesses, conceals, disposes of , or brings into Zambia any money, or property, that may reasonably be suspected of being proceeds of crime commits an offence.

2.3 **Section 37 of the ACC ACT No. 42 OF 1996 is finally repealed**

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[56] TIZ, Government Machinery for Accountability, page 29
[57] No.4 0f 2010
[58] Section 26, Act No. 0f 2010
[59] No.19 of 2010

The Anti-Corruption Bill[60] was finally tabled in Parliament on 24th September, 2010, which was aimed to enhance the prevention, detection, investigation, prosecution and punishment of corrupt practices and related offences and to bring the law into conformity with the provisions of the regional and international conventions to which Zambia is a state party, and also to implement the National Anti-Corruption Policy, 2009[61]
Section 37 was repealed and replaced by the `Concealment of offence', which creates an offence for a person who with intent to defraud or to conceal the commission of an offence with regard to the various offences of corrupt practices, destroys, alters, mutilates or falsifies any book, document, disk, computer printout, among other things.

2.3.1 **Stakeholders concerns towards the Bill amending Section 37**

Stake holders expressed varying concerns towards the repeal of the abuse of office offence. Those who were against the repeal submitted that, in the first place, the definition of corruption in the Bill was not consistent with that used in the United Nations Convention against Corruption(UNCAC), the SADC protocol Against Corruption, the AU Convention against Corruption Policy launched by Government in 2009. Specifically, it was worrying that the Bill proposed to omit the element of 'abuse of office' from the definition of corruption[62].

Some stakeholders strongly opposed the proposal in the Bill to remove or modify Section 37 of the repealed Act because they felt that the offence of corruption hinged on abuse of office[63]. It was felt that instead, the provisions were supposed to be tightened further, for instance, by inclusion of abuse of office by private officials as well as public officials. Furthermore, that though the offence of abuse of authority of office was provided for in the Penal Code, the provisions under the ACC Act was more comprehensive as it covered circumstances where a public official was found in possession of unexplained property,

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[60] National Assembly Bill no.41 0f 2010
[61] Report on the Committee on Legal Affairs, Governance, Human Rights and Gender, 2010
[62] Report on the Committee on Legal Affairs, Governance, Human Rights and Gender, 2010
[63] Report on the Committee on Legal Affairs, Governance, Human Rights and Gender, 2010

thus it gave powers to the prosecution authority to effect an arrest if a public official failed to account for what he or she possessed.[64]

It was further argued that the provision in the Penal Code was inadequate as it made the offence a misdemeanor which attracted weak sanctions and penalties. The contention was also that the offence under the Penal Code was enforceable by the Zambia Police Force as provided under the Criminal Procedure Code[65], and that the Zambia Police Force suffered from inadequate capacity and should not be charged with the onerous task enforcing such an important piece of Legislation; on the contrary, this power should be deposited in a specialized entity, the Anti-Corruption Commission[66].

On the argument that Section 37 in the repealed Act shifted the burden of proof from the prosecution, and placed it on the accused, it was submitted that the provision merely required a public officer to explain how he or she utilized his or her office or acquired wealth. It was contended that those who aspired for public office must be ready to explain any suspicion of corruption and that in any even, such provision was accepted in the terms of Article 18 (12) of the Constitution of Zambia which provided, inter-alia, that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Article (18) (2) (a) on the presumption of innocence to the extent that, it was shown that the law in question imposed upon any person charged with a criminal offence the burden of proving particular facts. In view of the foregoing, therefore, the provisions of Section 37 did not constitute a shift in the burden of proof, but merely a constitutionally accepted qualification of it[67].

It was further submitted that the abuse of authority clause had proved its efficacy as evidenced by the fact that a number of prosecutions based on the provision had been

[64] Report on the Committee on Legal Affairs, Governance, Human Rights and Gender, 2010
[65] Cap.88 of the Laws of Zambia
[66] Report on the Committee on Legal Affairs, Governance, Human Rights and Gender, 2010
[67] Report on the Committee on Legal Affairs, Governance, Human Rights and Gender, 2010

sustained in the courts of law. It was also felt that the provision had acted as a deterrent to would-be offenders, since public officers were aware that they could be questioned if they accumulated wealth not commensurate with their official earnings. It was further stressed that corruption was a clandestine activity whose direct evidence of commission was difficult to obtain if not through examination of the property accumulated by those involved in it[68].

However, other stakeholders had opposing views against maintaining Section 37 in the Act. They argued that repealing the section was necessary because its provisions under subsection (2) were at variance with Article 18 (7) of the Constitution which provided that a person who is tried for a criminal offence shall not be compelled to give evidence at the trial[69]. They contended that there was no exception made to the right of an accused person to remain silent, and therefore no law could make a provision that would have the effect of compelling an accused person in a criminal trial to give evidence during such trial as is the case in Section 37(2) of the ACC Act number 42 of 1996.

Further, it was submitted that the provisions of Article 20 of the Convention against Corruption were that subject to its constitution and fundamental principles of its legal system, each state party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, 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. It was argued that in reviewing the Anti corruption commission Act; the Government had a duty to ensure that this provision was removed in order to make it consistent with the Zambian constitution and the fundamental principles of the Zambian Legal System[70].

The stakeholders in favor of repeal of section 37, further stated that the provisions of the section had their genesis in the Leadership Code in the First Republic under the

[68] Report on the Committee on Legal Affairs, Governance, Human Rights and Gender, 2010
[69] Report on the Committee on Legal Affairs, Governance, Human Rights and Gender, 2010

[70] Report on the Committee on Legal Affairs, Governance, Human Rights and Gender, 2010

One Party State which was premised on socialism and, where public officers were prohibited from engaging in other types of activity to earn supplementary income. Furthermore, that there were practical difficulties in applying the provision as it effectively required the state to scrutinize present and past emoluments and required a citizen to provide records of all their income, both official and otherwise, which could not be reasonably expected to be kept by a citizen.

It was also argued that the provision was discriminatory as it ignored private sector corruption, which was also a reality.

Finally, the argument was that the provision in the Bill adequately covered all the corruption related offences that were in the Anti-Corruption Commission Act of 1996 and even introduced new offences.

This Chapter has attempted to give an account on how the Republic of Zambia has tried to bring in various interventions to counter the corruption scourge since independence. It has shown how various regimes have either embraced the fight against corruption or instead embraced corruption itself. The closing of the Chapter has witnessed the demise of an important legislation which formed the topic of this research.

CHAPTER THREE

3.0 CORRUPTION FIGHT IN OTHER JURISDICTIONS AND INTERNATIONAL INSTRUMENTS

As alluded to in the introductory chapter to this study, this party of the research is intended to explore anticorruption legislation and experience in other jurisdictions, as well as to examine necessary international instruments on the topic of study. This is necessary for comparative analysis to the Zambian situation.

3.1. International Instruments

3.1.2 The United Nations Convention against Corruption

The United Nations in realizing the evils of corruption came up with a document aimed at fighting the vice among state parties. The United Nations Convention against Corruption was opened to state parties for signature, ratification, acceptance, approval and accession from 9th to 11th December, 2003 in Merida, Mexico and, from then onwards, up to 9th December, 2005 at the United Nations Headquarters in New York.[71]

The Convention is divided into a preamble and eight chapters containing 71 Articles. In its preamble, the convention outlines the state parties concerns, convictions, and determinations. Thus, in the first paragraph, the concern is on the seriousness of the problems and threats posed by corruption to the stability and security of societies.

Under paragraph two, it has been acknowledged that there are dangerous links between corruption and other forms of crime, such as organized crime, economic crime and money laundering.

Paragraph three is a concern on cases involving vast quantities of assets which may constitute a substantial proportion of the resources of states, and it is believed that such

[71] Articles 67(1) to (4), 68(1), (2) 0f United Nations Convention against Corruption

type of corruption is a threat on political stability and sustainable development of those societies.

The United Nations has stated its conviction under paragraph four that corruption is no longer a local matter but a transnational phenomenon affecting all societies and economies, therefore, the need for international cooperation to control and prevent it. It is also convinced that availability of technical assistance play an important role in enhancing the ability of states and also by strengthening capacity and institutional building. A further conviction is that illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law.

Under paragraph eight of the preamble, the convention highlights the United Nations determination to prevent, detect and deter in a more effective manner the international transfers of illicitly acquired assets and to strengthen international cooperation in asset recovery. In paragraph nine, the fundamental principles of due process of the law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights, are being acknowledged by the United Nations.

The United nations has born in mind that the prevention and eradication of corruption is a responsibility of all states and that there is need for cooperation with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organization and community-based organizations if their efforts are to be effective.

The United Nations have seen the importance of the principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and the need to safeguard integrity and foster a culture of rejection of corruption.

Chapter three of the United Nations convention has criminalized a lot of actions. But perhaps more important to this paper are those provisions under articles, 19, 20, 21 and 24. Each state party has been encouraged to adopt legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse

of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining the undue advantage for himself or herself or for another person or entity.[72]

The convention is against illicit enrichment. It states that, subject to its constitution and the fundamental principles of its legal system, each state party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, 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.[73]

The convention has also recognized not only corruption in the public sector, but has also raised concerns in the private sector. Each state party has been urged to consider legislative or other measures to establish as criminal offences, when committed intentionally, in the course of economic, financial or commercial activities:

i) The promise, offering giving, directly or indirectly, of an undue advantage to any person who directs works, in any capacity for a private sector entity for the person himself or herself or for another person, in order that he or she, in breach of his duties, act or refrain from acting;

ii) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity for a private sector entity, for the person himself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

The United Nations also urged state parties to legislate or adopt other measures to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with the convention without having participated in such offences, the concealment or continued retention of property when

[72] Article 19 0f United Nations Convention against Corruption

[73] Article 20 0f United Nations Convention against Corruption

the person involved knows that such property is the result of any of the offences established in accordance with the convention.[74]

From the above, it is clear that the United Nations, which is an organization of civilized states, has set standards by which every serious government in trying to eradicate corruption should benchmark itself. However, the way the document was drafted follows the principle of *pacta sunt servanda*, that is, agreements must be kept. The principle does not really have the use of force to compel parties to abide by the rules, but merely by moral standards urges them to respect the rules. This should not be an excuse for countries not to follow the very advanced provisions of the convention.

3.1.3 **The Southern African Development (SADC) Protocol against Corruption and the African Convention on Preventing and Combating Corruption**

The SADC protocol was adopted in 2001 by all 14 SADC members. It provides both preventive and enforcement mechanisms. The purpose of the Protocol is (a) to promote the development of anti-corruption mechanisms at the national level (b) to promote cooperation in the fight against corruption by state parties and (c) to harmonize anti-corruption national legislation in the region. Preventive measures include the development of a code of conduct for public officials, transparency, and establishment of anti-corruption agencies. In line with the OECD Convention, the Protocol criminalises the bribing of public foreign officials. It also addresses the issue of money laundering by allowing for seizure of the proceeds of the crime, thereby making it more difficult to benefit from proceeds of corruption. The Protocol also sets out an implementation mechanism.[75]

The African Union on Preventing and Combating Corruption adopted in 2003; this legally binding convention has been ratified by 53 African countries. It covers the public and the private sector. Offences covered are bribery (domestic or foreign), diversion of property by public officials, trading in influence, illicit enrichment, money laundering

[74]Article 21 0f United Nations Convention against Corruption
[75]http:// www.biac.org/pubs/artibribery-resource/sect, accessed on 23/03/11

and concealment of property. All provisions are mandatory including those on private to private corruption. The Convention provides for prevention, criminalisation, regional cooperation and mutual legal assistance as well as the recovery of assets. The follow-up mechanism provided for in Art. 22 calls for an Advisory Board which has broad responsibilities for promoting anti-corruption work, collecting information on corruption in Africa, developing methodologies, advising governments, public officials, and building partnerships. In addition it is required to submit a developing code of conduct for report to the Executive Council on a regular basis on the progress made by each State Party in complying with the provisions of the African Union Convention. States Parties are required to report to the Board on their progress in implementing the Convention on an annual basis. They are also required to ensure and provide for the participation of civil society in the monitoring process.[76]

South African Minister for the Ministry of Public Service and Administration, Moleketi, in her address to the Work Shop on Public Sector Ethics and Trust in Government held in Seoul, Korea,[77] noted that there are many differences among countries which included size, population, legal traditions and so forth. However, she observed that corruption is a common feature in all political systems despite the differences existing in their governing philosophies or geography. It was noted that National states are clearly aware that corruption presents a serious threat to their core principles and values, and hinders social economic development,

In her presentation, it was learnt that there are three important international instruments relevant to Africa, that is, the SADC Protocol against Corruption, the AU Convention on Preventing and Combating Corruption, and UNCAC. The three instruments are aimed at promoting and strengthening the development of mechanisms and policies that would prevent, detect and punish corruption, and contain many provisions that are similar or have similar objectives.

Moreketi summarized the provisions of the AU Convention in its preventive measures as requiring state parties to establish anti-corruption bodies and enhanced transparency. That

[76] http:// www.biac.org/pubs/artibribery-resource/sect, accessed on 23/03/11

[77] http://www.unpan1.un.org/intradoc/groups/public/doc, accessed on 23/03/11

state parties should also actively promote the involvement of civil society and the media to raise public awareness of corruption.

State parties are also urged to criminalize a variety of actions, not only basic forms of corruption like bribery, but also concealment and 'laundering' of proceeds of corruption and illicit enrichment.

Moreketi further advised state parties to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court and to extradite offenders, as well as to undertake measures to support the tracing, freezing, seizure and confiscation of proceeds of corruption.

3.2 Country studies

3.2.1 BOTSWANA

Botswana is ranked on number 33 on the Transparency International Corruption Perception Index (CPI) of 2010. Though the index is said to be controversial, it is however regarded as the most credible measure of domestic public corruption.[78]

It is said that Botswana's rapid pace of development brought both benefits and problems.[79] Benefits, in that, the development of the mineral resources made the country self reliant. Development has brought about the acquisition of considerable revenues and a rapid expansion of the public service. Botswana has found it difficult to tightly control both the benefits and problems in spite of political determination. There have been a lot of weaknesses in the system, more especially at middle management where delegated authorities have been abused.[80]

It is understood that the country in recognizing the extent of the problem, took resolute actions in the form of the enactment of specific and powerful legislation and the establishment of a dedicated anti-corruption body.

[78] http://www.guardian.co.uk./news/datablog/2010, accessed on 23/03/10
[79] Directorate on Corruption and Economic Crime, Government of Botswana
[80] Directorate on Corruption and Economic Crime, Government of Botswana

It is said that corruption has never been publicly accepted in Botswana and, whenever scandals emerged they were met with general condemnation.[81] In the years 1980s and 1990s major corruption scandals involving very senior and prominent people were reported in Botswana. As a result, Commissions of Enquiry were put in place to try and address the vice. The directorate on corruption and Economic Crime believes that the reports from the enquiries brought a wrong perception that Government was powerless, or lacked political will to address the issues.[82]

The Botswana Government found it necessary to put in place the legal machinery to punish those involved in corruption irrespective of their status or political affiliation. In changing the laws, Botswana took into account the significant achievements of other jurisdictions. It is said that this approach achieved substantial results and, it involves the need for investigation and prosecution, public education and corruption prevention.

In 1994, Botswana enacted the Corruption and Economic Crimes Act.[83] The Act created new offences of corruption, including being in control of disproportionate assets or maintaining an unexplained high standard of living. In line with this development in the law, a new body, the Directorate on Corruption and Economic Crime (DCEC), was created and given special powers of investigation, arrest and seizure. The DCEC was established along the lines of the Independent Commission against Corruption (IACC) of Hong Kong after bench marking against other countries.

By the end of 1999 the DCEC had received a total of 5250 reports from which it launched 1565 investigations, 1018 were completed. 197 persons were prosecuted, with a conviction rate of 84%.[84]

Prior to the enactment of the ICAC, standards of ethical conduct in the Botswana civil service were based on several government documents which included, but not limited to;

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[81] Directorate on Corruption and Economic Crime, Government of Botswana

[82] Directorate on Corruption and Economic Crime, Government of Botswana

[83] No. 13 of 1994

[84] Gbadamosi, G, Corruption_Perception_and_Sustainable_Development http://eprints.worc.ac.uk/88/3/, accessed on 11/03/11

the public service charter; General Orders; and a number of ethics related guidelines.[85] Though DCEC was created for the public sector, it has realized the likely futility of its efforts if the private sector was neglected in the drive towards creating a more ethical work culture in the country.[86]

Factors which aided Botswana to Anti-Corruption efforts

The commitment at the top has been seen as one positive factor.[87] There has been a reported effort of good governance, improving the standards of living of the people and eradicating of poverty by government. Such commitment has been said to permeate a good number of leadership in the public service and the parastatals. It is said that the importance of top leadership commitment as a critical success factor in an anti-graft strategy is clearly demonstrated in the success of Hong Kong and Singapore in recent times.[88] Government of Botswana has embraced allegations of corruption raised by the media and have made investigations into such allegations instead of denying the reports out rightly.[89]

The second factor is that Botswana has embraced the 'cash less' society culture. Use of electronic banking services, credit/debit cards, ATMs, Cheques for payments and so forth is relatively on high in Botswana, and this significantly reduces the opportunities for corruption because large sums of money not properly accounted for can be traced and questioned. This is said to serve a vital lesson for other African economies.

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[85] Gbadamosi, G, Corruption_Perception_and_Sustainable_Development http://eprints.worc.ac.uk/88/3/, accessed on 11/03/11
[86] Gbadamosi, G, Corruption_Perception_and_Sustainable_Development http://eprints.worc.ac.uk/88/3/, accessed on 11/03/11
[87] Gbadamosi, G, Corruption_Perception_and_Sustainable_Development http://eprints.worc.ac.uk/88/3/, accessed on 11/03/11
[88] Gbadamosi, G, Corruption_Perception_and_Sustainable_Development http://eprints.worc.ac.uk/88/3/, accessed on 11/03/11
[89] Gbadamosi, G, Corruption_Perception_and_Sustainable_Development http://eprints.worc.ac.uk/88/3/, accessed on 11/03/11

However, despite seemingly a success story in Botswana's corruption fight, the country feels that more has to be done. The Directorate on Corruption and Economic Crime (DCEC) has pointed out the following as challenges:

i. The corruption and Economic Crime Act is considered inadequate to deal with issues of inside trading. Whistle blowing and cyber crime and is an area that requires urgent attention in order to tackle corruption. There is therefore, need to strengthen the legal frame work;
ii. Shortage of manpower at the Directorate of public Prosecutions (DPP) have resulted in the delay in prosecution of corruption cases;
iii. Botswana is yet to adopt the international criteria in dealing with the emerging trends in "e-corruption" committed via electronic devices such as email, facsimile, internet and telephone. There is also the problem of jurisdiction outside the county's territorial boundaries;
iv. There is difficulty in extraditing suspects who had absconded from bail and gone abroad, this relates to the problem of bail conditions set for foreigners and cooperation between states, sharing of crime data and harmonizing of laws;
v. The transnational nature of corruption and lack of cooperation from other jurisdictions.

3.2.2 **KENYA**

Kenya is ranked among the most corrupt countries in the world. According to the perception index by Transparency International, Kenya stands at number 154 on the Transparency International CPI.[90]

[90] http://www.guardian.co.uk./news/datablog/2010, accessed on 23/03/10

Kenya's corruption fight can be traced back to 1956 when the Prevention of Corruption Act (cap 65) was enacted.[91] The Act which has been amended several times, with far-reaching amendments in 1991, defined corruption and, detailed penalties against offenders.

Section 101 of the Penal Code,[92] also covers offences related to abuse of office. It was found that the two pieces of legislation as stated above were inadequate as far as corruption fight was concerned. One reason for the inadequacy was the vagueness in the definition of corruption and the other was to do with the focus (by the Act) on "public office" or "public body" effectively excluding the private sector.[93]

Apart from formal legislation in the corruption fight, other forces have also been involved. The press has been praised for its efforts in exposing incidents of corruption. One such incident to be exposed was what is called the 'Goldenberg Scandal' between 1991 and 1993. Non governmental organizations, especially the Catholic Church, spoke out against corruption in Kenya. The international community and organizations, which included the International Monetary Fund, condemned the Goldenberg Scandal. The Danish International Development Agency (DANIDA) cut its aid to Kenya as a result of corruption, more especially with the Goldberg scandal.[94]

It is said that the first comprehensive legislation against corruption came in 1997 when the Prevention of Corruption Act was amended, and resulted in the creation of the Kenya Anti-Corruption Authority (KACA).[95]

Before the introduction of KACA, there was a special police outfit called the Anti-Corruption Squad (ACP), appointed by the president.[96] The squad was tasked to help

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[91] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page 38

[92] Section 63 of the laws of Kenya

[93] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page 38

[94] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page 38

[95] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page 38

[96] Kivuta,K et al, Initiatives against Corruption in Kenya, Legal and Policy Intervention(2001),www.clarion Kenya.org/index.php/component/booklibrary/, accessed on 11/03/11

government fight corruption within the public and private sectors. The ACP is reported to have been doomed for failure from the beginning. One of the reasons was that it was ill conceived because it comprised one of the most corrupt institutions in Kenya, the Kenya Police. Instead of being the Anti-Corruption Squad, the ACP was now practically the 'corruption squad', therefore, was finally disbanded following public outcry.[97]

In July, 2001, the Anti-Corruption and Economic Crimes Bill was presented to parliament, which led to the establishment of the Kenya Anti corruption Commission (KACC).[98] The KACC was established as a body corporate, with powers to sue and to be sued, and to hold and alienate movable and immovable property. Its management was entrusted in a Director as Chief Executive Officer and four assistants. In performing their duties, the Commission and the Director are not subject to the direction and control of any other person and accountable only to parliament.[99]

It is important to note that before KACC was established, its predecessor, KACA was declared unconstitutional by a High court ruling. In the case of Stephen Mwangi Gachiengo and Albert Muthee Kahuria v Republic,[100] the questions brought to the fore by the accused were as follows:

i. Whether it was unconstitutional and contrary to the principle of separation of powers for KACA to be headed by a High Court Judge;
ii. Whether such leadership compromised the accused's right to a fair trial before an impartial court under section 77 (i) of the Kenyan Constitution;
iii. Whether the Attorney General's consent to the prosecution was valid under the constitution;
iv. Whether the provisions establishing KACA were in conflict with section 26 of the Kenyan Constitution.

[97] Kivuta,K et al, Initiatives against Corruption in Kenya, Legal and Policy Intervention(2001),www.clarion Kenya.org/index.php/component/booklibrary/, accessed on 11/03/11
[98] Kivuta,K et al, Initiatives against Corruption in Kenya, Legal and Policy Intervention(2001),www.clarion Kenya.org/index.php/component/booklibrary/, accessed on 11/03/11
[99] A Review of the Institutional Framework for Addressing Public Sector Corruption in Africa: African Capacity Building,2004,page 40
[100] (2000) H/C Misc Application No.32

The court held that the provisions in the Prevention of Corruption Act establishing KACA were unconstitutional and in conflict with the spirit and provisions of the constitution. This ruling effectively led to the demise of KACA.

There was one important provision in the powers of KACA. Clause 42 of the Bill empowered KACA to investigate how a public officer came into possession of any property if it appeared that such an officer maintained a standard of living above that which was commensurate with his or her present or past official emoluments.[101] However, it is said that the effect of this clause seemed to have been obliterated by another sub clause 6 which provided that 'subject to sub section 7 nothing in this section shall be construed as empowering the Authority or any other person or authority to investigate or require any explanation as to how a public officer acquired any of the property specified in the officers initial declaration of income, assets and liabilities under the provisions of any written law. The net effect is that a public officer who had looted public property would be safe from prosecution once he or she declared such property as his or hers under the code of conduct. Not even the Attorney General or the police could investigate that person.[102] It has been observed that Kenya's efforts in fighting corruption have not borne any fruits. Kivutha Kibwana and others have highlighted most of the reasons for this failure.[103] The Kenyan government has lacked political will to fight corruption, as doing so would be like fighting itself. The drafting of the bills meant for fighting corruption was designed so that they fail. The KACA lacked independence. It was noted that even when Parliament set up a select committee on Corruption, the same powerful political forces in Parliament who are beneficiaries of corruption would join hands to defeat the work of such a committee.[104] On the question as to what then could work for Kenya? Kivutha and others found that the enactment of more laws was not really an answer when the provisions in the existing laws were intended to defeat their very purpose.

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[101] Kivuta,K et al, Initiatives against Corruption in Kenya, Legal and Policy Intervention(2001),www.clarion Kenya.org/index.php/component/booklibrary/, accessed on 11/03/11
[102] Kivuta,K et al, Initiatives against Corruption in Kenya, Legal and Policy Intervention(2001),www.clarion Kenya.org/index.php/component/booklibrary/, accessed on 11/03/11
[103] Kivuta,K et al, Initiatives against Corruption in Kenya, Legal and Policy Intervention(2001),www.clarion Kenya.org/index.php/component/booklibrary/, accessed on 11/03/11
[104] Kivuta,K et al, Initiatives against Corruption in Kenya, Legal and Policy Intervention(2001),www.clarion Kenya.org/index.php/component/booklibrary/, accessed on 11/03/11

CHAPTER FOUR

4.0 RESEARCH FINDINGS AND ANALYSIS

It is clear from the findings of this research that there had been no time in the history of Zambia's corruption fight that had witnessed high profile convictions under a law as what had obtained under the repealed law on abuse of office offence. The successful prosecutions under the repealed abuse of office offence, of high profile public officers such as Geojago Musengule, Xavier Chungu, Richard Sakala, Wilford Singogo and others, is testimony of its efficacy. It can therefore be said that those in high offices were afraid of the law hence the need to repeal it, in case it may be used against them once they leave office.

The available laws on corruption fight in Zambia do not really make up for what the law under section 37 of the repealed ACC Act No 42 of 1996 was set to achieve. As highlighted in the findings, the repealed law was not a duplication of other existing laws in the Republic as claimed by government. The repealed law was unique as it had required a suspect to give an explanation as to how such a person acquired property and, maintained a standard of living which was not commensurate to his or her past or present lawful income. This provision of the law made it easy to use the unexplained accumulation of property as evidence against suspects of corruption.

In repealing the law, government did not put across convincing reasons as to why there was need for amendment in the said law. Government has, as reflected under chapter two of this research, lamentably failed to defend its reasons for repealing the law. For instance, it was stated that there was need to bring the law into conformity with the provisions of the regional and international conventions to which Zambia is a state party. However, the opposite was the reality. For how does repealing of the abuse of office offence be in the spirit of articles 19 and 20 of the United Nations Convention; as reflected under Chapter 3 of this paper? This defies all logic.

From government's arguments that the repealed law had shifted the burden of proof from the prosecution and placed it on the accused, the findings of the research were that those

who opposed the repeal had proved their point. They correctly stated that the provision merely required a public officer to explain how he or she utilized his or her office or acquired property, because those who aspired for public office must be ready to account. It was also well argued that the provision was not unconstitutional but provided for in terms of Article 18(12) of the Constitution of Zambia which provides that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Article 18 (12) (a) on the presumption of innocence to the extent that, it was shown that the law in question imposed upon any person charged with a criminal offence the burden of proving particular facts.

On government's argument that the repealed law had practical difficulties in applying the provision because it required the state to scrutinize present and past emoluments, and required a citizen to provide records of all their income, both official and otherwise, which could not be reasonably expected to be kept by a citizen. It was found that those in opposition to the repeal had well countered this claim by saying that on declaration of assets, the requirement should cover all public officers, and such declarations should be done upon taking office, annually and at termination of employment and, the commission should be given power to check the veracity of the declarations so made. This would ensure accountability of public officers. It was found that although the abuse of office offence was provided for in the Penal Code, the provisions in the repealed Act was more comprehensive as it covered circumstances where a public official was found to be in possession of unexplained property, it gave powers to the prosecuting authority to effect an arrest if a public official failed to account for what he or she possessed.

The provision in the Penal Code was found to be inadequate as it made the offence a misdemeanor attracting weak sanctions and penalties. It was further shown that the offence as provided for under the Penal Code and enforceable by the police under the Criminal Procedure Code, was a draw back as the police suffered inadequate capacity to be charged with such onerous task of enforcing an important piece of legislation.

It was further submitted that corruption was a clandestine activity whose direct evidence of commission was difficult to obtain if not through examination of the property accumulated by those involved in it.

From the study on other jurisdictions on the corruption fight, it was found that the two countries, involved, that is, Botswana and Kenya, had similar laws in place like the one we had in Zambia. For instance, it was found that both countries had in their respective Acts of Parliament provisions on abuse of office offence, which required a public officer to explain suspicious accumulation of wealth. While this seemed to have worked well in Botswana, it has been watered down in Kenya.

Botswana found it necessary to strengthen its laws on corruption by following the very progressive provisions in the United Nations Convention, while at the same time maintaining the abuse of office clause in its laws.

However, for Kenya it has been a different story, as Kivuta and others put it; the laws on corruption have been deliberately designed in such a way as to make them fail in the very purpose they were intended to remedy. Lessons from the two countries have reviewed that it is not really the strength of the law alone which makes the fight against corruption to fail or succeed, but there is need for political will to fight corruption on those who wield political power.

From the studies on Botswana, it has been found that despite their success story in the corruption fight, they still have a lot of challenges, for instance, the problem of non cooperation as far as jurisdiction is concerned between different countries. In Zambia, this brings us to the Frederick Chiluba saga which, despite overwhelming evidence of corruption and consequently a conviction in a foreign jurisdiction, the culprit escaped justice on the technicality of registration of judgment into Zambia. This weakness was echoed by the Swedish government through their head of development cooperation in Zambia, Georg Andren.[105] He pointed out that though there were institutions and legislation to fight corruption, there was lack of political commitment on the part of

[105] The Post newspapers, Wednesday 10th December,2010

government. Two cases which made the Swedish government to conclude that there was lack of political commitment were first of all, government's failure to appeal Chiluba's acquittal in 2009, and secondly, government's failure to appeal against the High Court's decision not to register the London judgment in Zambia which found Chiluba and others liable to have stolen US$ 46 million of public funds.

Kenya, despite being one of most corrupt countries in the world, has on record at least of striking its laws as unconstitutional through the courts of law. In Zambia it has been the opposite that the executive and the legislature had to declare an Act of parliament as unconstitutional. For instance, the Kenyan Anti-Corruption Authority was declared unconstitutional after litigation process in court. In Zambia what happened can be termed as Parliaments usurpation of judicial powers in making declarations against a law. Really, this is abuse of power.

Findings from Zambia and Kenya have been that the police have been found wanting as far as combating corruption is concerned in that in both cases, they are worst culprits embroiled in the vice they intend to defeat. The police lacked skills and were also amenable to political manipulation. This calls for specialized and independent institutions in fighting the scourge. However, enacting toothless laws as has been seen in Kenya, adds nothing to the most needed independence for the anti-corruption institutions. It has been learnt in Kenya that most anti-corruption laws have been designed to defeat the very purpose they were intended to achieve. In analyzing the findings in the Zambian situation, it can be safely said that the idea of going back to the Penal Code and use its provisions on abuse of office offence is making the laws fail.

A few positive results can be said to have been achieved by Zambia in its anti-corruption legislative drive in the recent years. Previous researches by the Transparency International Zambia (TIZ) had reviewed that the Electoral Act[106] lacked the enforcing authority, but now this was found to have been catered for under section 34 of the new Anti-Corruption Act. The section provides that the Commission has jurisdiction to investigate and prosecute any offence under the Electoral Act, 2006.

[106] No. 12 of 2006

Enactment of the Public Interest Disclosure (Protection of Whistleblowers) Act[107] deserves credit. This is a well come answer to re commendations made by previous researches by the TIZ.

In concluding this Chapter, it can therefore be said that government's repeal of the abuse of office offence was not within the spirit of aligning the resulting law with international standards. Government failed to prove their point for repealing the law. The fact that the repealed provision was unique and made prosecution of the offenders easy, it therefore means that it would now be difficult to prove corruption cases of which direct evidence has been found difficult to obtain apart from through examination of property.

CHAPTER 5

5.0 RECOMMENDATIONS AND CONCLUSIONS

5.1 RECOMMENDATIONS

5.1.1 Need to Revisit the Law on abuse of office offence

From the findings of this research, it is quite clear that Government did not put forward convincing reasons for repealing the law on abuse of office. It is therefore recommended

[107] No. 4 of 2010

that either the current government or whichever government would be in place in future should go back to the drawing board and rethink on the options of restoring the repealed law. Kenya is a good example, despite being one of the most corrupt countries in Africa, still maintains similar provisions in their Laws. Section 46,[108] states that a person using his office to improperly confer a benefit on himself or anyone else is guilty of an offence. Section 57 (1) of the Kenyan Act states that unexplained assets may be taken by the court as corroboration that a person accused of corruption or economic crime received a benefit. Section 2 which is an interpretation clause, defines "unexplained assets" as, firstly, that acquired at or around the time the person was allegedly guilty of corruption or economic crime; and secondly, whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.

5.1.2. The definition of corruption should be reviewed to make it consistent with internationally accepted standards

Coupled with the restoration of the repealed law on abuse of office, it is hereby recommended that the definition of corruption be also reviewed to make it consistent with internationally accepted definitions as contained in the regional and international anti-corruption conventions to which Zambia is a party.

5.1.3 Top leadership are urged to show Commitment to fighting Corruption

Borrowing from Botswana, the top leadership is urged to show commitment of the leadership in ensuring good governance, improving the standards of living of the people and trying to eradicate corruption. According to Dr. Gbadamosi Gbolahan,[109] the importance of top leadership commitment as a critical success factor in an anti-graft strategy is clearly demonstrated in the successes of Hong Kong and Singapore in recent times. Furthermore, like what obtains in Botswana, leaders are better advised to lend a

[108] Anti-Corruption and Economic Crimes Act, 2003 (KENYA)
[109] Corruption Perception and Sustainable Development: Sharing Botswana's Anti-Graft Agency Experiences (2006)

listening ear to allegations raised by the media. They should carry out thorough investigations in order to establish the truth or otherwise.

5.1.4 The Action taken by Government was a step backwards which needs to be reviewed

While government was on the right course to bring in the new law entitled 'concealment of offence' which is in line with the UNCAC, it is advisable to rethink of bringing back the abuse of office offence. The action taken by government could be likened to a man who takes one step forward and then two steps backwards but boasts of advancing to his destination.

5.1.5. The Requirement for Declaration of Assets should be applied to all Public officials

One of the issues brought up in the debates in favor of the repeal of abuse of office offence was that there was practical difficulties in applying the provisions as it effectively required the to scruitinise present and past emoluments and required a citizen to provide records of all their income , both official and otherwise, which could not be reasonably expected to be kept by a citizen, and also that the provision was discriminatory as it ignored private sector corruption, which was also a reality. In order to counter this problem, it is hereby recommended that once the law on abuse is restored, the requirement for declaration of assets be applied to all public officials and, that it be done on a regular basis. Furthermore, the provision should be strengthened to cover acquisition of wealth by private persons and bodies.

5.2 CONCLUSIONS

The efforts made by Zambian consecutive governments in bringing about a lot of anti-corruption legislation and other policy initiatives is very encouraging and cannot pass without being commended. However, after reviewing most of this legislation and efforts,

the repealed law on abuse of office was exceptional because as learnt in the research, corruption is a clandestine crime whose direct evidence of commission is difficult to obtain if not through examination of the property accumulated by the accused. Botswana and Kenya are good examples who are using evidence with similar clauses like our repealed law.

Government, who promised so well to harmonize the anti-corruption laws with international standards, viz, the UNCAC, SADC Protocol against Corruption and, the AU Convention on Preventing and Combating Corruption, instead did the opposite. The research has shown that the repealed law was within the international standards.

It can, therefore, be safely said that government did not prove their reasons put forward for repealing the law. Removal of the law which had proved its efficacy in fighting corruption only shows lack of political will to fight the scourge on the part of government.

This paper concludes that the implication of repealing the law on abuse of office offence is that it would make it difficult to prove the cases on abuse of office. Moreover, since most of the cases which were successfully prosecuted under the repealed law did not reach the level of res-judicata, it leaves room to those who were convicted to argue that their prosecution was done unconstitutionally. This turn of events sets a bad precedence to the efforts against corruption. Furthermore looking at the decision in Re: implied Amendment of the Constitution, it is possible that most of those cases litigated under the repealed law would be in favor of the accused on appeal, because Government's rationale for repealing the law was that it was unconstitutional.

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