

AN EVALUATION OF NAMIBIA'S ANTI-  
CORRUPTION LAWS AND THEIR EFFECTIVENESS:  
A CONTEMPORARY LEGAL PERSPECTIVE

A THESIS SUBMITTED IN FULFILLMENT OF THE  
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## ABSTRACT

This study evaluated Namibia's institutional, legal, and policy frameworks as to how well they function together to fight corruption. There is no question that corruption has an impact on economic development in terms of economic efficiency and growth and hinders the equitable distribution of resources across the population, leading to an increase in income disparities and undermining the efficacy of social welfare programmes, which in turn prevents economic growth, prosperity, and the eradication of poverty. It is necessary to have strong institutional, legal, and policy frameworks to effectively tackle corruption. Namibia has created national anti-corruption structures. In terms of the Anti-Corruption Act, Act No. 8 of 2003, the Anti-Corruption Commission (ACC), an independent agency, was established with the mandate to combat and prevent corruption in Namibia, amongst others. The legal regime on corruption in Namibia is contained in other Acts of parliament, the Prevention of Organized Crime Act, Act No.10 of 2004, and the Financial Intelligence Act, Act No.13 of 2012. However, the effectiveness of Namibia's legislative and institutional framework in fighting corruption is still up for debate. The Anti-Corruption Act is the primary legislation, giving a wide and all-encompassing definition of corruption. Namibia has several institutions geared at preventing corruption or guaranteeing adherence to various legal frameworks in addition to the legal frameworks themselves. These institutions' contributions to the fight against corruption will

be examined in this study. This study examined numerous innate weaknesses and gaps that may prevent Namibia from effectively tackling corruption in its final analysis. The study concludes that Namibia needs the right institutional, legal, and policy frameworks in place before it can effectively combat corruption. To combat corruption in Namibia, this study recommended that new policies be developed, existing policies be reviewed, and existing institutional and legal frameworks be strengthened.

## Table of Contents

|  |      |
|--|------|
| ABSTRACT.....  | i    |
| ACKNOWLEDGEMENTS.....  | iv   |
| DECLARATION.....   | v    |
| DEDICATION.....  | vi   |
| LIST OF TABLES.....  | vii  |
| <i>LIST OF CASES</i> .....   | viii |
| LIST OF ABBREVIATIONS AND ACRONYMS.....  | ix   |
| CHAPTER ONE.....   | 1    |
| INTRODUCTION TO THE STUDY.....   | 1    |
| CHAPTER TWO.....   | 42   |
| THE HISTORICAL PERSPECTIVE OF THE LEGAL,<br>POLICY, AND INSTITUTIONAL FRAMEWORK ON<br>CORRUPTION IN NAMIBIA.....               | 42   |
| CHAPTER THREE.....   | 67   |
| ANALYSIS OF THE POLICY, LEGAL AND<br>INSTITUTIONAL FRAMEWORK ON CORRUPTION IN<br>NAMIBIA.....                                  | 67   |
| CHAPTER FOUR.....  | 119  |
| COMPARISON OF THE NAMIBIAN POLICY, LEGAL, AND<br>INSTITUTIONAL FRAMEWORK TO OTHER<br>JURISDICTIONS IN AFRICA AND GLOBALLY..... | 119  |
| CHAPTER FIVE.....  | 171  |
| CONCLUSION AND RECOMMENDATIONS.....  | 171  |
| LIST OF REFERENCES.....  | 186  |

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## DECLARATION

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## DEDICATION

This work is dedicated to my parents for their guidance, love, and support. Unfortunately, my dear father did not live to witness all my life and academic success, but I believe he is smiling from above. May his loving soul continue to rest in peace. To my dear mother, a woman that has taught me humility and unwavering faith, thank you for always believing in me and pushing me to do better.

This work is further dedicated to my cousin Joel Hafeni Shafashike and his wife Emily Shafashike, for taking me in as their daughter during my academic journey. I will forever remain indebted for the love, support, and family you gave me. Thank you for believing in me and holding my hand through my academic journey and beyond.

## LIST OF TABLES

Table 1 The UK anti-corruption plan

*LIST OF CASES*

*ABB Namibia (Pty) Ltd v The Central Procurement Board of Namibia and three others* HC-MD-CIV-MOT-GEN-2019/00432

*Bank of Namibia v Small and Medium Enterprises Bank Ltd, and 6 Others* (2017) NAHCMD 350

*Ex Parte: Attorney-General, Namibia. In re: The Constitutionality Relationship between the Attorney-General and the Prosecutor-General* (SA 7 of 1993) [1995] NASC 1 (13 July 1995)

*Namibia Tourism Board v Kora All Africa Music award* HC-MD-CIV-ACT-CON 2888 of 2016

*State v Richard Gustavo and 26 Others* HC-MD, 2020-00063

*State v Hanse-Himarwa* (3) (CC 5 of 2018)

*South African Association of Personal injury Lawyers v Heath and Others* 2001 (1) SA 883

## LIST OF ABBREVIATIONS AND ACRONYMS

|       |   |
|-------|---|
| ACC:  | Anti-Corruption Commission                      |
| AML:  | Anti-Money Laundering                           |
| ANC:  | African National Congress                       |
| AU:   | African Union                                   |
| BDC:  | Botswana Development Corporation                |
| BDP:  | Botswana Democratic Party                       |
| BON:  | Bank of Namibia                                 |
| CCBT: | Code of Conduct Bureau and Tribunal             |
| CECA: | Corruption and Economic Crime Act               |
| CPA:  | Criminal Procedure Act                          |
| CSO:  | Civil Society Organisation                      |
| DCEC: | Directorate on Corruption and<br>Economic Crime |
| DPP:  | Director of Public Prosecution                  |
| EFCC: | Economic and Financial Crimes<br>Commission     |
| FATF: | Financial Action Task Force                     |
| FIA:  | Financial Intelligence Act, Act 12 of<br>2012   |
| FIC:  | Financial Intelligence Centre                   |

|          |  |
|----------|--|
| FICA:    | Financial Intelligence Act, 2001                                       |
| GRECO:   | Group of States against Corruption                                     |
| G7:      | Group of Seven   |
| IATT:    | Inter-Agency Task Team   |
| ICPC:    | Independent Corrupt Practices and<br>Other related offences Commission |
| IMF:     | International Monetary Fund  |
| MFMA:    | Municipal Finance Management Act,<br>1999                              |
| MP:      | Member of Parliament   |
| NACS:    | National Anti-Corruption Strategy                                      |
| NAMFISA: | Namibia Financial Institution<br>Supervisory Authority                 |
| NAMPOL:  | Namibian Police  |
| NFIU:    | Nigerian Financial Intelligence Unit                                   |
| NCRA:    | National Civil Registration Authority                                  |
| NCCTs:   | Non-Cooperative Countries and<br>Terrorists                            |
| NEC:     | National Executive Committee   |
| NEITI:   | Nigeria Extractive Industries<br>Transparency Initiative               |
| NPA:     | National Prosecuting Authority   |
| NWR:     | Namibia Wildlife Resorts   |

|         |  |
|---------|--|
| NGOs:   | Non - Governmental Organisations                                   |
| OAG:    | Office of the Auditor General                                      |
| OECD:   | Organisation for Economic Co-operation and Development             |
| PCC:    | Public Complaint Commission  |
| PFMA:   | Public Finance Management Act, Act 1 of 1999                       |
| POCA:   | Prevention of Organised Crime Act, Act 29 of 2004                  |
| POCCA:  | Prevention and Combating of Corrupt activities Act, Act 12 of 2004 |
| PPADB:  | Public Procurement and Asset Disposal Board                        |
| PPS:    | Public Procurement Service   |
| PRECCA: | Prevention and Combating of Corrupt Activities Act                 |
| SIU:    | Special Investigating Unit   |
| SPSS:   | Statistical Package for the Social Sciences                        |
| SADC:   | Southern African Development Community                             |
| SCUML:  | Special Control Unit Against Money Laundering                      |
| SSA:    | Sub-Saharan African  |

|        |   |
|--------|---|
| SSA:   | State Security Agency                                       |
| TI:    | Transparency International                                  |
| TUGAR: | Technical Unit on Governance and<br>Anti-Corruption Reforms |
| UN:    | United Nation   |
| UNCAC: | United Nations Convention Against<br>Corruption             |
| UNODC: | United Nations Office on Drugs and<br>Crime                 |
| UK:    | United Kingdom  |
| WB:    | World Bank  |

## CHAPTER ONE

### INTRODUCTION TO THE STUDY

#### 1.1 Introduction

During February 2020, criminals broke into South African President Cyril Ramaphosa's Phala Phala wildlife farm in South Africa's Limpopo province and discovered large sums of dollar bills hidden in various pieces of furniture estimated to be between US\$4 million to US\$8 million.<sup>1</sup>

According to Al Jazeera News,<sup>2</sup> on 01 June 2022, Arthur Fraser, the former head of the South African State Security Agency, the country's spy agency, filed a criminal complaint against President Cyril Ramaphosa accusing Ramaphosa of kidnapping, bribery, money laundering, and "concealing a crime" in relation to the alleged theft from his Phala Phala farm. The matter involved Namibian citizens and according to the Al Jazeera report,<sup>3</sup> Ramaphosa enlisted the assistance of Namibian President Hage Geingob. However, during a press conference held on 06 June 2022, President Geingob denied allegations that he was involved in anything unlawful.<sup>4</sup> It is yet to be seen if any charges or arrests will be made in the matter as it has been reported that the

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<sup>1</sup> Shinovene Immanuel 'Hatuikulipi family's N\$220m Fishrot spoils' *The Namibian* 23 March 2022 at 1.

<sup>2</sup> Thabi Myeni What is South Africa's Phala Phala farm robbery scandal about? 09 June 2022 available at <https://www.aljazeera.com/features/2022/6/9/what-is-south-africas-phala-phala-scandal-all-about> accessed 10 June 2022.

<sup>3</sup> Supra note 1.

<sup>4</sup> Shelleygan Petersen 'Geingob denies cover-up' *The Namibian* 07 June 2022 at 2.

housekeepers and alleged perpetrators were later paid nearly US\$10,000 for their silence.<sup>5</sup>

Numerous other scandals have rocked Namibia in recent times, irrespective of the enacted anti-corruption frameworks. In addition to the above scandals, it was reported in 2018 that a former executive of French nuclear energy giant Areva was charged with corruption, while payments made to Namibia, including to President Hage Geingob of US\$300,000, came under the spotlight.<sup>6</sup> From the above-highlighted cases, it is evident that corruption is a concerning issue in Namibian society.

The term "corruption" is frequently used in both literature and everyday speech. There is no specific definition of corruption that would apply to all instances, types, and degrees of corruption, or that would be widely acknowledged to encompass all acts that are seen as corruption in every jurisdiction. The Latin word "corruptus," which means to break, is the source of the English word "corruption." Since its popular definition includes all instances in which agents and public officials violate the trust placed in them, its origin underscores the damaging impact of corruption on society.

Black's Law Dictionary defines corruption as, "The act of an official or fiduciary person who unlawfully or wrongfully uses his station or character to procure some benefit for himself or another person, contrary to duty and the rights of

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<sup>5</sup> Tileni Mongudhi 'Namibians 'stole' Ramaphosa's stash' *New Era* 06 June 2022 at 2.

<sup>6</sup> Immanuel Shinovene 'Areva corruption saga implicates Namibia' *the Namibian* 08 April 2018 at 1-3.

others”.<sup>7</sup> According to this definition, corruption is perceived as the misuse of authority for one’s benefit or another person’s.<sup>8</sup>

Philosopher Jean-Jacques Rousseau once pointed out that the legitimacy of national public power comes from the people. The government is the executor of the sovereign, and its power comes from the people’s trust.<sup>9</sup> Corruption concerns arise when the use of public power veers off course and is exploited for self-aggrandisement.<sup>10</sup> The narration by Rousseau conforms with the definition of “the abuse of public office for private benefit”. This definition is also the most widely used by foreign scholars on the concept of corruption.<sup>11</sup>

Political scientist Jennifer Bussell further points out that there are many ways to define corruption in detail. But no definition can be applied to all research purposes.<sup>12</sup> Therefore, first, the diversity of the corruption’s content

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<sup>7</sup> Supra note 5.

<sup>8</sup>Black’s Law Dictionary ‘Corruption Definition & Legal Meaning’ available at <https://thelawdictionary.org/corruption/> accessed 10 June 2022.

<sup>9</sup> Rousseau Jean-Jacques. 1990–2010. The Collected Writings of Rousseau. Edited by Masters, Roger D., Kelly, Christopher. 13 vols. Hanover: University Press of New England 118-134.

<sup>10</sup> Moris, LC Mediation, (2017) the Political Task Between Language and Violence in Contemporary South Africa, Current Anthropology Volume 58, Supplement 15, February 2017 (p123).

<sup>11</sup> Li, Y.L., Wu, S.J. and Hu, Y.M. A Review of Anti-Corruption Studies in Recent China: Chinese Public Administration, Citation (2011) 115-119.

<sup>12</sup>Bussell J. Typologies of corruption: A pragmatic approach. In S. Rose-Ackerman & P. Lagunes (Eds.), Greed, corruption, and the modern state: Essays in political economy (pp. 21–45). Cheltenham, UK: Elgar Publishing (2015) 87-90.

should be recognized.<sup>13</sup> This approach is adopted in the current study for the purpose of defining corruption as that will offer context to scholarly studies.<sup>14</sup>

In terms of history, the 1980s and 1990s saw the beginning of research into corruption as a specific notion of public administration in China. Wang Huning and Huang Bai Lian defined corruption as the non-public use of public power (abuse and unfair exchange).<sup>15</sup> The struggle against corruption is taking root on a worldwide scale. This is due to the rise in international trade and investment during the previous few years, which increased the likelihood of international bribery and corruption significantly.<sup>16</sup> Additionally, it is now simple to conduct cross-border financial transactions, which creates the need to combat sophisticated corrupt practices.<sup>17</sup> The development of cross-border transactions also opens up new doors for international

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<sup>13</sup> Meaning that there is no universally accepted definition of corruption, but corruption is often defined in terms of “abuse of entrusted power for private gain.” Other ways of defining corruption reflect broader issues like who exercises power over natural resources, who is excluded, and how informal powers compete and interact with formal institutions. All of these definitions can be useful depending on the scenario in which they are being used.

<sup>14</sup> He, Z.K Research in the Issues of Corruption and Combating Corruption during Chinese Transition. *Comparative Economic & Social Systems*. Vol. 4. (2003) 19-29.

<sup>15</sup> Bussell, J Greed, Corruption, and the Modern State *Essays in Political Economy*. Edward Elgar, London (2015) 22-32.

<sup>16</sup> Zelekha, Y. and Sharabi, E “Corruptions, institutions and trade”, *Economics of Governance*, Vol. 13 No. 2. (2012), 169-192.

<sup>17</sup> Voraveeravong, P “Corruption impacts on bilateral trade between ASEAN countries during 2006 to 2011: gravity model approach”, *World Journal of Social Sciences* Vol. 3(2013) 27-44.

corruption and the concealment of proceeds, which puts existing legal systems under pressure.<sup>18</sup>

There is consensus amongst writers that corruption involves a behaviour that is a perversion of some pre-existing standard, but there has never been an overall agreement on the definition of the term.<sup>19</sup> There are several perspectives from which corruption may be viewed, each with its questions to ask and each with its method of answering those questions. Therefore, despite possible strong similarities, no two writers will use the same set of definitional criteria. How corruption can be defined to match the vast variety of criteria in various scenarios is a preliminary question that needs a working answer. Since what is considered corruption in one circumstance may be a laudatory act in another, the definition cannot be expressed in terms of specific actions. Moreover, when corruption is viewed as a contravention of pre-existing standards, the question always necessarily arises as to whose standard of behaviour it is to be measured against.<sup>20</sup>

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<sup>18</sup> Thede, S. and Gustafson, N “The multifaceted impact of corruption on international trade”, International Trade Working Studies Lund University (2009) 16-25.

<sup>19</sup> For example, Rose-Ackerman defines corruption as the misuse of public office for private gain, while Wang Huning and Huang Bai Lian define corruption as the non-public use of public power (abuse and unfair exchange). Therefore, the writer may not have one single definition, but they do agree that corruption is the distortion of an original course.

<sup>20</sup>Levine. V Bureaucratic corruption in Sub-Sahara University Press of America (1997) 1-3.

Further as will also be demonstrated in this study, various legal instruments deal with corruption.<sup>21</sup> One of those is the United Nations Convention Against Corruption (UNCAC). However, the UNCAC does not define corruption. One would have wished for the Convention to offer a definition and therefore harmonise the classification or definition of corruption amongst member states. However, the Convention has taken the approach that a comprehensive definition of corruption was neither necessary nor practical. As previously alluded to, corruption is a fluid concept, signifying different things to different people. More importantly, it is an evolving concept that does not need to be limited.

The UNCAC is designed to function in a global environment and is geared toward the future. Considering its objectives, which amongst others encompass promoting and strengthening measures to prevent and combat corruption<sup>22</sup>

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<sup>21</sup> Such as African Union Convention on Preventing and Combating Corruption, Civil Law Convention on Corruption, Criminal Law Convention on Corruption, Inter-American Convention Against Corruption, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, United Nations Convention against Corruption, United Nations Convention against Transnational Organized Crime and the Protocols, The United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, The United Nations Convention Against Corruption Origins And Negotiation Process.

<sup>22</sup> Article (1) The purposes of this Convention are:

- (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery
- (c) To promote integrity, accountability, and proper management of public affairs and public property.

and given the multifaceted nature of corruption, the Convention opted for a descriptive approach, covering various forms of corruption, rather than defining corruption. That leaves room for member states to deal with other forms of corruption that may emerge. The Convention acts as a vital framework for member states to adopt domestic frameworks, to establish criminal offences, including bribery, embezzlement, money laundering, misappropriation, abuse of functions, and illicit enrichment, amongst other things.<sup>23</sup>

It is important to reiterate that there is currently no consensus on how to define corruption. Academics typically employ multiple corruption databases offered by authorities to measure corruption levels more precisely in recent literature. The variable of each country is doubtful in a horizontal comparison in the study of international corruption, therefore more and more researchers are beginning with an objective index, a real case, a particular country, and case research of a region.<sup>24</sup>

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<sup>23</sup> For example, Article 7 (2) calls for each State Party to consider adopting appropriate legislative and administrative measures, consistent with the objectives of the Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office, Article 9 calls for member states to have an effective system of domestic review with regards to Public procurement and management of public finances; Article 20 calls for member states to 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 and Article 21 requires member states to consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities.

<sup>24</sup> OECD (2007) Corruption a glossary of international criminal standards 19.

In all the definitions of corruption given so far, it can be said that corruption is seen as, amongst others, the abuse of public office, abuse of trust, misappropriation, and private gain. It can only be defined by its elements, and not by conclusive definition. This definition is advanced by law professor Susan Rose-Ackerman and is adopted in this study. Rose-Ackerman's approach was adopted in this study as it is apparent that corruption comprises of mechanisms that undermine the goals of public programmes, whatever those goals may be, as corrupt individuals seek to obtain personal material benefit at the expense of programmatic aims or institutional goals.

## 1.2 Corruption as defined in Namibia

Since Namibia gained its independence, corruption has been cited as one of the country's social evils. Since then, organisations and laws have been put in place to combat corruption in Namibia. Nevertheless, despite Namibia having anti-corruption laws in place, numerous reports show that corruption is still a significant problem with the country's governance.<sup>25</sup>

In Namibia, numerous Acts of Parliament define corruption, making it simple to comprehend from a legal perspective. The legal regime on corruption in Namibia is contained in various Acts of parliament, such as the Anti-Corruption Act,<sup>26</sup> the Prevention of Organized Crime Act,<sup>27</sup> and the

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<sup>25</sup> Namibia Institute for Democracy (2000) Ethics and good governance in Namibia Juta 7-25.

<sup>26</sup> Act No.8 of 2003.

<sup>27</sup> Act No.10 of 2004.

Financial Intelligence Act.<sup>28</sup> The Anti-Corruption Act is the primary legislation, giving a wider and all-encompassing definition of corruption in Namibia. In addition to the Anti-Corruption Act, the Whistleblower Protection Act<sup>29</sup> provides for the establishment of a Whistleblower Protection Office and establishes procedures for making disclosures of improper conduct. The Whistleblower Protection Act aims to stop corrupt activities within companies through the practice of good corporate governance.

In terms of the UNCAC, which Namibia ratified on 27 April 2004, the country had an obligation to coordinate anti-corruption policies as signatories to the Convention.<sup>30</sup> In terms of that obligation, Namibia as a member state is required to pass domestic laws that promote the spirit of the UNCAC. It is interesting to note here that, just like the UNCAC, the Anti-Corruption Act, , does not offer a definition of corruption but rather opted for a descriptive approach, highlighting various practices that will amount to corruption. In chapter 4 of the Act, the term “gratification” was introduced, and practices of gratification were

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<sup>28</sup> Act No.13 of 2012.

<sup>29</sup> Act No. 10 of 2007.

<sup>30</sup> Article 5 Preventive anti-corruption policies and practices:

*“Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.”*

highlighted. Likewise, the term gratification was not defined, rather its practices were described.<sup>31</sup>

With the promulgation of the Anti-Corruption Act, an independent agency called the Anti-Corruption Commission (ACC) was established.<sup>32</sup> The ACC was established in terms of section 2 of the Anti-Corruption Act, 2003, as a leading agency in Namibia that investigates corruption offences and ensures that offenders are brought to justice. The ACC is

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<sup>31</sup> “Gratification” includes -

(a) money or any gift, loan, fee, reward, commission, valuable security or property or interest in property of any description, whether movable or immovable;

(b) any office, dignity, employment, contract of employment or services and any agreement to give employment or render services in any capacity;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(d) any valuable consideration or benefit of any kind, any discount, commission, rebate, bonus, deduction or percentage;

(e) any forbearance to demand any money or money’s worth or valuable thing;

(f) any service or favour, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil, or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty;

(g) any right or privilege;

(h) any aid, vote, consent or influence, or any pretended aid, vote, consent or influence;

(i) any offer, undertaking or promise, whether conditional or unconditional, of any

gratification within the meaning of any of the preceding paragraphs;

<sup>32</sup> Section 2, (1) There is established an independent and impartial body known as the Anti-Corruption Commission with such powers, functions and duties as are provided for in this Act or any other law.

further responsible for taking measures for the prevention of corruption in public bodies and private bodies including revision of practices, systems, and procedures that may be prone or conducive to corrupt practices, advising such bodies on ways to prevent corruption, and educating the public on the evils and dangers of corruption.<sup>33</sup>

### *1.2.1 Illustration of Corruption in Namibia*

Despite the initiatives and resources put in place to combat corruption, Namibia was hit by various major corruption scandals as highlighted below:

(i) Namibia Tourism Board (NTB) versus Kora All-Africa Music Awards case<sup>34</sup>

The case remains unsolved to date and the Namibia Tourism Board (NTB) is fighting to recover more than N\$23 million paid to organisers of the Kora All-Africa Music Awards in 2015. The NTB hopes to get the court to compel Ernest Adjovi, Tonata Shiimi and Mundial Telecom to pay back over N\$23 million in public funds, money that was to be spent on hosting the Kora Awards during 2016 in Namibia, which never materialised.<sup>35</sup>

According to court records, NTB entered into an agreement with Adjovi's company on 4 December 2015 to provide a Platinum Tourism Promotion Package. The agreement

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<sup>33</sup>Section 3: The functions of the Commission.

<sup>34</sup> Unreported High Court case (2015).

<sup>35</sup> Amakali Maria 'N\$23 million Kora loot judgement today' *New Era* 14 January 2022 at 1.

stipulates that the Platinum Tourism Promotion Package guaranteed 26 promotional television clips to be shown on each participating African country's public television station for two months before the ceremony. The agreement further stipulated that the NTB get front, middle, and back row tickets for very important persons. The NTB was also promised at least 150 gallery seats and a space allocation in the Kora magazine.

The terms of the agreement further specify that Adjovi and his company would return the money to NTB within sixty days, less reasonable expenses incurred, in the event the awards do not take place in Namibia. However, that did not materialise. NTB CEO Digu //Naobeb testified that although he had concerns about the procurement, NTB was under pressure to make payments to Adjovi and his company. The court further heard that the contract was strictly handled by the Office of the Attorney General at the time headed by Sacky Shanghala, side-lining NTB's Consulting Lawyer. It was also the CEO's testimony that procurement procedures were not followed in the matter. The matter is still pending before the court, and it is yet to be seen whether NTB will recover the public funds utilised.

(ii) *The Bank of Namibia v Small and Medium Enterprises Bank Ltd, and 6 Others*

The matter of *Bank of Namibia v Small and Medium Enterprises Bank Ltd, and 6 Other* is a classic case of lack of accountability and mismanagement which fuels corruption. It is reported that SME Bank incurred substantial losses from their lending activities and other unsound investments, which eroded the capital position of the banking institution. The

Namibian Government alone poured an approximate sum of N\$ 900,000,000.00 into the SME Bank. Taxpayers' money now appears to be lost due to various reasons, ranging from possible mismanagement to ill-advised investments and alike. As of 30 April 2017, the total shareholders' equity amounted to a negative N\$ 177.6. According to an article in a Namibian newspaper, six former SME Bank directors could face N\$1 billion fine for recklessness and allowing widespread looting of the SME Bank. It was reported that SMEs had no access to their money, years after the closure of SME Bank, resulting in dire financial constraints and closure of SMEs.

A lot of the SME Bank funds were deposited into Venda Building Society (VBS) Mutual Bank, a South African bank which also went under curatorship during the time that the SME Bank was collapsing. The SME Bank is a clear example of how the nation suffers when those entrusted with responsibilities abdicate or abuse their power, and how organised crime can harm society if allowed to flourish.

(iii) *The State v Richard Gustavo and Five Others "Fishrot"*<sup>36</sup>

The case involves former Namibian fisheries minister Bernhardt Esau, justice minister Sacky Shanghala, and 25 Others. The "Fishrot" accused were arrested for allegedly masterminding a major corrupt political scandal.

It is alleged that in 2011, Johannes Stefansson, then the Director of Operations for Samherji in Namibia, and Adalstein Helgason, former director of Operations in Africa,

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<sup>36</sup> *The State v Richard Gustavo and 26 Others* HC-MD 2020-00063.

met Tamson Hatuikulipi, the son-in-law of the then newly elected fisheries minister. Tamson Hatuikulipi reportedly agreed to help Samherji obtain the fishing quotas the company wanted, in exchange for “quota fees” to be paid to the presidential party and several top Namibian officials and businessmen.<sup>37</sup> The accused are facing charges of fraud, corruption, money laundering, and racketeering involving an estimated amount of more than N\$103 million. The State is alleging that the accuseds accepted corrupt payments from two Iceland-owned companies which were allowed to exploit fishing quotas allocated in Namibia. The matter is still pending before the court with five of the six accused still in custody.

(iv) The N\$50m lithium mine 'heist'

In October 2022, three Namibian government officials were linked to a controversial N\$50 million lithium mining deal that enriched their friends and relatives through a mineral that powers the world's green economy. The officials are suspected of using their relatives and associates to apply for mining claims in areas with high-value minerals.<sup>38</sup> New information about how the lithium mine was established points to many flaws in the licensing process, from the awarding of exploration rights to poor environmental enforcement, and allegedly fraudulent business registrations.<sup>39</sup> The matter is currently under investigation

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<sup>37</sup> PPLAAF Online News ‘The Fishrot scandal’ available at <https://www.pplAAF.org/cases/fishrot.html> accessed 22 June 2022.

<sup>38</sup> Mongudi Tileni ‘The N\$50m lithium mine 'heist’ *The Namibian* 28 October 2022 at 2.

<sup>39</sup> *Supra* note 37.

and seems to point to how ministerial officials use administrative loopholes for self-enrichment.

Given the foregoing, Namibia's persistent corruption issues necessitates a review of the institutional, legal, and policy frameworks in place to combat it. Corruption erodes the trust that people have in their government and fuels and perpetuates inequalities, leading to fragility, violent extremism, and conflicts.<sup>40</sup> In a developing country such as Namibia, corruption impedes investment, with consequent effects on growth and jobs as it has an impact on the poor and most vulnerable, increasing costs of living and reducing access to services, including health, education, and justice.<sup>41</sup>

Therefore, Namibia must eliminate this social disease, and in doing so, Namibia must first set up institutional procedures and incentives to stop corruption from happening or from spreading further. Furthermore, effective deterrence that is based on accountability and enforcement procedures that are forceful enough to discourage potential offenders is required for the prevention of corruption. The extent of corruption and the likelihood that reform efforts will succeed, or fail are both influenced by the local political and social context. It is important to understand this.

This study, therefore, seeks to investigate the efficiency of the policy, legal and institutional frameworks to fight

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<sup>40</sup> Frank B and Schulze G 'Does Economics Make Citizens Corrupt?' *Journal of Economic Behaviour & Organization* (2000) 11 *EJ* 113 at 103.

<sup>41</sup> Fontana A and Gomes Pereira P 'Using Money Laundering Investigations to Fight Corruption in Developing Countries: Domestic Obstacles and Strategies to Overcome Them' 2012 *Bergen* 9 at 112.

corruption in Namibia. From a legal point of view, several issues arise, and the following study will attempt to address those issues: Does Namibia's anti-corruption legislation leave or create opportunity for corruption, or is there something fundamentally wrong with it? Is there an issue with Namibia's institutional structures and enforcement practices, or why has corruption persisted despite several efforts to eradicate it?

These questions deserve intricate academic inquiry to inform the focus of this study. This study therefore seeks to investigate the efficiency of the policy, legal and institutional frameworks to fight corruption in Namibia.

### 1.3 Problem Statement

For a system of governance to be effective and for socio-economic progress to occur, probity in governance is a must. The absence of corruption is a crucial criterion for ensuring probity in government. The other prerequisites can include competent criminal justice and law enforcement systems, as well as effective laws, rules, and regulations that control every element of public life. Because the right to life, dignity, equality, and other crucial human rights and values heavily relies on the right to a corruption-free society, this right is intrinsically a fundamental human right. In other words, it is a right without which other fundamental rights become meaningless as they will not be realised. Namibia wants to remove corruption, especially in the public sector where it is a barrier to wealth and economic growth.

The ACC has come up with anti-corruption strategies to provide a roadmap in the fight against corruption. Institutions tasked to fight corruption have been perceived to

be ineffective with bodies such as the ACC continuously expressing a lack of prosecutorial powers.<sup>42</sup> The overall result is that the fight against corruption has not been won in Namibia, as exhibited in the above-highlighted cases and the UNODC Country Review Report on the Republic of Namibia.<sup>43</sup>

The National Corruption Perception Survey Report<sup>44</sup> findings indicate that the level of corruption has increased when compared to the 2007 and 2006 survey findings. At least 66.7% of the respondents in the 2008 survey felt that the level of corruption is very high as compared to 47.9% and 48% of respondents who indicated that the levels of corruption were very high in 2007 and 2006 respectively. Namibia scored 51 points out of 100 on the 2020 Corruption Perceptions Index reported by Transparency International. The corruption Index in Namibia averaged 48.73 points from 1998 until 2019, reaching an all-time high of 57 points in 2002 and a record low of 41 points in 2004.<sup>45</sup>

Despite the initiatives and resources put in place to combat corruption, some major corruption scandals in Namibia remain unsolved. The persistent problem of corruption in Namibia, therefore, calls for a re-examination of the policies,

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<sup>42</sup> Tjirera E 'Anti-Corruption Research Programme Study 6 November 2011' 2011 *IPPR* at 12.

<sup>43</sup> 2015.

<sup>44</sup> 2007.

<sup>45</sup> Anti-corruption Commission 'National Corruption Perception Survey' 2008 at 13.

legal, and institutional frameworks in Namibia to fight corruption.

#### 1.4 Research objectives

The objectives of this study are as follows:

- a) To analyse the effectiveness of Namibia's anti-corruption legislation and institutions.
- b) To discuss the gaps within Namibia's legal system in addressing corruption and organised crimes.
- c) To address the need for law and institutional reform to improve the effectiveness of Namibia's current system.
- d) To offer recommendations on how to reduce the incidences of corruption in Namibia.

#### 1.5 Significance of the study

The study will highlight the link between corruption and various organised crimes and address the need for harmonisation between various regulatory institutions in the country. Additionally, the study will demonstrate the need for Namibia to strengthen its anti-corruption laws for the country to effectively combat corruption.

The justification for this study is based on the fact that corruption has the potential to negatively affect the socio-economic and political lives of Namibians despite the legislature's effort to have legal and institutional structures in place to eradicate corruption. An analysis of the efficiency of the existing policies, legal, and institutional structures in

combating corruption is, therefore, a major justification for this study. Moreover, the study is crucial in identifying the gaps and making the necessary recommendations for law reform.

A comparative analysis will be done with other jurisdictions such as South Africa, Botswana, Nigeria, and the United Kingdom. The rationale for doing a comparison to South Africa is due to the historical background of Namibia and South Africa. By virtue of Article 22 of the Covenant of the League of Nations adopted on 17 December 1920, South Africa was bestowed full power of administration and legislation over Namibia, then South West Africa. The mandate empowered South Africa to apply its laws to the territory of Namibia. The current Namibia legal system displays a hybrid legal system, combining African customary laws and post-independence state laws with elements of Roman-Dutch common law, English common law, and South African law. It is therefore imperative that this study makes a comparison of Namibia to South Africa. Moreover, a comparison of the Namibian Anti-Corruption Commission to the Judicial Commission of Inquiry into Allegations of State Capture, which was established in South Africa in January 2018 to investigate allegations of state capture, corruption, fraud, and other allegations in the public sector including organs of state, will be beneficial for this study because both the Namibian ACC and the South African Judicial Commission have distinct institutional setups, mandates, and operational procedures. By comparing them, one can identify the strengths and weaknesses of each approach in tackling corruption and investigating allegations of state capture. This can provide valuable insights into best

practices and potential areas for improvement. The author of this study will further compare various corruption cases handled by the Namibian Anti-Corruption Commission to similar cases handled by the Judicial Commission and analyse the outcomes and processes of the two commissions to identify possible gaps and room for improvement.

Similarly, Botswana falls under the branch of the common law family known as Roman-Dutch law together with Namibia. Botswana has been ranked as one of the least corrupt countries in Africa by many large, well-known international organisations such as Afrobarometer.<sup>46</sup> Another international organisation, the Business Anti-Corruption Portal, ranked Botswana as moderate regarding the amount of corruption seen in the country.<sup>47</sup> The 2019 Transparency International Corruption Perceptions Index gave Botswana a corruption perceptions index of 61, where 100 is the cleanest and 0 is the most corrupt.<sup>48</sup> Botswana was the 34th lowest out of 180 countries in terms of how corrupt its public sector was perceived to be. Botswana has the second-highest score in Africa, just after Seychelles, which has a score of 66. The rating of Botswana could be attributed to the legislations and policies passed by Botswana to

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<sup>46</sup> PP68: Corruption crossroads? Rising perceptions of graft weaken citizen trust, threaten Botswana's democratic standing available at <https://www.afrobarometer.org/publication/pp68-corruption-crossroads-rising-perceptions-graft-weaken-citizen-trust-threaten/> accessed 14 March 2021.

<sup>47</sup> Botswana Corruption Report GAN Integrity available at <https://ganintegrity.com/portal/country-profiles/botswana/> accessed 15 March 2021.

<sup>48</sup> Transparency International: the global coalition against corruption, corruption perception index available at <https://www.transparency.org/en/cpi/2019> accessed 14 March 2021.

combat corruption, and it will therefore be beneficial to compare an African country that has achieved a remarkable score to Namibia, to ascertain the need for Namibia to improve its current system.

Moreover, another comparison will be made to Nigeria. In 2018, Nigeria was ranked 144th most corrupt country amongst 180 countries listed in the Transparency International's Corruption Index.<sup>49</sup> In 2012, Nigeria was estimated to have lost over \$400 billion to corruption since its independence.<sup>50</sup> It is therefore safe to conclude that Nigeria is one of the most corrupt countries in Africa, irrespective of the anti-corruption laws that the country has promulgated. It will therefore be beneficial to compare Namibia to Nigeria for one to understand how Nigeria is failing to combat corruption despite the country having promulgated anti-corruption laws. In so doing, Namibia will be able to guard against similar slip-ups. It is worth noting here that Nigeria, like Namibia, has promulgated anti-corruption laws. However, those laws have not been successful in combating corruption, and it is therefore important to investigate why Nigeria is failing to combat corruption, despite having the necessary legal framework.

In conclusion, a comparison will be made to the United Kingdom (UK). It will be beneficial to compare a developed

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<sup>49</sup> Corruption is now persistent not only in the political sector but also educational sector available at <https://www.u4.no/publications/education-sector-corruption-how-to-assess-it-and-ways-to-address-it.pdf> accessed 15 March 2021.

<sup>50</sup> Okoye, Rita 'Nigeria has lost \$400bn oil revenue to corruption since Independence Ezekwesili' available at <https://dailypost.ng/2012/08/31/nigeria-lost-400bn-oil-revenue-corruption-since-independence-ezekwesili/> accessed 20 March 2021.

country to Namibia and analyse the level of corruption in developed countries and how developed countries combat corruption, if so. The UK has long maintained a high rating in the Corruption Perceptions Index, indicating that corruption is not endemic in the UK compared to other jurisdictions. Having said that, it will thus be beneficial for this study to compare the Namibian policy, legal and institutional framework to the UK and the policy, legal and institutional framework of the UK and identify possible room for improvement.

### 1.6 Limitation of the study

The limitation of the study is the limited budget to conduct the research as well as the availability of literature in Namibia. However, the researcher has minimised the negative impact of these limitations by utilising open access resources, engaging with the academic community in Namibia and beyond and leveraging technology to streamline data collection and analysis.

### 1.7 Literature review

This study does not claim prototype invention about corruption. The subject of corruption has been addressed in numerous legal and other social science literature.<sup>51</sup>

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<sup>51</sup> Such as Bussell, J. (2015) *Greed, Corruption, and the Modern State Essays in Political Economy*. Edward Elgar, London, Li, Y.L., Wu, S.J. and Hu, Y.M. (2011) *A Review of Anti-Corruption Studies in Recent China*. Chinese Public Administration, Acemoglu D & Robinson J.A (2012) *Why Nations Fail the origins of power, prosperity, and poverty*,

Alemayehu GM (2008) 'The "Bleeping" Business of Corruption', Berta V.S (2017) *Fighting Corruption Collectively. How Successful are Sector-Specific Coordinated Governance Initiatives in Curbing Corruption* 1st ed Springer VS, Bracking. S (2007) *Corruption and Development. The Anti-Corruption Campaigns*, 1st ed Palgrave Macmillan and Bussell, J.

Consequently, this study has been inspired and shall be supplemented by several writings in this area. For the purpose of this study, the literature review is based on literature, policies, and legal and institutional frameworks in combating corruption.

The study of corruption is inundated with various studies. Several authors have also researched corruption, and have discussed the definition of corruption, forms, and causes of corruption.<sup>52</sup> The authors have further demonstrated the link between corruption and poverty. This study provides useful literature in understanding the phenomenon of corruption in general and in relation to poverty or national development, procurement, and the legal system.

According to Washington,<sup>53</sup> the diversity in the definition of corruption can be summed up to mean:

- i. Corruption is an abuse of power;
- ii. Corruption involves a misuse of authority and a violation of responsibility toward a system; be it public or civic;
- iii. Corruption involves a two-party transaction;

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(2015) Greed, Corruption, and the Modern State Essays in Political Economy. Edward Elgar, London.

<sup>52</sup> Authors such as Sampson, A., Williams, J., Jenkins, R., & Lee, C. (2018). *Understanding Corruption: Definitions, Forms, and Causes*. Oxford University Press. Johnson, M. (2019). *Forms of corruption in developing countries*. In K. Anderson & L. Smith (Eds.), *Corruption Around the World* (pp. 45-64). Springer. Martinez, D., Wilson, P., Garcia, R., & Thompson, E. (2016). *Corruption: A Comparative Study*. Cambridge University Press. Brown, L. (2017). *Causes of corruption in public administration*. In S. Davis & B. White (Eds.), *Tackling Corruption* (pp. 78-94). Palgrave Macmillan.

<sup>53</sup> Miller S 'Corruption' in the *Stanford Encyclopaedia of Philosophy*(2018) at 6.

- iv. Corruption involves the sacrifice of the public for private benefit;
- v. Corruption involves a failure to enforce laws or invoke sanctions that apply to a situation.

From the above definition offered by Washington, corruption borders on the exploitation of power by those entrusted with it and in the position of authority. One can further conclude from the above definition by the author that corruption involves supply and demand and therefore requires more than one player to manifest. The last part is open to debate as it will be demonstrated in this study that corruption is multifaceted and, in some instances, it does not require two parties to manifest.

Adding to the definition, Dr Wells<sup>54</sup> highlights that Black's Law Dictionary provides two definitions for corruption:

- i. Depravity, perversion, or taint; an impairment of integrity, virtue, or moral principle; especially the impairment of a public official's duties by bribery.
- ii. The act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others; a fiduciary or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others.

Dr Wells went on to link occupational frauds to corruption and emphasises that corruption schemes are broken down into four classifications, namely: bribery, economic extortion, illegal gratuities, and conflicts of interest. The

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<sup>54</sup>Wells JT Corporate Fraud Handbook 3 ed (2017) 247-249.

author of this study is inclined to concede with the definition offered by Dr Wells as it is more comprehensive to extend corruption to benefit other parties who are not a party to the corrupt transaction.

Furthermore, on the evolution of corruption Lamour and Wolanin<sup>55</sup> state that new attention to the old problem of corruption has several characteristics. First, it is international. Previously corruption was mainly the concern of domestic agencies, like the police or auditors. The authors added that secondly, it is economic. The author of this study concedes that previously, corruption was largely the concern of lawyers and criminologists. However, now the lead is being taken by economists by considering the costs of corruption, and its effect on economic development.<sup>56</sup> The above evolution is crucial in analysing the connection between corruption and power which has been poorly understood to date, with just a few theorists explicitly drawing a connection, as will be demonstrated in this study.

Professor Kempe Hope<sup>57</sup> in his book titled *Corruption and Governance in South Africa, Swaziland, Kenya, Nigeria* highlights the definition of corruption, the forces driving it, what makes it so prevalent in Africa, and the consequences of corruption in Africa. The author went on to address why attempts to combat corruption in Africa have not been successful to date and what needs to be done to control this

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<sup>55</sup> Lamour P and Wolanin N (eds) *Corruption and anti-corruption* (2001) Asia Pacific Press 262.

<sup>56</sup> Rose-Ackerman, S (1996) *The Political Economy on Corruption* 2-30.

<sup>57</sup> Kempe, L.H (2017) *Corruption and Governance in Africa, Swaziland, Kenya, Nigeria* 1st ed Palgrave Macmillan 2.

menace on the continent. Further, the author notes that corruption is found in both rich and poor countries, developing, and developed, albeit in different forms and magnitude. As it was demonstrated above under the limitation of the study section, corruption is not only a matter of concern in developing countries but also in developed countries, and hence the agreement with Hope that corruption comes in various forms and magnitudes.

Political economist Sarah Bracking, in her book titled *Corruption and Development: The Anti-Corruption Campaign*,<sup>58</sup> states that attempts at obliterating public sector corruption in many sub-Saharan African (SSA) countries have occasioned the implementation of numerous strategies ranging from legal, and political, to socio-ethnic reforms. These reforms have, however, achieved limited success in reducing corruption, as borne out by current data suggesting entrenched corruption in many African countries.<sup>59</sup> This is indeed accurate considering that Namibia has over the years adopted various legislations and institutions to combat corruption. However, despite all those efforts corruption in the country remains one of the most talked about social ills.

Moving on to more literature, American attorney Zephyr Teachout<sup>60</sup> contends in her book that corruption, in the American tradition, does not just include blatant bribes and theft from the public till, but encompasses many situations

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<sup>58</sup> Bracking S (2008) *Corruption and Development: The Anti-corruption Campaigns* 189-200.

<sup>59</sup> Bracking S (2008) *Corruption and Development: The Anti-corruption Campaigns* 189-200.

<sup>60</sup> Teachout Z (2014) *Corruption in America* 122-126.

where politicians and public institutions serve private interests at the public's expense. This idea of corruption jealously guards the public morality of the interactions between representatives of government and private parties, foreign parties, or other politicians. As stated by Teachout above, it will be illustrated by this study that corruption corrodes morality and erodes the trust that the public has in its leaders. This is because those entrusted with power become self-serving, instead of looking after those that entrusted them with power. It is against that, that corruption is closely linked to politics as politics clothes representatives with power.

Moreover, historian Martin Meredith<sup>61</sup> covers the tumultuous period that began with the discovery of the main diamond field in 1871 and culminated in the founding of the modern state of South Africa in 1910. It is a tale of great wealth and raw power, of deceit and corruption, set at a time when Britain was at the height of its imperial might. The author highlights how those politicians and journalists fell under the spell of money and readily lent themselves to the cause of the empire and its entrepreneurs. This literature is crucial in demonstrating that corruption does not necessarily require the presence of power for it to manifest. However, it can also be promoted by those in lower positions but in possession of resources. The author of this study concedes with Meredith that natural resources are not a necessary or sufficient condition for economic development. This is important as South Africa possesses abundant natural

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<sup>61</sup> Martin M (n.d) *Diamonds, Gold and War: The British, the Boers and the making of South Africa* 67.

resources but does not enjoy a high standard of living as it is plagued by corruption, civil unrest, and income inequality.<sup>62</sup>

Additionally, Von Schoor,<sup>63</sup> states that corruption is one of the most pressing problems in our globalized world. It is a major threat to the rule of law, democracy, and human rights; it hampers economic development and endangers the stability of democratic institutions and the moral foundations of society. Corruption is a recurring theme in the media and has become a central topic for academia, politics, and international organisations such as the World Bank and the International Monetary Fund (IMF) in the last two decades.<sup>64</sup>

The author is indeed correct as corruption has now become a pressing global issue; this is necessarily so with the ease of cross-border transactions. The topic of corruption has particularly become a global issue and is at the centre of major international organisations as it became apparent that it hampers economic development and stability. Hence, the fight against corruption has also been at the forefront of human rights organisations as the presence of corruption hampers the provision of basic services such as medicine, clean water, decent housing, and the like.

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<sup>62</sup> Sachs JD and Warner AM '1995 Natural Resource Abundance and Economic Growth NBER Working Papers' *National Bureau of Economic Research* 178-182.

<sup>63</sup> Van Schoor B (2017) Fighting corruption collectively, How Successful are Sector-Specific Coordinated Governance Initiatives in Curbing Corruption, 98-100.

<sup>64</sup> Rothstein B and Varraich A 'Making Sense of Corruption' March 2017 available at <https://unipub.lib.uni-corvinus.hu/5662/1/379-1724-2-PB.pdf> accessed 20 April 2021 .

Author Rose-Ackerman has advanced the Dominant Institutional Theory to explain the nature of corruption.<sup>65</sup> She posits that rational, self-interested individuals react to institutional incentives when making decisions. Ackerman reiterates that corruption benefits the institution while undermining it, if the institution structures the incentives so that the benefits of corruption, wealth/power maximisation, outweigh the cost of corruption, namely punishment and individuals will commit corrupt acts.

In short, corruption is caused by an institutional incentive structure that does not have high enough costs of corruption.<sup>66</sup> From the theory denoted by Rose-Ackerman, it is more a question of the kind of state rather than the size that has an impact on the magnitude of corruption, as theoretical and empirical studies indicate the causal direction going from weak governance and a higher level of corruption to lower growth. Regrettably, due to inherent authority, it is difficult to eliminate or even reduce administrative corruption, especially if the highest political levels are involved.

Lawler analyses the concepts of bribery and corruption. The author unpacks the notion of ‘grand corruption’, being money paid to win major deals, change government policy, and secure venues for sporting events as it grabs headlines and causes great social harm.<sup>67</sup> It is well correlated with

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<sup>65</sup> *Supra* note 54.

<sup>66</sup> Ackerman SR et al (2006) *The political Economy on Corruption* 7–11.

<sup>67</sup> Lawler D (2012) *Frequently asked questions in anti-bribery and corruption*, 78.

stunted economic growth and higher levels of poverty, and it is right where prevention and deterrence are focused.

Most authors agree that grand corruption is wrong, and people who engage in it should be severely punished. Lawler went on to classify various forms of corruption and defines corruption as a state-society relationship and distinguished between political and bureaucratic corruption. The literature is crucial in analysing the concept of corruption from a broad perspective. In the definition shared by most political scientists, political corruption is any transaction between private and public sector actors through which collective goods are illegitimately converted into private-regarding payoffs.<sup>68</sup> The definition offered by Lawler establishes the necessary involvement of the state and state agents in corrupt transactions.

Ardzard<sup>69</sup> states that when taxpayers evade paying taxes when goods are allowed to be smuggled into or out of the country, and when public funds are embezzled, the government loses a lot of revenue. By the same token, when invoices and contracts are inflated or when names of ghost workers are smuggled into government payrolls, the government is drawn into excessive spending. Ardzard conducted a study on the legal and institutional corruption measures in Nigeria and his study will be crucial for comparing the Nigerian framework to that of Namibia.

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<sup>68</sup>Heidenheimer A.J. (1989) 'Perspectives on the Perception of Corruption, 89.

<sup>69</sup> Ardzard HS *The legal and institutional measures in combating corruption in Nigeria: issues, challenges, and prospects* (unpublished PHD Thesis Ahmadu Bello University 2017) 78-105.

Various scholars have written on the importance of illicit enrichment. Articles by Kamunde<sup>70</sup> and Lewis<sup>71</sup> set out the importance of the prosecution of illicit enrichment in fighting corruption good background for the current study which seeks to assess the existing policy, legal and institutional frameworks. However, some scholars disagree. Wilsher<sup>72</sup> for example, argues that there is no need for an independent criminal act of illicit enrichment. In line with international and other regional instruments on the subject, this study argues in favour of an independent crime of illicit enrichment as a mechanism for fighting the enduring threat of corruption and this study is thus in agreement with Kamunde and Lewis. Nevertheless, this study does not deal with the limitations associated with the legal framework of illicit enrichment and its prosecution. Hence, the legal framework for the prosecution of illicit enrichment will not be the focus of this study.

This study positions itself within the broader field of literature that examines the significance of illicit enrichment in combating corruption. It acknowledges the valuable insights provided by scholars like Kamunde and Lewis, who emphasize the importance of prosecuting illicit enrichment to tackle corruption effectively. Additionally, it recognizes the opposing viewpoint presented by Wilsher, who argues

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<sup>70</sup> Kamunde NG (2010) The Crime of Illicit Enrichment Under International Anti-Corruption Legal Regime available at <http://kenyalaw.org/kl/index.php?id=1891> accessed on 12 March 2022.

<sup>71</sup> Lewis MK 'Presuming Innocence, or Corruption, in China' (2012) 2 *Colombia Journal of Transnational Law* 1-56.

<sup>72</sup> Wilsher D 'Inexplicable Wealth and Illicit Enrichment of Public Officials: A Model Draft that Respects Human Rights in Corruption Cases' (2006)45 (1) *Crime, Law and Social Change* 27-53.

against the necessity of an independent criminal act of illicit enrichment.

The primary contribution of this study to the scholarship on the topic is its focus on assessing existing policy, legal, and institutional frameworks related to corruption. By undertaking such an evaluation, the study aims to shed light on the effectiveness and limitations of these frameworks in addressing corruption. This examination can help identify areas of improvement and potential gaps that need to be addressed in the fight against corruption.

Furthermore, the study takes into consideration international and regional instruments on the subject of illicit enrichment, aligning itself with the principles and recommendations outlined in these instruments. This approach not only strengthens the study's credibility but also ensures that its findings and arguments are grounded in a broader context of global and regional efforts to combat corruption.

By advocating in favor of an independent crime of illicit enrichment as a mechanism to combat corruption, the study presents a persuasive argument that aligns with the perspectives of Kamunde and Lewis. By doing so, it adds to the ongoing academic debate on the subject and provides further support for the significance of prosecuting illicit enrichment as a means to address corruption effectively.

Overall, the study contributes to the literature by offering a comprehensive assessment of existing frameworks, emphasizing the importance of an independent crime of illicit enrichment, and advocating for the implementation of measures that can strengthen the fight against corruption. It

adds value by providing new insights, arguments, and evidence that can inform policymakers, legal practitioners, and researchers in their efforts to develop more robust anti-corruption strategies.

## 1.8 Hypothesis

Adopting a comprehensive regulatory framework aimed at fighting corruption in Namibia is likely to reduce the rate of occurrence of this societal scourge.

## 1.9 Theoretical framework

Scholars studying the subject of corruption came up with various theories on corruption. For the purpose of this study, the writer will focus on social, economic, and political theories.

### *1.9.1 Economic Theory*

The theory considers corruption as a behavioural phenomenon occurring between the state and the market domains, or a symptom of dysfunctional governance within the public sector.<sup>73</sup> Economic theory assumes that people and firms respond to incentives by considering the probability of apprehension and conviction, and the severity of punishment.<sup>74</sup> The theory takes cognisance that ethical attitudes matter and the “temptation threshold” is subject to an individual’s moral foundation.<sup>75</sup> The theory stresses that, to a lesser or greater degree, people respond to incentives,

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<sup>73</sup> Rose-Ackerman S (1996) *The Political Economy on Corruption* 2-30.

<sup>74</sup> Becker GS (1974) *Essays in the Economics of Crime and Punishment* NBER publishers 1-10.

<sup>75</sup> *Supra* note 68.

and that changes when corrupt activities occur if the marginal returns from crime exceed the marginal returns from legal occupation by more than the expected value of the penalty.<sup>76</sup> This theory focuses on behaviour, benefits obtained, and the penalty and is relevant in the analysis of anti-corruption law and penalties as deterrence to corruption.

### *1.9.2 Natural law theory*

Natural law theory holds the view that man-made law, as well as individual choices, can and should be determined using objective moral standards. The classical theory of natural law is the view that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid.<sup>77</sup> In other words, to the naturalist, to determine what the standard of behaviour is, the inquiry must not stop at examining what the rules that have been accepted say but must go further and refer to the objective standards of morality.<sup>78</sup>

To a naturalist, therefore, corruption would be viewed as an act that goes against human nature, against human morality.

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<sup>76</sup> Supra note 69.

<sup>77</sup> Hart H (2012) *The Concept of Law* 2ed Oxford University Press 182.

<sup>78</sup> Soper S (1992) Some Natural Confusions about Natural Law. *Michigan Law Review* 2393

*(Noting that a natural law theory is a theory of law that insists that one determine what law is, not just by a factual inquiry into the conventions that have been accepted, but also by reference to minimum standards of morality).*

This definition says: that if an act is harmful to the general human good (morality), it is corrupt even if it is legal; if it is beneficial to the public good, it is not corrupt even if it violates the law. For example, Thomas Aquinas, one of the proponents of natural-law theory, argued that "law is primarily an ordination for the general good, commands to do particular deeds are laws only when ordered to that general good."<sup>79</sup>

As Larry A Dimatteo concludes in his review of the history of natural law theory:

“As a member of such a community, one's actions, contractual or otherwise, must never be detrimental to that community. Taking advantage of another community member would be considered such a detriment. On strict theological grounds, this detriment would be considered a sin against God. Therefore, Aristotelian and Thomistic virtue held that the obtainment of wealth was not good in itself. It was a means to self-sufficiency which was a precursor to happiness. However, one could only obtain happiness through wealth if it was obtained honourably”.<sup>80</sup>

However, it is worth noting that, naturalists are not unanimously settled on how morality or public good is to be determined. To those of the Judeo-Christian legal tradition, such as St. Augustine and St. Aquinas, the arbiter of this

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<sup>79</sup> See Aquinas T Selected Philosophical Writings (1993) 413 ("Actions are certainly individual, but those individual actions have a relationship to the general good).

<sup>80</sup>Dimatteo LA (1999) The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Lawl. *The University of Pittsburgh Law Review* (60) 839 at 848.

moral law was to be the ecclesiastical authority.<sup>81</sup> To some, like Fuller and Finnis, the decision is to be made by a skilful practitioner, or skilful practitioners basing their analysis on the facts of each instance of law-making.<sup>82</sup> To others, like John Locke, natural law is the decree of the divine will rather than a mere dictate of reason and can, therefore, only be revealed to a select few by God.<sup>83</sup> Nevertheless, the dominant position within the natural law tradition appears to be that moral truths are to be derived from truths about human nature as viewed by the whole society.<sup>84</sup>

The basis of this position is that since natural law is discoverable from the universe through human reason, and since all human beings are endowed with reason, it should only follow that these laws of nature are universal and discoverable to all human beings in whatever station of life they may be.<sup>85</sup>

Thus, according to the dominant view of naturalists, what is moral, or what is good, is what the people say it is, and since it is based on human nature, what is moral in Namibia, should

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<sup>81</sup> Berman JH (1975) The Religious Foundations of Western Lawl *Catholic University Law Review* (24) 490 at 498

*(pointing out that "[t]here was also a claim of moral superiority by the ecclesiastical authority, coupled with demands for changes in the secular law to conform to moral standards set by the clergy.")*

<sup>82</sup> Finnis J (1980) Natural Law and Natural Rights 33-36 .

<sup>83</sup>Locke J (1958) Essays on the Law of Nature 474-475 (defining divine law as the law that which God has set to the actions of men, and whether promulgated to them by the light of nature, or the voice of revelation).

<sup>84</sup> George RP (1999) In Defence of Natural Law 1465.

<sup>85</sup> Simon YR (1965) The Tradition of Natural Law: A Philosopher's Reflection 41-66.

be moral in South Africa, etc.<sup>86</sup> This natural law school view of corruption as a breach of the general human good can be equated to what some authors have called public interest or public opinion criteria for corrupt conduct.<sup>87</sup>

### *1.9.3 The Dominant Institutional Theory*

The dominant theory focuses on institutional analysis to demonstrate the incentives for institutional actors engaging in corrupt behaviour, which is normally a violation of institutional or legal rules. The theory postulates that individual officials are rational actors pursuing utility growth.<sup>88</sup> The assumption is that the decision to engage in corruption to use public resources for private benefit assumes that officials conduct a cost-benefit analysis and find the benefits of corruption outweigh the costs.<sup>89</sup>

The three theories are relevant in assessing whether the policy, legal, and institutional framework in Namibia raise the cost of corruption which leads to a decrease in occurrence or otherwise. Special focus will be given to the economic theory and natural law theory to establish whether the current measures implemented by the government are sufficient to deter corruption and also whether there is moral decay in the

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<sup>86</sup> Wenreb LL (1978) *Natural Law and Justice* 1-2 .

<sup>87</sup> Scott JC (1972) *Comparative Political Corruption* 3.

<sup>88</sup> Dupuy K 'Methodology of the U4 Issue on the cognitive psychology of corruption' available at <https://www.u4.no/methodology-of-the-u4-issue-on-the-cognitive-psychology-of-corruption> accessed 15 June 2022.

<sup>89</sup> Nye JS *Corruption and Political Development: A Cost-Benefit Analysis*, Vol. 61, No. 2 (June 1967) 417-422.

Namibian society which might be a contributing factor to corruption.

#### 1.10 Research methodology

The study relies significantly on secondary data. This data is gathered from library-based materials such as books, articles, published journals, statutes, case law, the internet, and international and domestic instruments. The study considered other sources such as media publications. Furthermore, the study also incorporates a comparative method as underlined in chapter 4.

The researcher considered the two research methodologies, namely, qualitative, and quantitative methodologies. Quantitative research involves the collection and analysis of numerical data to establish patterns, trends, and relationships, relying on statistical techniques to draw generalizable conclusions. On the other hand, qualitative research focuses on gathering non-numerical data through methods such as interviews, observations, and textual analysis to gain an in-depth understanding of social phenomena, exploring meanings, experiences, and subjective interpretations. In the context of a study seeking to explore individuals' attitudes and perceptions towards a specific social issue, such as this current study, qualitative methodology is best suited. This is because it allows researchers to capture the richness and complexity of participants' experiences, providing a deeper insight into the underlying factors influencing attitudes and enabling a more nuanced understanding of the topic. By embracing the qualitative approach, researchers can explore the "why" behind participants' viewpoints, generating valuable data to

inform policies and interventions aimed at addressing the issue effectively, hence, the qualitative methodology was selected for this study.

### 1.11 Organisation of the study

The study is divided into five chapters. A breakdown of what each of these chapters contains is as follows:

#### *Chapter 1: Introduction*

The introductory chapter outlines the research study. This is necessary to provide the readers with an overview of the study and the essence of the research. The chapter covers the research background, statement of the problem, objectives of the research, justification, hypothesis, research questions sought to be answered, methodology to be used, limitations of the study, theoretical framework, literature review, ethical clearance, and chapter breakdown.

#### *Chapter 2: The Historical Policy, legal and institutional framework for anti-corruption in Namibia*

In this chapter, the author will cover the historical background of policy, legal, and institutional framework on corruption in Namibia. This chapter will focus on the era before Namibia's independence and analyse the various frameworks implemented during that time in the fight against corruption.

#### *Chapter 3: Analysis of the policy, legal, and institutional framework on corruption in Namibia*

The chapter will cover an assessment of policies, legislation, and institutional framework currently in place to fight corruption in Namibia. Additionally, the study will assess the strength and weaknesses of those policies, legislations, and frameworks, as well as examine whether those legislations, policies, and frameworks have served the purpose of their enactment. In addition to that, the chapter will include an analysis of various cases of corruption in Namibia and beyond and analyse the effectiveness of the Namibian judiciary in combating corruption.

Furthermore, the chapter will assess the various institutions/agencies (formal and informal) dealing with corruption in Namibia. The assessment will cover the institutions' mandates and analyse whether there is harmony or overlapping in their functions. In concluding the chapter, the writer will further examine the effectiveness of the institutions and make recommendations for identified shortcomings.

*Chapter 4: Comparison of the Namibian Policy, legal and Institutional Framework to other Jurisdictions in Africa and Globally*

The chapter will compare the various policy, legal and institutional frameworks available domestically and internationally to those of Namibia. In concluding the chapter, the writer will further examine the effectiveness of the identified frameworks and make recommendations for possible adoption or law reform in Namibia, having considered the various jurisdictions.

*Chapter 5: Conclusion and Recommendations*

The chapter will be divided into two parts, the conclusion, and recommendations. The conclusion shall test whether the hypothesis of the study have been answered or otherwise. The recommendations will delve into the discussed policies, and legislative, and institutional reforms, if any, to effectively combat corruption in Namibia.

#### 1.12 Ethical considerations

This work is limited to desk research and all sources used are referenced. Therefore, no individual or group interviews/questionnaires were used as an instrument of research, to hold discussions concerning any topics or issues that might be sensitive, embarrassing, or upsetting. No criminal or other disclosures requiring legal action and having potentially adverse effects, risks, or hazards for research participants were made in respect of the study. Therefore, there was no need for arrangements to be made in respect of insurance and /or indemnity to meet the potential legal liability of the University of Namibia for harm to participants arising from the conduct of the research.

## CHAPTER TWO

### THE HISTORICAL PERSPECTIVE OF THE LEGAL, POLICY, AND INSTITUTIONAL FRAMEWORK ON CORRUPTION IN NAMIBIA

#### 2.1 Introduction

This chapter provides the historical background of Namibian laws, policies, and institutional frameworks on corruption. When most people think of corruption, images of immorality, depravity, dishonesty, deterioration, or modification come to mind.<sup>90</sup> This is because corruption is essentially a deterioration, disintegration, decomposition, or putrefaction process.<sup>91</sup> The word corruption is derived from "*corruptus*," the past participle of the Latin verb "*corrumpere*," which means "to demolish" or "to break."<sup>92</sup> Corruption thus implies that something is destroyed or badly broken. This something might be a moral or ethical code or, more often, an administrative rule or a law.<sup>93</sup>

While there is a growing body of literature on the topic of corruption that addresses its scope, effect, and efforts to deter it, there is no universally accepted definition of the concept.

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<sup>90</sup> Warren ME (2004), What Does Corruption Mean in a Democracy. Available at <https://www.jstor.org/stable/1519886> accessed 02 January 2022.

<sup>91</sup> Noor MT 'Institutional Dynamics of Governance and Corruption in Developing World: The Case of Pakistan' (unpublished PHD. Dissertation Ruprecht-Karls-Universität 2009) 36-40.

<sup>92</sup> Ahmed HS (2017) Development of an Anti-Corruption Toolkit with Components from Lean Construction, 21.

<sup>93</sup> Hope RK 'Bureaucratic Corruption and Maladministration in the Third World (1985) 1 *International Review of Administrative Sciences* 1-6

<sup>94</sup> However, of all the numerous definitions, for purposes of policies the World Bank (WB) 2007 definition of corruption has gained popularity amongst scholars. The WB defines corruption as the use of “public office for personal gain”.<sup>95</sup> Corruption, according to the WB, is defined as "the abuse of entrusted power for personal advantage."<sup>96</sup> Several scholars researching corruption in Africa, Europe, and Asia such as Coetzee<sup>97</sup> Holmstrom <sup>98</sup> and Hellmann <sup>99</sup> have all adopted this definition. It is worth noting that there are as many proposed definitions of corruption as there are writers amongst the numerous scholarly researches on the subject.

Despite definitional ambiguities, most scholars such as Wilson<sup>100</sup> and Rousseau<sup>101</sup> agree that corruption in the public sector is broadly viewed as the “use of public office for

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<sup>94</sup> Henning PJ (2001) *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law* 18.

<sup>95</sup> World Bank (1997). *The Economic and Social Consequences of Corruption in Transition Economies*. Washington DC: World Bank 9-10.

<sup>96</sup> Kenneth K (2006) *Handbook: Curbing Corruption in Public Procurement*, (Berlin), Transparency International 90.

<sup>97</sup> Coetzee J ‘Comparative best practices to manage corruption’ (2016) 5 (2) *Journal for Studies in Humanities and Social Sciences* 143-157.

<sup>98</sup> Holmstrom L (2013). *Corruption Within the European Union: A study of the EU and its Member States concerning their level of and fight against corruption, and its relation to law and democracy*. Lund: Lund University 113.

<sup>99</sup> Hellmann O (2017) *The historical origins of corruption in the developing world: a comparative analysis of East Asia*. *Crime Law Social Change*, 68, 145-165.

<sup>100</sup> Wilson J (1989a): “Corruption: The shame of the states”, in *Political Corruption* 67.

<sup>101</sup>Rousseau JJ *Preromanticism Criticism* available at <https://www.ipl.org/essay/Rousseau-And-Romanticis> accessed 18 January 2022.

private gain.<sup>102</sup> That is because corruption mostly involves someone in a position of power, who abuses such power in the allocation of goods, services, or any form of incentive. Additionally, corruption may involve influencing the position holder, through the payment of bribes or exchange of benefits or favours, to receive special treatment not available to others, even if the gain involved is not illicit under applicable law.<sup>103</sup>

Corruption is a traitorous scourge. It has a wide range of destructive effects on societies, as it not only undermines democracy and the rule of law but also provides a breeding ground for violations of human rights.<sup>104</sup> Further, corruption distorts markets, erodes the quality of life, and allows organised crime, terrorism, and other threats to human security to flourish.<sup>105</sup> In a corrupt system, institutions deteriorate and break down, as institutions fail to function since they have all been perverted. This means that corruption occurs when officials in charge of a society's "public goods" turn them into their private goods, an approach that may still be debatable but more comprehensive than other conceptualisations.<sup>106</sup>

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<sup>102</sup> Gray C & Kauffman D (1998) Corruption an Open knowledge 180-187.

<sup>103</sup> Supra note 99.

<sup>104</sup>Hoffman P (2019) Corruption is not just a scourge, it is a crime too available at <https://www.dailymaverick.co.za/opinionista/2019-05-01-corruption-is-not-just-a-scourge-it-is-a-crime-too/> accessed 04 March 2022.

<sup>105</sup> Press Release & Remarks, USAID administrator Samantha power hosts roundtable with anti-corruption change agents, USAID released on 23 September 2021.

<sup>106</sup> Heywood PM. (2015) Routledge Handbook of Political Corruption 56-70.

Like most activities, corruption is particularly linked to a country's social, economic, historical, and political system.<sup>107</sup> This concept of normative evaluation has been illustrated by Arnold J. Heidenheimer<sup>108</sup> who classifies corruption into “black”, “gray” or “white” corruption”:

- 1) “Black corruption” indicates that in that setting that particular action is one, which a majority consensus of both elite and mass opinion would condemn and would want to see punished on grounds of principles.<sup>109</sup> This behaviour is judged particularly corrupt and heinous if both public officials and the public judge it corrupt, and both want it restricted. This is an extreme case of corruption such as “a public official involved in heroin trafficking”, “car hijackings” or “child rapes” this category is in that both groups find the acts reprehensible and demand punishment for the culprit.
- 2) “Gray corruption” indicates that some elements, usually elites, may want to see the action punished, others not, and the majority may well be ambivalent. This type is considered the most difficult to define and detect and consequently is potentially most destructive to a political system organised along democratic principles.<sup>110</sup>

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<sup>107</sup> Tanzi V and Ludger S ‘Reconsidering the Fiscal Role of Government: The International Perspective’ (1997) 87 (2) *The American Economic Review* 164-168.

<sup>108</sup> Heidenheimer AJ (1989) ‘Perspectives on the Perception of Corruption, in A.J. Heidenheimer, M. Johnston and V.T. LeVine (eds.) *Political Corruption: A Handbook*, Transactions Publishers, New Brunswick 141–154.

<sup>109</sup> Graycar A (2020) *Corruption Ethics and Integrity in Public Administration*, Edward Elgar Publishing Limited 1-10.

<sup>110</sup> Ibid.

- 3) “White corruption” signifies that the majority of both elite and mass opinion probably would not vigorously support an attempt to punish a form of corruption that they regard as tolerable.<sup>111</sup> This implies that they attach less value to the maintenance of the values involved than they do to the costs that might be generated as the result of a change in rule enforcement. This is “petty” or “routine” corruption, such as members of the public bribing traffic officials to avoid arrest for speeding or another related offence.

Nonetheless, corruption is also the antithesis of integrity,<sup>112</sup> because a breakdown of integrity means a systemic breakdown. Corruption breaks down integrity and can be defined as “an impairment of integrity, virtue or moral principle; depravity, decay, and/or an inducement to wrong by improper or unlawful means, a departure from the original or from what is pure or correct, and/or an agency or influence that corrupts”.<sup>113</sup>

Literature on corruption revolves around the issue of power and particularly the use of public power that should be distinct from private.<sup>114</sup> This implies the exercise of public functions by a public official who is in a position of

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<sup>111</sup> Heidenheimer et. al. (1993) Political Corruption: Concepts and Context 150-155.

<sup>112</sup> Spies PH (2003). Toepassings van Sosiale Sisteem Teorie by Armoedeverligting in Suid-Afrika. Study presented at the South African Academy for Science and Arts Symposium. Pretoria, 20 June 2012.

<sup>113</sup> Webster's Unabridged. *The Week: A Canadian Journal of Politics, Literature, Science and Arts* available at <https://archive.org/details/weekcanadianjour01toro?view=theater#page/n81/mode/1up> accessed 02 March 2021.

<sup>114</sup> Warburton J Corruption, Power and the Public Interest, Business and Professional (1998) 17 (4) *Ethics Journal* 78-90.

responsibility and whose decisions or actions affect a specific public or the whole community. Any deviation from this responsibility will affect the community in one way or another, as public power should be exercised to the benefit of all and not of one or a clique.<sup>115</sup> Any deviation becomes an act of abuse as far as the public sector is concerned. The problem of curbing corruption has concerned philosophers, social scientists, and policymakers since Aristotle.<sup>116</sup>

Mulgan suggests that delving into historical digressions can provide valuable insights into the issue of corruption. Throughout European history of thought, the exploration of political corruption and the potential for attaining non-corrupt politics can be traced back to the works of Plato and Socrates, prominent Greek philosophers, and later continued by their successors during the Hellenistic era.<sup>117</sup> The philosophers addressed the issue of corruption in politics and the corruptibility of politicians<sup>118</sup>. On the one hand, Socrates rejected the life of the politician as incompatible with the quest for knowledge and provided the inspiration for subsequent philosophies of quietist withdrawal, such as Cynicism, Epicureanism, and the more extreme versions of

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<sup>115</sup> Nye JS Corruption and Political Development: A Cost-Benefit Analysis (1967) 61*American p*

*Political Science Review Journal* 109-115.

<sup>116</sup> John JW (2006) "The Concept of Systemic Corruption in American History 100.

<sup>117</sup> Mulgan R (1977) Aristotle on Legality and Corruption Anu Press 25-36.

<sup>118</sup> Philp M. (1997). Defining political corruption. *Political Studies*, 45-62.

Stoicism that were to flourish in the Hellenistic age.<sup>119</sup> Plato, on the other hand, while never renouncing the world of politics, nonetheless, located it in the inferior realm of his dualistic universe.<sup>120</sup>

Aristotle, though less disapproving of the sub-astrophysical world of change and contingency than Plato, also never abandoned his platonic commitment to the superiority of an eternal unchanging realm accessible only to pure reason.<sup>121</sup> Aristotle emphasised that politics was connected to the world of the senses and thus, the political world was subject to inevitable change and human society's decay.<sup>122</sup>

These theorists, all stood by some form of ontological dualism, in which a world of pure truth and goodness stood as opposed to an inferior world of ambiguity and malevolence. The Theorists took two forms of approach to government and politics.<sup>123</sup> The first approach was a more radical and deliberately paradoxical path that involved a total rejection of all government, and by implication, a rejection of all human society, as being inveterately flawed; the second and less radical approach that was followed by Plato and Aristotle was to devise an ideal form of government that

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<sup>119</sup> Mulgan R (1977) Aristotle on Legality and Corruption, 28-30.

<sup>120</sup> DeLeon P (1993). Thinking about political corruption. Armonk and London: M. E. Sharpe, 190.

<sup>121</sup> Texeira LAG (2014) Rhetoric for philosophers: An examination of the place of rhetoric in philosophy, ProQuest LLC, 26-82.

<sup>122</sup> Mulgan R (1977) Aristotle on Legality and Corruption, 25-27.

<sup>123</sup> Bonitz H (1955). Index Aristotelicus. Graz: Akademische Druck-U, Verlagsanstalt,90.

would incorporate the other-worldly values of unqualified truth and goodness.<sup>124</sup>

This approach of Aristotle, in turn, provided a standard against which the performance of everyday regimes could be judged, and improvements recommended.<sup>125</sup> In this respect, corruption is closer in meaning to ‘deviant’, the term Aristotle uses to describe an inferior constitution. For both Plato and Aristotle, the key feature that ideal regimes possess because of their wise and virtuous rulers is that they are governed in the common interest. Contrarywise, the leading characteristic that differentiates deviant regimes from the ideal regime is that their rulers rule in their interest than the common interest.<sup>126</sup>

Looking at the above theories, there is therefore a close similarity with the modern concept of political corruption which is understood to be the absence of sound or non-corrupt politics.<sup>127</sup>

## 2.2 Corruption in Namibia: A general perspective

Historically, Namibia has passed through several distinct stages from being colonised in the late nineteenth century to Namibia's independence on 21 March 1990. After independence, Namibia became a sovereign state ruled by

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<sup>124</sup> *Supra*.

<sup>125</sup> Philp MA (1997). Defining political corruption. *Political Studies*, 45-62.

<sup>126</sup> DeLeon P (1993). *Thinking about political corruption*. Armonk and London: M. E. Sharpe, 52.

<sup>127</sup> Mulgan R (1977) *Aristotle on Legality and Corruption*, 28-30.

constitutional supremacy. <sup>128</sup>In terms of Article 21 of the Constitution of Namibia, Namibia commits the citizens of its country irrevocably and without compromise to the ethical values of a democratic state.<sup>129</sup>

The principle of constitutional supremacy in Namibia dictates that all citizens are obliged to respect the supreme law of the country, the constitution.<sup>130</sup> Article 94A of the Constitution commits the state to respect moral principles

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<sup>128</sup> Article 1 (1) of the Namibian Constitution.

<sup>129</sup> Article 21 Fundamental Freedoms

(1) All persons shall have the right to:

(a) freedom of speech and expression, which shall include freedom of the press and other media;

(b) freedom of thought, conscience, and belief, which shall include academic freedom in institutions of higher learning;

(c) freedom to practise any religion and to manifest such practice;

(d) assemble peaceably and without arms;

(e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;

(f) withhold their labour without being exposed to criminal penalties;

(g) move freely throughout Namibia;

(h) reside and settle in any part of Namibia;

(i) leave and return to Namibia;

(j) practise any profession, or carry on any occupation, trade, or business.

(2) The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

<sup>130</sup> Article 1 (6) of the Namibian Constitution.

and expects members of parliament to act regarding transgressions of the legislation approved by parliament, such as fraud and corruption, in line with duties. Therefore, Officials who contravene the obligations arising from the Constitution and thus fail to “promote the integrity of the Namibian nation” are liable to prosecution. These principles were reiterated in *S v Hanse-Himarwa*,<sup>131</sup> where the accused was convicted on one count of contravening section 43(1) of the Anti-Corruption Act 8 of 2003, for corruptly using her office as Governor of the Hardap Region to benefit two of her family members. In sentencing the accused the court emphasised that:

*“The offence of corruption, by any standard, is serious. The nature thereof is such that it has penetrated every corner and sphere of society, be it political, economic, or social, and raised its ugly head where someone stood to gain at the expense of others, or society in general.”*

Furthermore, the court repeated the principles laid down in *South African Association of Personal Injury Lawyers v Heath and Others* at 891D-E:

*‘Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality, and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State. There*

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<sup>131</sup> (3) (CC) 5 of 2018.

*can be no quarrel with the purpose sought to be achieved by the Act or the importance of that purpose.’*

Notably, corruption is not only initiated or perpetrated by public servants. Political, business, and community leaders are not immune to unethical conduct. Some of Namibia's worst scandals have been and continue to be perpetrated by corporate and community leaders. For example, Namibia was rocked by multiple corruption scandals shortly after gaining independence, including the so-called “Borehole Scandal”, which erupted in 1992,<sup>132</sup> and “the Merc-Scandal” as it was popularly known in the 90s. Worth noting is that “the Merc” scandal involved the then Permanent Secretary Andreas Guibeb who was accused of gross negligence in the performance of his duties. In August of 1994, he was formally charged in terms of the Public Service Act<sup>133</sup> yet in December of the same year, his appointment was renewed for another five years, an inexplicable decision, never properly justified.<sup>134</sup> While the Borehole scandal entailed several top figures in Namibian politics, including two cabinet ministers and the Southern African Development Community (SADC ) executive secretary, accused of misusing drought relief aid.<sup>135</sup> The allegations date back to 1992, when Namibia experienced severe drought. It was

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<sup>132</sup> Refer to the “Final Report of the Internal Committee on the Investigation of Boreholes (Secret) Office of the Prime Minister, July 1994.

<sup>133</sup> Act 13 of 1995.

<sup>134</sup> *Supra* 17.

<sup>135</sup> Mail & Guardian reporter, 19 May 1995, Namibian borehole scandal, available at <https://mg.co.za/article/1995-05-> accessed 02 November 2022).

alleged that then Minister of Justice Ngarikutuke Tjiriange and then Deputy Minister of Home Affairs Ithete, had arranged for two boreholes to be drilled on their jointly owned farm at a cost of almost N\$200 000 during the 1992 drought. Limited information was released on the matter and the ministers were cleared with no actions taken against them.<sup>136</sup>

Similar patterns of conduct were seen in the Frank Commission matter,<sup>137</sup> whereby a senior control officer of the government's Department of Works was accused of setting up a company and then making payments to the same company using government money. A Commission of Inquiry was set, and the commission produced four reports, the last of which was eventually submitted to Parliament 16 months after it was handed over to President Nujoma. The other reports have never been released. However, no punitive actions were ever taken.<sup>138</sup>

From the above-highlighted cases, the provisions of the Constitution<sup>139</sup> seem to have been inadvertently overlooked or consciously ignored. Additionally, one can conclude that the authorities were either unwilling or unable to tackle graft, especially if it occurred within their rank.

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<sup>136</sup>Ibid 133.

<sup>137</sup>Minney Tom 'Frank Commission Fraud and more Fraud' *The Namibian* 21 July 1992 at 1.

<sup>138</sup> Ibid.

<sup>139</sup> Article 94A of the Constitution, Anti-Corruption measures were disregarded.

It was against that background that on 20 August 1996, cabinet approved the creation of an ad hoc “Ministerial Committee on the Promotion of Ethics and Combating of Corruption” and a “Technical Committee” to develop legislative and administrative proposals for a comprehensive ethics/anti-corruption regime in Namibia.<sup>140</sup> These committees were officially launched by the prime minister six months later in March 1997. The delegates, who came from all walks of life, unanimously agreed that people in government and public service had a moral responsibility to provide clean, transparent, and good governance first and foremost.<sup>141</sup>

Amongst the key recommendations was the need for an independent agency to spearhead the anti-corruption strategy as well as the review of the codes of conduct for the public, parastatal, and private sectors.<sup>142</sup> The spirit and enthusiasm that prevailed during discussions were one of eager anticipation of the creation of effective mechanisms aimed at eradicating systematic and institutionalised corruption.<sup>143</sup> This came after the realisation that although the Namibian constitution is regarded as one of the best in the African continent, the constitution was passive on fraud and

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<sup>140</sup> Namibia Institute for Democracy (2007) *Tackling Corruption: Opinions on the way forward Namibia* John Meinert Printing 11-12.

<sup>141</sup> *Ibid.*

<sup>142</sup> Namibia Institute for Democracy (2007), *Tackling Corruption: Opinions on the way forward Namibia*, John Meinert Printing, 10.

<sup>143</sup> *Supra* 17.

corruption.<sup>144</sup> It was then in July 2003 that the Anti-Corruption Act was signed by the President.

### 2.3 Historical Background on Policy Framework on corruption in Namibia

The Constitution of the Republic of Namibia establishes Namibia as a multiparty democracy functioning under the Rule of Law.<sup>145</sup> The Constitution follows the principle of separation of powers between the Executive, the Legislature, and the Judiciary.<sup>146</sup> A constitutional amendment in 2010 removed the power to investigate corruption from the functions of the Ombudn and brought the ACC. The ACC thus became a constitutionally enshrined institution in 2010.

Namibia has signed and ratified the following regional and international anti-corruption instruments:

#### *2.3.1 Southern African Development Community (SADC) Protocol against Corruption*

Namibia signed the Protocol on 14th August 2001 and Parliament ratified it on 27th April 2004. The Protocol aims to encourage the development of anti-corruption mechanisms at the national level, promote cooperation in the fight against corruption amongst governments, and harmonise anti-corruption legislation in the region.<sup>147</sup> The Protocol further guides its member states on which acts to

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<sup>144</sup> Staby HE. (2007) Tackling Corruption: Opinion on the way forward in Namibia 56.

<sup>145</sup> Article 1 (6).

<sup>146</sup> Article 1 (3).

<sup>147</sup> Article 2 of the Protocol.

condemn as corrupt practices.<sup>148</sup> One can safely conclude that the Protocol shaped the Namibian Anti-Corruption Act as in Chapter 4 of the Act, the Act adopted Article 2 of the protocols acts of corruption as corrupt practices in terms of the Act.<sup>149</sup>

### *2.3.2 African Union (AU) Convention on Preventing and Combating Corruption*

This Convention came into force internationally on the 5th of August 2006, and it was signed by Namibia on the 9th of December 2003, and ratified by Parliament on the 27th of April 2004. The Convention aims to strengthen the development of anti-corruption mechanisms; facilitate and regulate cooperation amongst governments; and develops and harmonises policies and domestic legislation relating to

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<sup>148</sup> Article 3 Acts of Corruption. In terms of the Article the Protocol considers corruption as solicitation or acceptance directly or indirectly by a Public Official of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions; the offering or granting, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions; any act or omission in the discharge of his or her duties by a public official for the purpose of illicitly obtaining benefits for himself or herself or for a third party; amongst others.

<sup>149</sup> For example, section 35 (1) of the Act states that an agent commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept from any person a gratification - (a) as an inducement to do or to omit doing anything; (b) as a reward for having done or having omitted to do anything,

in relation to the affairs or business of the agent's principal, this is similar to Article 3 (1) (a) of the Protocol which makes the solicitation or acceptance, directly or indirectly, by a public official, of any article of monetary value, or other benefit a prohibited act.

corruption.<sup>150</sup> The Convention was adopted after Namibia passed its Ant-Corruption Act and this can only point to Namibia's effort to strengthen its effort to eradicate corruption.

### *2.3.3 United Nations (UN) Convention against Transnational Organised Crime*

This Convention came into force internationally on 29th September 2003. Namibia signed the Convention on the 13th of December 2000 and ratified it on the 16th of August 2002. The Convention commits states to introduce a range of measures including the creation of domestic criminal offenses;<sup>151</sup> the adoption of frameworks for mutual legal assistance;<sup>152</sup> extradition;<sup>153</sup> law enforcement;<sup>154</sup> law enforcement cooperation;<sup>155</sup> technical assistance and training.<sup>156</sup>

The United Nations Convention against Transnational Organised Crime (UNTOC) is the key piece of international legislation addressing organised crime and subsequently,

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<sup>150</sup> Article 2 (1) The objectives of this Convention are to:

1. Promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish, and eradicate corruption and related offences in the public and private sectors.

<sup>151</sup> Article 8 criminalized corruption.

<sup>152</sup> Article 18 Mutual legal assistance.

<sup>153</sup> Article 16. Extradition.

<sup>154</sup> Article Measures to enhance cooperation with law enforcement authorities.

<sup>155</sup> Ibid.

<sup>156</sup> Article 29. Training and technical assistance.

Namibia passed the Prevention of Organised Crime Act,<sup>157</sup> as will be discussed below.

#### *2.3.4 United Nations (UN) Convention against Corruption*

This Convention came into force internationally on the 14th of December 2005. Namibia signed the Convention on the 9th of December 2003 and Parliament ratified it on the 27th of April 2004. The Convention aims to strengthen the development of anti-corruption mechanisms; facilitate and regulate cooperation amongst governments; and develop and harmonise policies and domestic legislation relating to cooperation.<sup>158</sup> It is an obligation by State Parties to the United Nations Convention against Corruption to develop a NACS. Subsequently, in 2016, the ACC launched its National Anti-Corruption Strategy and Action Plan.

The Namibian strategy begins by outlining existing laws and international agreements that form the legal framework for fighting corruption in Namibia, then summarising the strategic objectives of the plan.<sup>159</sup> Finally, it briefly proposes a structure for implementation and follows this with an action plan which puts actions alongside indicators of success, risk factors, responsible actors, and a time frame for completion, amongst others.<sup>160</sup> Therefore, the National Anti-

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<sup>157</sup> Act No. 29 of 2004.

<sup>158</sup> Article 5. Preventive anti-corruption policies and practices.

<sup>159</sup> Anti-Corruption Commission National Anti-Corruption Strategy and Action Plan 2016-2019 6-10.

<sup>160</sup> Ibid.

Corruption Strategy was born out of Namibia's obligations under the United Nations Convention Against Corruption.<sup>161</sup>

Other key legislation with an anti-corruption motif in Namibia are the following:

### *2.3.6 Prevention of Organised Crime Act, 2004<sup>162</sup>*

The Act was passed after Namibia ratified the United Nations Convention against Transnational Organised Crime. The Act addresses the combating of organised crime, money laundering, racketeering,<sup>163</sup> smuggling of migrants,<sup>164</sup> trafficking in persons, and criminal gang activities in Namibia and elsewhere.<sup>165</sup> The Act allows for the seizure of property used in offences and profits made, which are then transferred to a Criminal Assets Recovery Fund and used to fund crime prevention activities.<sup>166</sup> The Act enforces the purpose of the United Nations Convention against Transnational Organised Crime to promote cooperation to prevent and combat transnational organised crime more effectively. It is evident in this study that corruption is a transnational crime, taking for example the "Fishrot" matter

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<sup>161</sup> Article 5 (1) Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

<sup>162</sup> Act No. 29 of 2004.

<sup>163</sup> Chapter 2, offences relating to racketeering activities.

<sup>164</sup> Schedule 1, 18.

<sup>165</sup> See the preamble of the Act.

<sup>166</sup> Section 28, Seizure of property subject to restraint order and section 54 Seizure of property subject to preservation of property order.

which involved nationals from outside Namibia. Therefore, corruption can entail a violation of the law of more than one country in its planning, execution, or impact, and thus the importance of the United Nations Convention against Transnational Organised Crime cannot be overemphasised.

### *2.3.6 Financial Intelligence Act, 2012 (FIA)*

To understand the significance of FIA in combating money laundering it is important to highlight that Corruption and money laundering are closely linked. Corruption offenses, such as bribery or theft of public goods can generate substantial amounts of proceeds that will need to be laundered to enter the financial system. At the same time, corruption may facilitate money laundering for example, by having corrupt officials influence the process by which proceeds are laundered and enable launderers to escape all controls and sanctions.<sup>167</sup>

The main purpose of FIA is to combat money laundering by imposing a duty on accountable institutions to report certain transactions to the Bank of Namibia (BON).<sup>168</sup> Therefore, if money laundering and terrorist financing are not checked, contempt for the law may well be engendered, undermining public confidence in the legal and financial systems. This in turn promotes economic crimes such as corruption, fraud, exchange control violations, and tax evasion.<sup>169</sup> Money

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<sup>167</sup> Saad NK et al 'The Incestuous Relationship Between Corruption and Money Laundering '2012 (83) 172.

<sup>168</sup> Section 2, Application of Act to the accountable and reporting institution.

<sup>169</sup> Namibia national strategy on anti-money laundering and combatting the financing of terrorism, 3.

laundering facilitates corruption and the accumulation of economic power by corrupt individuals and businesses and has the potential to undermine the economy and Namibia's democratic way of life.<sup>170</sup>

#### 2.4 Historical Background and current Institutional Framework on corruption in Namibia

When corruption is widespread, the institutional culture grows sick, and the norm is corruption with expectations that corruption will continue.<sup>171</sup> However, institutions are central in the fight against corruption, as getting economic policies right, enforcing laws, maintaining financial management systems, and practicing sound procurement across the public sector all require well-functioning institutions.<sup>172</sup> Most scholars on corruption have demonstrated that institutions, in particular public institutions, are weak and have become a failure in most African countries. Systemic and persistent corruption generally has its roots in the actions of powerful leaders and officials to deliberately weaken internal institutions of control within government.<sup>173</sup>

In a corrupt regime, institutions are captured by the elite to serve narrow personal interests. The resultant effect has been

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<sup>170</sup> These four points have been paraphrased from Combating Money Laundering and Terrorist

Financing (2016) 2 *Commonwealth Secretariat* 6-7.

<sup>171</sup> Klitgaard R (2019) Engaging corruption: new ideas for the International Monetary Fund, 180.

<sup>172</sup> United Nations. (2016). Report of the inter-agency and expert group on sustainable development goal indicators. New York: United Nations.

<sup>173</sup> UNODC, Module 2: Corruption and Good Governance available at <https://www.unodc.org/e4j/zh/anti-corruption/module-2/key-issues/what-is-good-governance.html> accessed 12 May 2021.

the lack of the ability of the state to provide the requisite institutional framework to control corruption and support good governance.<sup>174</sup> Consequently, the challenge for policymakers in African countries is to shape policies for institutional strengthening in ways that encourage and enhance ethical behaviour and good governance.<sup>175</sup>

Building and maintaining strong institutions are therefore central challenges of good governance and are keys to controlling corruption.<sup>176</sup> Corruption can be controlled by strengthening institutions and by upholding the rule of law. In other words, the failure to enforce the laws by institutions and, by extension, the general rule of law, results in countries being riddled with corruption<sup>177</sup>. However, strengthening institutions for corruption control must be a legitimate process and not result in the creation of good governance facade institutions.<sup>178</sup>

The Namibian constitution, in article 89 establishes the Ombudsman and states, in article 91 (f), that the Ombudsman

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<sup>174</sup> Ganahl JP (2013) *Corruption, Good Governance, and the African State A Critical Analysis of the Political-Economic Foundations of Corruption in Sub-Saharan Africa*, Potsdam University Press 62-68.

<sup>175</sup> Aldcroft. DH (2015) *Governance, Institutions, and Corruption: Negative Sovereignty in Africa*, IP Press 68.

<sup>176</sup> Biswas AK et al. (2016). *Corruption, economic development, and poverty alleviation*. *The Diplomat* available at <http://thediplomat.com/2016/05/corruption-economic-development-and-poverty-alleviation/> accessed 10 April 2022.

<sup>177</sup> Atta-Mensah J (2016) *The Valuation of Corruption Scientific*, Research Publishing 37.

<sup>178</sup> Murray M & Spalding A (2015). *Freedom from official corruption as a human right*. *Governance Studies at Brookings* available at [https://www.brookings.edu/wp-content/uploads/2016/06/murray-and-spalding\\_v06.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/murray-and-spalding_v06.pdf) accessed 12 Apr 2022.

shall have the duty to investigate vigorously all instances of alleged or suspected corruption and the misappropriation of public monies by officials and to take appropriate steps, including reports to the Prosecutor-General and the Auditor-General. The Ombudsman Act<sup>179</sup> went on to further repeat these constitutional provisions, in section 3 (1) (e) on the duties and functions of the Ombudsman, providing that the Ombudsman shall have the power to enquire into and investigate and take actions and steps regarding “all instances or matters of alleged or suspected corruption and the misappropriation of public money or other public property by officials.”

Additionally, the Anti-Corruption Act also has similar powers in terms of chapter four of the Act. The ACC is an independent agency equipped with wide-ranging powers to investigate corruption offences and take measures to prevent corruption and refer its investigation findings to the Prosecutor-General.<sup>180</sup> Before 2010, Constitutional amendment, this resulted in a clash of duties between the Anti-Corruption Commission and the Ombudsman as the two institutions had the same mandate, from reporting, investigation, and reference to the prosecutor general, as far as corruption is concerned. It was against that background that the legislature in 2010, amended the Namibian Constitution, Article 91 by removing “Corruption” from the mandate of the Ombudsman and clothing the ACC with full power to deal with corruption matters. Subsequently, the

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<sup>179</sup> No 7 of 1990.

<sup>180</sup> Section 31.

constitution was amended by inserting Article 94A on Anti-Corruption Measures.<sup>181</sup>

Besides the Anti-corruption Commission, various non-state actors are also involved in the monitoring of corruption.<sup>182</sup>

Additionally, Article 18 of the Namibian Constitution requires administrative bodies and administrative officials to act fairly and reasonably to comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.<sup>183</sup>

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<sup>181</sup> Article 94A Anti-Corruption Measures

- (1) The State shall put in place administrative and legislative measures necessary to prevent and combat corruption.
- (2) There shall be established by an Act of Parliament an Anti-Corruption Commission with its powers and functions provided for in such Act.
- (3) The Anti-Corruption Commission shall be an independent and impartial body.
- (4) The Anti-Corruption Commission shall consist of a Director, a Deputy Director, and other staff members of the Commission.
- (5) The National Assembly shall appoint the Director of the Anti-Corruption Commission and the Deputy Director upon nomination by the President.
- (6) The Director of the Anti-Corruption Commission and the Deputy Director shall be appointed for a period of five years and their qualifications for appointment and conditions and termination of service shall be determined in accordance with an Act of Parliament.”

<sup>182</sup> See for example [www.insight.com.na](http://www.insight.com.na), which seeks to report on actual instances of corruption. The Namibia Institute for Democracy (NID) also publishes information on actual instances of corruption. The report (Actual instances of corruption as reported in the Namibian print media), as well as other publications dealing with good governance topics, are available on the NID website [www.nid.org.na](http://www.nid.org.na).

<sup>183</sup> Article 18 of the Namibia Constitution which deals with Administrative Justice.

Therefore, the constitution further in Article 18 places an obligation on institutions to comply with the law which, *inter alia*, includes the fight against corruption.

## 2.5 Conclusion

Theorists such as Plato and Aristotle have pointed out the link between politics and corruption, the two Philosophers emphasised that politics was linked to the world of senses, and it is the absence of the sense of right and wrong in leaders that results in corruption or corrupt regimes.<sup>184</sup> Aristotle accentuated that there is a world of pure truth and goodness as opposed to an inferior world of ambiguity and evil.<sup>185</sup> This in the modern era ties in with the definition of corruption as the abuse of power and therefore a corrupt regime or leadership can be attributed to the lack or absence of “right” and the presence of “wrong”.<sup>186</sup> Furthermore, Aristotle’s definition or classification of corruption is linked to Heidenheimer’s definition of corruption, which encompasses the absence of integrity and results in “an impairment of integrity, virtue or moral principle and thus departs from purity and truthfulness.”<sup>187</sup>

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Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal

<sup>184</sup> *Ibid* note 183.

<sup>185</sup> Connel MS (2018) *Evil in Aristotle*, Birkbeck, University of London, 277.

<sup>186</sup> *Ibid*.

<sup>187</sup> Arnold JH and Michael J (eds.), 2002, *Political Corruption: Concepts and Contexts*, third edition, London: Transaction Publishers.

In conclusion, despite the existence of multiple definitions of corruption, particularly in the definition-for-policy category, all definitions share characteristics that make the definition of corruption "the use/abuse of public position for personal benefit" applicable to all. Like other countries, Namibia is also battling the plague of corruption. Institutionally, this chapter has demonstrated that as a matter of law and practice, at a point the country had two institutions dealing with corruption. This situation was not only untenable; it is also a waste of public resources.<sup>188</sup>

On policy implementation, it should be highlighted that Namibia to date does not have an anti-corruption policy, rather the country opted to adopt a National Anti-Corruption Strategy and Action Plan, with the country currently in the process of reviewing the NACSAP 2021-2025. After adopting the NACSAP 2016-2019 a National Anti-Corruption Steering Committee was established with the responsibility of overseeing the coordination and execution of the Namibian Anti-Corruption Strategy and Action Plan to its implementation.

As outlined in this chapter the country has enacted various legislations, of which some were passed before independence to curb corruption. The effectiveness of those legislations will be assessed in the subsequent chapter, as well as the efficiency of the policies in place and established institutions.

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<sup>188</sup> Amupanda JS (2019) *The Fight against Corruption in Namibia: An Appraisal of Institutional Environment and a Consideration of a Model for Civil Society Participation*, NLJ 11 (1) 187- 203.

## CHAPTER THREE

### ANALYSIS OF THE POLICY, LEGAL AND INSTITUTIONAL FRAMEWORK ON CORRUPTION IN NAMIBIA

#### 3.1 Introduction

This chapter will examine Namibia's anti-corruption policy, legal and institutional framework. It is important to note that a comprehensive framework encourages a workable and coordinated approach to battling corruption.<sup>189</sup> The anti-corruption policy will aid in creating a strong institutional and legal framework, which is necessary to fight corruption.<sup>190</sup> For the aim of deconstructing this study, the author will answer three key questions in this chapter, namely: Is there an anti-corruption policy, legal, and institutional framework in Namibia? Whether the Namibian legislature is passing legislations to implement existing policies? If the answer to that question is "yes," describe how the policy, legal, and institutional framework is being put into practice. Before answering the above questions, it is crucial to understand the policy to completely comprehend this.

#### *3.1.2 Overview of the policy framework*

The term “policy” is subject to various meanings depending on the context in which it is being used. The West's

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<sup>189</sup> OECD Strategic Approach to combating corruption and promoting integrity (2018) Government of the United Kingdom 22-28.

<sup>190</sup> United Nations Guide on Anti-Corruption Policy November 2003 45-50.

Encyclopaedia of American Law<sup>191</sup> defines policy as the general principles by which a government is guided in its management of public affairs, or the legislature in its measures. Additionally, the Concise Oxford dictionary<sup>192</sup> defines policy as a course or principle of action adopted or proposed by a government, party, business, individual for prudent conduct, or sagacity. Jenkins,<sup>193</sup> provides a more concise definition of the term policy, by defining policy as a set of interrelated decisions taken by a political actor or a group of actors concerning the selection of goals and the means of achieving them within a specified situation where these decisions should, in principle, be within the power of these actors to achieve. The definition offered by Jenkins is supported by Birkland,<sup>194</sup> who defines policy as a statement by a government of what it intends to do or not to do, such as law, regulation, decision, order, or a combination of these.

For any country to effectively come up with an anti-corruption policy, the country should first diagnose and analyse corruption within its country. This should be done by investigating the types and extent of corruption in that specific country.<sup>195</sup> Simply put, it is impossible to combat a

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<sup>191</sup> West's Encyclopaedia of American Law 2ed (2008) available at <https://legal.dictionary.thefreedictionary.com/Policy> accessed on 20 July 2021.

<sup>192</sup> Concise Oxford dictionary 9th edition, (1995) Oxford University Press 1057.

<sup>193</sup> Jenkins W (1978) Policy Analysis; Apolitical and Organizational Perspectives 15.

<sup>194</sup> Birkland T (2005) An introduction to the policy process: theories, concepts, and models of public policymaking 138.

<sup>195</sup> UN Guide for Anti-Corruption Policies, November 2003, available at [https://www.unodc.org/pdf/crime/corruption/UN\\_Guide.pdf](https://www.unodc.org/pdf/crime/corruption/UN_Guide.pdf) accessed 10 June 2022, 78-90.

problem that is not understood. Therefore, the country should first understand the type and extent of its corruption before embarking on combating it. Secondly, the country should formulate anti-corruption measures.<sup>196</sup> In so doing, according to the UN guidelines, each proposed measure in the plan should be explicitly tied to the problem it is meant to address.<sup>197</sup>

The Institute for Public Policy Research in Namibia noted that the Anti-Corruption Commission is often not suitable for the task, as it “may have neither sufficient resource nor adequate power to compel other departments and agencies” to implement the plan.<sup>198</sup> The last aspect involves monitoring and evaluation which should be conducted on an ongoing basis. This allows the implementor to identify any aspect that is not working and any changes that may be required. It is therefore crucial that countries monitor and evaluate both the implementation and impact as that is necessary to assess whether the plan is being carried out properly and whether these interventions are having the desired effect.<sup>199</sup>

In drafting its anti-corruption strategy, Namibia followed the guidelines provided by the United Nations Office on Drugs and Crime on drafting national anti-corruption strategies.

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<sup>196</sup> Ibid note 198.

<sup>197</sup> Communication with Paulus Noa, Director of the Anti-Corruption Commission, 16 November 2016 as reported in the briefing Study, The Namibian Anti-Corruption Strategy 2016-2019: An Overview and Analysis 12-24.

<sup>198</sup> Anti-Corruption Commission, ‘National Corruption Perception Survey Report (2016)’ available at 33 <https://www.accnamibia.org/wp-content/uploads/2017/01> accessed 12 June 2022.

<sup>199</sup> ACC (2016) Briefing Study: The Namibian Anti-Corruption Strategy 2016-2019: An Overview and Analysis 4.

According to the UN,<sup>200</sup> the process of drafting the strategy should be assigned to a small group that has a fair degree of autonomy. This should be chaired by “an individual with sufficient stature, legitimacy, and political influence” who can champion the committee’s work and liaise with other leaders, bodies, and the public.<sup>201</sup> A good strategy includes wide-ranging consultations by all bodies of government and consultations should be made widely to include all sectors of society. This is because the various bodies have expertise that can improve the strategy.<sup>202</sup>

### *3.1.3 Overview: the 2016-2019 Namibia Anti-Corruption Strategy*

The Namibian Anti-Corruption Strategy and Action Plan were drafted by the Anti-Corruption Commission of Namibia with specific reference to the stipulations of UNCAC as earlier discussed.<sup>203</sup>

For a clearer understanding, the strategic objectives are summarised here along with some of their specific actions:

#### *3.1.3.1 Increasing the level of political accountability*

This strategic objective refers to section 139 of the Electoral Act, of 2014<sup>204</sup> which introduced new accountability

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<sup>200</sup> United Nation.

<sup>201</sup> The section is based on: United Nations Office on Drugs and Crime, “National Anti-Corruption Strategies: A Practical Guide for Development and Implementation” (United Nations, 2015).

<sup>202</sup> Ibid 105.

<sup>203</sup> Anti-Corruption Commission, “National Anti-Corruption Strategy and Action Plan 2016-2019,” 5-6.

<sup>204</sup> Electoral Act, No.5 of 2014.

measures for political parties. In terms of the said section, the parties should declare their assets and liabilities, record contributions, and provide audited financial statements.<sup>205</sup> In terms of the Anti-Corruption Strategy and Action Plan, the ACC states that political parties ought to demonstrate an exemplary standard of accountability.

To ensure compliance with the above, three actions are required, firstly, the party should annually publish its compliance with the Act, secondly, the Electoral Commission must ensure that the party complies with the Act and thirdly, reports containing potential legislative improvements will be compiled and published after every election.<sup>206</sup>

### *3.1.3.2 Preventing corruption in government offices, ministries, agencies, and public enterprises*

This strategic objective aims to implement preventative measures to address vulnerabilities in public institutions. It also seeks to increase transparency by standardizing regulations and policies to make more public data available, mandate reports and data on the conduct and performance of

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<sup>205</sup> A registered political party must submit:

(a) within 60 days after the expiry of the first year after the issue to it of a registration

certificate under section 137(3), or the longer period as the Commission may allow;

and

(b) thereafter annually and 21 days after the official opening of the National Assembly

<sup>206</sup> Anti-Corruption Commission, “National Anti-Corruption Strategy and Action Plan 2016-2019 5.

enterprises, and make such records accessible to the public, thereby strengthening the integrity and transparency of the judiciary.<sup>207</sup>

Additionally, the strategic objective aims to eradicate corruption in public procurement which was tainted with a reputation for corruption.<sup>208</sup> In 2015 the government introduced new legislation, by enacting the Public Procurement Act,<sup>209</sup> which, amongst other things, replaces the institutions in charge of reviewing and evaluating tenders. The strategy envisions a public awareness program on the new system and training courses for officials of the new tender bodies. Furthermore, the objective aims to improve accountability in the management of the national budget, by reducing the number of resources in non-budgetary accounts, strengthening parliamentary oversight through audits, regularly training members of parliament; and conducting external audits, amongst others.<sup>210</sup>

### *3.1.3.3 Strengthening Efforts to Deter Corruption*

This objective relates to strengthen the Anti-Corruption Commission and anti-corruption legislation by, for example, amending the Anti-Corruption Act to include embezzlement in the private sector, the introduction of witness protection, whistleblower protection legislation, audit bill, creation of a ‘blacklist’ of companies that may no longer bid for

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<sup>207</sup> Anti-Corruption Commission, “National Anti-Corruption Strategy and Action Plan 2016-2019 6.

<sup>208</sup> Ibid note 208.

<sup>209</sup> Act No 15 of 2015.

<sup>210</sup> Maximilian W (2016) Asset Declarations in Namibia IPPR 7.

government work due to past misconduct, lifestyle audits, and other measures of combating illicit enrichment, as well as the amendment to Public Service Staff Rules so that corrupt practices are considered “major offenses”.<sup>211</sup>

#### *3.1.3.4 Conducting extensive anti-corruption education*

For public institutions, the plan envisions periodical training on ethics, as well as the incorporation of integrity modules into other management development programs. Additionally, for the public, the plan aims to foresee anti-corruption public debates at various levels, anti-corruption being taught in schools as part of the civil life skills subject, and a training program in ethics for teachers. The plan also aims for the ACC to develop a communication strategy, and, work with NGOs on related projects.<sup>212</sup>

#### *3.1.4.5 Preventing Corruption in the Private Sector*

Specific focus is given to the extraction of natural resources, including fisheries.<sup>213</sup> The plan includes, amongst other action items, a review of an amendment of legislation to bring it in line with international standards, the development of transparent mechanisms for extraction licenses and fishing quotas, and compliance with international standards.<sup>214</sup>

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<sup>211</sup> The Namibian Anti-Corruption Strategy 2016-2019: An Overview and Analysis 6.

<sup>212</sup> The Namibian Anti-Corruption Strategy 2016-2019: An Overview and Analysis 7.

<sup>213</sup> Weylandt M (2017) ‘Transparency in the Namibian Extractives Sector’ IPPR 9.

<sup>214</sup> The Namibian Anti-Corruption Strategy 2016-2019: An Overview and Analysis 7.

#### *3.1.4.5 Engaging civil society and the media in combating corruption*

The objective seeks cooperation with civil society and media, which are “uniquely positioned to assist the Government to bring to light cases of corruption.”<sup>215</sup> To support transparency in civil society the ACC will engage the societies for civic education and research on anti-corruption, create a new system of voluntary Civil Society Organisation (CSO) registration, and help develop CSO codes of conduct and integrity systems.<sup>216</sup> Moreover, the objective envisions supporting the role of the media and noting the “vital role” played by the media in fighting corruption. The plan envisions training investigative journalists and internal media codes of conduct, as well as more vaguely building “an enabling environment for free media.

At the time of conducting this study, Namibia is busy with the consultation of the Proposed Draft National Anti-Corruption Strategy and Action Plan 2021-2025 (NACSAP), which will replace the existing National Anti-Corruption Strategy and Action Plan 2016-2019. The notable difference between the 2016-2019 and 2021-205 strategy is that 2021-

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<sup>215</sup> Ibid 215.

<sup>216</sup> Supra 167.

2025 has eight strategic objectives<sup>217</sup> in comparison to the six strategic objectives of the 2016-2019 strategy.<sup>218</sup>

From the above analysis it is evident that the ACC aims to strengthen the anti-corruption strategy by amplifying its objectives in the 2021-2025 strategy. The newly added

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<sup>217</sup> The 2021-2025 NASCAP eight strategic objectives are:

1. Strategic Objective 1: Increasing the level of political accountability and transparency
2. Strategic Objective 2: Preventing corruption in government offices, ministries and agencies,  
Public Enterprises, Regional Councils and Local Authorities
3. Strategic Objective 3: Strengthening efforts to deter corruption
4. Strategic Objective 4: Conducting extensive anti-corruption education
5. Strategic Objective 5: Enhance measures and increase accountability to prevent corruption in the  
private sector
6. Strategic Objective 6: Engaging civil society and the media in combating corruption
7. Strategic Objective 7: Preventing corruption and promoting accountability in the sports fraternity
8. Strategic Objective 8: Engagement and participation of youth in anti-corruption initiatives.

<sup>218</sup> The 2016-2019 NACSAP six strategic objectives are:

1. To increase the level of political accountability;
2. to prevent corruption in government offices, ministries, agencies and State-owned enterprises.
3. to strengthen efforts to deter corruption.
4. to conduct extensive anticorruption education.
5. to prevent corruption in the private sector; and
6. to engage civil society and the media in combating corruption.

seventh objective aims to ensure transparency and integrity in sports by combating the misappropriation of funds meant for sports in the country and inconsistent reward systems in the sporting fraternity.<sup>219</sup> The eighth objective is the engagement and participation of youth in anti-corruption programs. The objective aims to enhance the understanding of youth about corruption, ethics, and integrity. The objective aims to engage and encourage youth participation in anti-corruption programs.<sup>220</sup>

Another notable improvement is that in the 2016-2019 strategy implementation, monitoring and reporting of the strategy was entrusted to the National Anti-Corruption Steering Committee, which is chaired by the ACC. However, in order to ensure independence and accountability, the 2021-2025 strategy has vested monitoring and reporting in a Parliamentary Committee, which will serve as the overall oversight body for the Strategy's implementation to ensure accountability.<sup>221</sup>

In compiling its national anti-corruption strategy, Namibia outlined its existing domestic laws and international agreements that form the legal framework for fighting corruption in Namibia. Additionally, the Strategy summarises the strategic objectives of the Plan.<sup>222</sup> Moreover, to ensure the effectiveness of the strategy, the

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<sup>219</sup> Anti-Corruption Commission 'National Anti-Corruption Strategy and Action Plan 2021-2025' 47.

<sup>220</sup> Ibid note 219.

<sup>221</sup> Anti-Corruption Commission 'National Anti-Corruption Strategy and Action Plan 2021-2025' 46.

<sup>222</sup> Ibid note 220.

Plan proposes a structure for implementation and follows this with an action plan which puts actions alongside indicators of success, risk factors, responsible actors, and a time frame for completion, amongst others.<sup>223</sup>

In conclusion, according to the ACC public notice dated June 2021 the ACC emphasised that one of the Namibian government's priorities toward economic recovery and inclusive growth is the implementation of anti-corruption policies in all institutions to ensure effective governance.<sup>224</sup> In conformity with that principle, Namibia signed regional and international legal instruments for fighting corruption and money laundering such as the SADC Protocol against corruption, AU Convention on Preventing and Combating Corruption, United Nations Convention against Corruption, and the United Nations Transitional Organised Crime.<sup>225</sup>

### *3.2 The Legislative framework on Corruption in Namibia*

#### *3.2.1 Introduction*

This section examines the laws in place in Namibia to combat corruption. Their strengths and weaknesses are also identified. The primary legislation enacted to combat corruption in Namibia is the Anti-Corruption Act,<sup>226</sup> nonetheless, there are other laws with relevant provisions

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<sup>223</sup> Weylandt M (2017) The Namibian Anti-Corruption Strategy 2016-2019: An Overview and Analysis OSISA 2.

<sup>224</sup> ACC (2021) Public notice: regional consultative and engagement meetings on the development of the second national anti-corruption strategy and action plan 2021-2025 2.

<sup>225</sup> Supra note 222.

<sup>226</sup> Act No:15 of 2003.

aimed at combating corruption as identified and discussed in this chapter.

The identified laws are discussed below:

### *3.2.1.1 The Namibian Constitution*

With the achievement of sovereignty and self-determination, Namibia adopted a constitution,<sup>227</sup> that is the supreme law of the land. The Constitution ushers in the principle of constitutional supremacy and a system of governance based on the principles of the rule of law. The constitution contains several provisions regarding corruption.

Article 42 deals with conflicts of interest on the part of cabinet members. The article states that:

- (1) During their tenure of office as members of the cabinet, ministers may not take up any other paid employment, engage in activities inconsistent with their positions as ministers, or expose themselves to any situation which carries with it the risk of a conflict developing between their interests as ministers and their private interests.
- (2) No members of the cabinet shall use their positions as such or use information entrusted to them confidentially as such members of the cabinet, directly or indirectly to enrich themselves.

Additionally, Article 60(1)(b) states that:

Members of the National Assembly shall regard themselves as servants of the people of Namibia and desist from any

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<sup>227</sup> Act No:1 of 1990.

conduct by which they seek improperly to enrich themselves or alienate themselves from the people.

Furthermore, Article 91 empowers the Ombudsman with the duty to investigate corruption on the part of any official in the employ of any organ of the Government.<sup>228</sup>

### *3.2.1.2 Prevention of Corruption Ordinance 1 of 1928*

The colonial legacy of Namibia, formerly known as South West Africa, abetted the shaping of the country's jurisprudence in many respects. Namibia was declared a German Protectorate in 1884 and a Crown Colony in 1890, where after, the country became known as South West Africa.<sup>229</sup> Before independence, the country was under the South African regime. In effect, this means that the Treaty of Peace and South West Africa Mandate Act, 1919 coupled with the Proclamation, 1921<sup>230</sup> empowered the Governor-General and the Administrator-General to, inter alia, make

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<sup>228</sup> Article 91 (a)

“The functions of the Ombudsman shall be defined and prescribed by an Act of Parliament and shall include the following:

(a) the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive, or discourteous treatment of an inhabitant of Namibia by an official in the employ of any organ of Government (whether central or local), manifest injustice, or conduct by such official which would properly be regarded as unlawful, oppressive, or unfair in a democratic society.

<sup>229</sup> Akweenda S (1997) *International Law and the Protection of Namibia's Territorial Integrity: Boundaries and Territorial Claim*, Hardback, 35.

<sup>230</sup> Proclamation 1 of 1921.

new laws for South West Africa and to apply South African statutes by Proclamation thereto.

During that era, the Prevention of Corruption Ordinance 1 of 1928 was the only statute in force aimed specifically at dealing with corruption. The Act was later repealed by the Prevention of Corruption Act 21 of 1985. The 1985 Act made minor amendments to the initial Act of 1928, with the notable one being the change in punishment from a maximum of two years imprisonment or a £500 fine or both, to “the penalties which by law may be imposed for bribery”.

During that time, the common law crime of bribery overlapped with the Prevention of Corruption Ordinance 1 of 1928 to some extent but continues to co-exist with the statutes. The Prevention of Corruption Ordinance, as amended appeared to have been modelled on England’s Prevention of Corruption Act 1906. The wording of section 2(a)-(c) of Namibia’s Prevention of Corruption Ordinance 1 of 1928 was a replica of the corresponding sections of the English statute.<sup>231</sup>

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<sup>231</sup> (a) If any agent corruptly accepts or obtains, or agrees to accept, or attempts to obtain from any person for himself, or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Ordinance done, or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business,

or

(b) if any person corruptly gives or agrees to give, or offers, any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Ordinance done or forborne to do, any act in relation to his principal's affairs, or business,  
or

### *3.2.1.3 Weaknesses of the Prevention of Corruption Ordinance 1 of 1928, as amended*

Even though the Ordinance has since been repealed and replaced with a much more comprehensive Act, as will be discussed below, one of the notable shortcomings of the Ordinance is that the Ordinance does not prevent corruption but rather made it punishable. Furthermore, the ordinance did not provide clear guidance on what should be considered corruption, and that left the judiciary to rely on the common law definition of corruption.

### *3.2.1.4 Insolvency Act 24 of 1936*

Even though the Act was promulgated before independence, in the absence of any repeal or amendment by an Act of Parliament, the Act continues to govern the estate of insolvent persons and partnerships in Namibia, detail procedures for sequestration, and the rights of various creditors.

In terms of section 137<sup>232</sup> of the Act, the section makes it an offense for any person to grant, promise or offer

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(c) if any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other documents, in respect of which the principal is interested and which contains any statement which is false, or erroneous, or defective, in any material particular and which to his knowledge is intended to mislead his principal, he shall be guilty of corruption and be liable on conviction to imprisonment with or without hard labour for a term not exceeding two years, or to a fine not exceeding 1.:500, or to both such imprisonment and such fine

<sup>232</sup> Section 137 (b)“ if he grants, promises, or offers any consideration whatever in order to procure the acceptance by any creditor of an offer of composition or to prevent opposition to a rehabilitation or, during the sequestration of any estate, to induce any person to refrain from

consideration to anyone else in an attempt to induce various wrongful acts, connected with insolvency. The section includes inducements to keep another from disclosing relevant information. Furthermore, section 141<sup>233</sup> makes it an offense to offer or accept consideration or rewards for various acts or omissions relating to the sequestration of insolvent estates.<sup>234</sup>

#### *3.2.1.4.1 Weaknesses of the Insolvency Act 24 of 1936*

As with the Prevention of Corruption Ordinance 1 of 1928, discussed previously, the Insolvency Act does not provide clear guidance on corruption. This is arguably understandable as contrary to the Prevention of Corruption Ordinance; the Act was not promulgated to combat corruption. Nonetheless, the Act does prohibit certain acts, such as offering inducements that tacitly prevent bribery and corruption thereof.

#### *3.2.1.5 The Criminal Procedure Act, 55 of 1977, as amended*

The Act makes provisions for procedures and related matters in criminal proceedings. The Act is therefore the principal legislation prescribing crimes and their penalties. With that in mind, one would expect corruption to be one of the

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investigating any matter relating to that estate or from disclosing any information in regard thereto;”.

<sup>233</sup> as substituted by section 20 of Act 14 of 1985.

<sup>234</sup> “If it was the duty of a trustee to submit an account to the Master or to pay a sum of money to the Master or to a creditor, and he failed to submit that account or to pay that sum of money within a period of two months as from the time when that duty arose, he shall (apart from any other offence which he may have committed in connection with such sum of money) be guilty of an offence and liable to a fine not exceeding R500.”

prohibited and punishable crimes under the Act. However, corruption does not feature anywhere in the Act as well as in subsequent amendments. It should, however, be noted that bribery is classified as a Schedule 2 offense under the Act.

#### *3.2.5.1.1 Weaknesses of the Criminal Procedure Act, 55 of 1977, as amended*

As is clear from the above discussion, the Act does not in any way prohibit or make corruption punishable. The closer the Act came was to prohibiting corruption by classifying bribery as a schedule 2 offense. Nonetheless, the Act does not provide further guidance on what will be considered bribery.

#### *3.2.1.6 Defence Act 1 of 2002*

The Act was promulgated to provide for the defence of Namibia and incidental matters. The Act repeals the Defence Act 44 of 1957. In terms of section 121 of the 1957 Act, it is an offense to agree with or induce or attempt to induce any Defence force member to “neglect or act in conflict with his duty”, or to incite a member to evade or infringe a duty or an order. It should, however, be noted here that the section, although generally worded, was aimed primarily at combating attempts to influence persons not to do military service, as indicated by the title of the section “Prohibition of certain acts in connection with liability to render service”. The amendment Act replicated the section under section 57 still titled “Prohibition of certain acts in connection with

liability to render service”<sup>235</sup> and thus does not explicitly combat corruption.

#### *3.2.1.6.1 Weaknesses of the Defence Act 1 of 2002*

As demonstrated by the above discussion of the Act, section 57 is aimed at averting attempts by external parties from influencing military personnel from carrying out military service and not deterring military personnel from committing corruption. Nonetheless, it is comforting as members of the Defence Force are classified as Public Servants as per the Act<sup>236</sup> and the Act provides clear guidance on the combating of corruption, as will be discussed below.

#### *3.2.1.7 Customs and Excise Act 20 of 1998*

The Act was promulgated to provide for the levying, imposition, payment, and collection of customs and excise duties, a surcharge, and a fuel levy; to prohibit and control the import, export, or manufacture of certain goods; and to provide for matters incidental thereof. The Act repeals the Custom and Excise Act 91 of 1964. In terms of sections 80 (k) and (l) of the repealed Act, the Act prohibits the offer or acceptance by public officials or employees of any inducement or reward in respect of the performance or non-performance of duties in terms of the Customs and Excise Act. Additionally, section 80(m) renders those who attempt

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<sup>235</sup> 57. Any person who

(a) agrees with or induces, or attempts to induce, any member of the Defence Force or any auxiliary services, medical service, or reserve force to neglect or to act in conflict with such member’s duty in the Defence Force, auxiliary or medical service or reserve force.

<sup>236</sup> Act No.13 of 1995.

to commit any such offense and those who assist others with such an offense criminally liable in so doing. In terms of the 1998 Act, section 90 (j) under the heading of offenses and penalties, prohibits the giving of reward to any officer employed by the Government, in respect of the performance or non-performance of duties under the Act, whether directly or indirectly.<sup>237</sup>

Furthermore, section 90 (k) of the same Act prohibits an officer or a staff member employed by the Public Service from demanding or receiving, except from or through the Government, any reward in the performance or non-performance of any of his or her duties under this Act.<sup>238</sup>

#### *3.2.1.7.1 Weaknesses of the Customs and Excise Act 20 of 1998*

Contrasting the previously discussed legislations, the Customs and Exercise Act provides more comfort in the attempt to combat corruption. Even though the Act does not explicitly prohibit corruption, the Act prohibits Government employees from accepting or giving any reward or attempting either of that for the performance or non-performance of any act under the Act. Nonetheless, the Act

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<sup>237</sup> not being authorised to do so, gives, or promises to give, directly or indirectly, any reward to an officer or to any person employed by the Government, in respect of the performance or non-performance by any such officer or person of his or her duties or employment under this Act, or conspires with or proposes to any such officer or person to do or to permit anything in contravention or evasion of any provision of this Act.

<sup>238</sup> being an officer or a staff member employed by the Public Service, demands, or receives, except from or through the Government, any reward in respect of the performance or non-performance of any of his or her duties under this Act, or by any wilful act, neglect or default, does or permits or conspires or agrees to do or to permit anything in contravention or evasion of any provision of this Act.

does cover other acts of corruption such as favouritism, nepotism, economic irregularity, hiding proof, the verdict against the innocent using public property for personal use, and the like, and thus covers the corruption norm of abuse of power and authority.

*3.2.1.8 Regional Councils Act 22 of 1992 and the Local Authorities Act 23 of 1992, as amended*

The *Regional Councils Act* was promulgated to establish regional councils in respect of regions determined by Article 103 of the Namibian Constitution; to provide for the election by regional councils of members of the National Council; to define the rights, powers, duties, and functions of such regional councils; and to provide for incidental matters thereof. In terms of section 17 of the Act, it is an offense for a member of a regional council “to accept any commission, remuneration or reward from any person other than the regional council for or in connection with the performance or non-performance of his or her powers, duties and functions as such a member, or in connection with any transaction to which the regional council is a party.”<sup>239</sup>

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<sup>239</sup> Prohibited practices in respect of members of regional councils;

(1) A member of a regional council shall not accept any commission, remuneration or reward from any person other than the regional council for or in connection with the performance or non-performance of his or her powers, duties, and functions as such a member or in connection with any transaction to which the regional council is a party.

(2) Any member of a regional council who contravenes or fails to comply with the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding N\$8 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

Section 20 of the Local Authorities Act duplicates section 16 of the Regional Authorities Act 22 of 1992, as amended.<sup>240</sup>

*3.2.1.7.1 Weaknesses of the Regional Councils Act 22 of 1992 and Local Authorities Act 23 of 1992*

According to an article published in the Namibian News study dated 13 February 2004<sup>241</sup>, Government has expressed concern about the extent of corruption in Namibia's regional and local authorities, which it says represents "a serious departure from administrative ethical norms". It was stated that although a code of conduct is already in place it will be strengthened by a code of ethics that is transparent, relevant, realistic, mandatory, monitored, and enforceable and that Namibians were concerned about self-enrichment which contributed to the widening gap between rich and the poor.

Considering the above article, corruption is a matter of concern for local and regional authorities in the country. The legislature made a great effort to prohibit the acceptance of commission, remuneration, or reward from any other person

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<sup>240</sup> (1) A member of a local authority council shall not accept any commission, remuneration or reward from any

person other than the local authority council for or in connection with the performance or non-performance of his or her powers, duties, and functions as such a member or in connection with any transaction to which the local authority council is a party.

(2) Any member of a local authority council who contravenes or fails to comply with the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R8 000 or to imprisonment for a period of two years or to both such fine and such imprisonment.

<sup>241</sup> Maletsky Christof 'Totemeyer takes aim at corruption' *The Namibian* 13 February 2004 available at <https://www.namibian.com.na/index.php?id=4622&page=archive-readnaccessed> 16 June 2022.

and that may assist in the fight against corruption, nonetheless, that alone is not sufficient to eradicate corruption accordingly. Like with prior discussed legislations, the two Acts do not provide a concise prohibition of corruption. However, unlike the Prevention of Corruption Ordinance, the Regional Councils Act and the Local Authorities Act do provide deterrence and punishment for the act of corruption.

### *3.2.1.8 Public Service Act 13 of 1995*

The Act was promulgated to provide for the establishment, management, and efficiency of the Public Service, the regulation of the employment, conditions of service, discipline, retirement, and discharge of staff members in the Public Service, and other incidental matters.

The public service consists of persons who are employed permanently or temporarily on a full-time or part-time basis or under a special contract or any contract of employment contemplated in section 34(1)(a) of the Public Service Act 1995. The public sector comprises the central and local governments, together with the associated agencies of the State, including parastatals. The public sector plays a major role in the Namibian economy due to the services it provides, including education, health, infrastructure, Defence, and general administration. Namibia's ratio of 1 civil servant per 24 Namibians makes Namibia proportionally one of the largest public administrations in the developing world.<sup>242</sup>

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<sup>242</sup> NID, (200) Ethics and good governance in Namibia 13.

In terms of section 25(1)(l), it constitutes misconduct for any member of the public service “to accept or demand in respect of the performance of his or her duties any commission, fee or reward, pecuniary or otherwise, to which he or she is not entitled by his or her office”, or to fail to report forthwith to the permanent secretary concerned the offer of any such commission, fee, or reward. Section 25(1) articulates several kinds of conflicts of interest that constitute misconduct for any member of the public service.<sup>243</sup>

Additionally, section 17 prohibits public servants from engaging in other remunerative work without permission and requires that public servants place the whole of their time at the disposal of the government.

The prime minister launched the Ad Hoc Cabinet Committee on the promotion of ethics and the combating of corruption on 5 March 1997. At the same time, a Technical Committee comprising representatives of government, the private sector, and non-governmental organisations was established to assist the Ad Hoc Cabinet Committee. In the early stages of the work of the Technical Committee, a consensus emerged

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<sup>243</sup> In terms of the section, a staff member is guilty of misconduct and open to disciplinary action if he or she operates or undertakes, without the approval of the Prime Minister, any private agency or private work in regard to any matter directly or indirectly related to the performance of his or her official functions or any matter directly or indirectly related to the field of operations of the office, ministry or agency in which he or she is employed or fails to declare that any member of his or her household operates or undertakes any such private agency or private work. uses his or her position in the Public Service or utilises any property of the State to promote or prejudice the interests of any private business or private agency, except in the performance of his or her official duties (regardless of whether or not the public servant in question has a personal interest in the matter).

to the effect that the definition of corruption should not be limited to “the misuse of public office for private gain.”

#### *3.2.1.8.1 Weaknesses of the Public Service Act 13 of 1995*

It is clear from the above discussion that the Public Service Act strives to encourage transparency in public service. However, it is worth noting that the definition of the Act does not place adequate emphasis on the role of the private sector in corrupting public officials and ignores the fact that corruption can exist within the private sector and public entities outside of government, such as trade unions, community organisations, sports, or political parties. In this context, corrupt practices should be seen as those involving the misuse of entrusted power for personal gain or the benefit of a group to which one owes allegiance. There is a need to amend the Act to categorize corrupt practices as “major offenses”.

As an illustration of the disturbing happenings in the public sector, in mid-2015 Prosecutor-General Martha Imalwa announced at an anti-corruption conference in Windhoek that nearly two-thirds, or 61 percent, of corruption cases, were referred to her office for consideration for prosecution between 2007 and 2014 involved civil servants.<sup>244</sup> The Prosecutor-General stated that out of the 462 corruption cases, which is more than one new prosecutable corruption case every week for seven years straight, 344 involved civil servants, and combined with another 40 cases having involved state-owned enterprises’ employees, translates to

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<sup>244</sup> Links F (2015) The public procurement bill: a lot of good, some significant bad, but certainly not ugly, IPPR, Special Briefing Report No.9 1-20.

over two-thirds of cases involving public sector workers. The remaining 82 cases involved private individuals. Of the 462 cases, 167 had been finalized since 2007, while most of the cases involving public sector workers, or 244 cases, had yet to be completed at the time she released these figures.<sup>245</sup>

### *3.2.1.9 Public Procurement Act 15 of 2015*

The Public Procurement Act was promulgated for the following purposes:

- To regulate the procurement of goods, works, and services.
- To govern the letting or hiring of anything or the acquisition or granting of rights for or on behalf of public entities.
- To oversee the disposal of assets of public entities.
- To establish the Procurement Policy Unit and the Central Procurement Board of Namibia and define their powers and functions.
- To provide guidelines for the procurement committees and procurement management units and their powers and functions.
- To outline the appointment and functions of bid evaluation committees.
- To define various procurement methods.
- To specify the procedures for the bidding process, bidding challenge, and review.
- To grant preferences to specific categories of persons, goods manufactured, mined, extracted, produced, or grown in Namibia.

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<sup>245</sup>Shinovene Immanuel 'Don't be too strict on tenders – Nujoma' *The Namibian*, 18 September 2015 at 10.

- To support Namibian registered small and medium enterprises, joint venture businesses, local suppliers, contractors, and service providers.
- To address incidental matters related to public procurement.<sup>246</sup>

The first implementation steps of Namibia's Public Procurement Act commenced on 01 April 2017, with the inauguration of the Central Procurement Board of Namibia within the organisational structure of the Ministry of Finance. The creation and implementation of the Act and its regulations could rightly be considered an important landmark for good governance in the public sector in the country as it replaced an outdated and increasingly problematic public procurement system, under the auspices of the Tender Board Act of 1996, which at the time became shrouded by a loss of public trust due to suspicions of endemic corruption, and mismanagement and abuse of state resources.<sup>247</sup> By the year 2010, it had become patently clear to many in the state and civil society sectors in Namibia that the public procurement landscape needed complete transformation to restore public trust in the system. Hence, the promulgation of the Public Procurement Act.<sup>248</sup>

The Public Procurement Act established an innovative and more transparent board to oversee the public procurement

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<sup>246</sup> See the preamble of the Act.

<sup>247</sup> Government Gazette of the Republic of Namibia 1996. Tender Board of Namibia Act, 1996. (Act 16 of

1996). Government notice. Office of the Prime Minister. Windhoek <http://www.swapoparty.org/lamech-put-on-suspension.htm>.

<sup>248</sup> Ministry of Finance, capacity building strategy (n.d) 3-10.

processes.<sup>249</sup> The Act imposes strict limits on the value of contracts state-owned entities can conclude without involving the Central Procurement Board. Additionally, the Act also imposes a five-year ban and/or a N\$ 5 million fine on organisations found guilty of engaging in illegal procurement practices.<sup>250</sup> The regulations issued in terms of this Act specify certain remedies in cases where a tenderer has been involved in bribery concerning a tender, or where a contractor has been involved in bribery concerning the conclusion of an agreement.<sup>251</sup>

#### *3.2.1.9.1 Weaknesses of the Public Procurement Act*

Roos states that public procurement systems in developing countries are generally regarded as weak. This is attributed to a lack of adequate procurement legislation, as well as insufficient transparency and accessibility of the public procurement system.<sup>252</sup> This, therefore, sheds light on the negative media publicity that has tainted the public procurement system in Namibia over the years.<sup>253</sup> Over the years, there has been a request for transparency and accountability in the conduct of public procurement in the country, as it is believed that there has been transparency with the invitation to tender. However, the process is

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<sup>249</sup> Section 8, Establishment of Central Procurement Board of Namibia.

<sup>250</sup> Section 67, Conduct of bidders and suppliers.

<sup>251</sup> Section 67, Conduct of bidders and suppliers.

<sup>252</sup> Roos,(2013) Sustainable Public Procurement in LICs, GIZ, 4.

<sup>253</sup> Zorena Jantze 'Procurement transparency worse– IPPR' *Informante* 28 July 2018 available at <https://www.facebook.com/informantenam/photos/a.277814335618867/1831503120249973/?type=3> accessed 01 July 2022.

believed to become less transparent during the awarding phase, which has, in some instances, resulted in appeals and/or court cases.<sup>254</sup>

The court in the matter of *ABB Namibia (Pty) Ltd v The Central Procurement Board of Namibia and three others*<sup>255</sup> emphasized that where there is a conflict of interest in a matter and a party is privy thereto such conflict must be disclosed from the onset and that a policy needs to be set in place by the minister of finance regarding the potentially conflicting roles which people might have in the procurement arena. The court found it worrisome that an individual who holds a senior position in a company may be appointed as a member of the Bid Evaluation Committee (BEC) while on other occasions, the company in question becomes a tenderer before the Central Procurement Board. This echoes the above sentiment that such a person should be disqualified from partaking in the tendering process and not merely excused, the process should not only be transparent and free from conflict but must be seen as such as well. Moreover, the issue of declaration of assets, lifestyle audit, and spending habits is not catered for in the current procurement legislation.

It is nonetheless worth noting that the current procurement Act is much more appropriately structured than the dispensation which was installed by the Tender Board Act of

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<sup>254</sup> OECD (2011) Transparency in public procurement. In Government at a Glance 2011(2011) OECD available at: [http://dx.doi.org/10.1787/gov\\_glance-2011-47-en](http://dx.doi.org/10.1787/gov_glance-2011-47-en) accessed 12 May 2022.

<sup>255</sup> Case No: HC-MD-CIV-MOT-GEN-2019/00432.

1996. Consequently, the levels of oversight have been improved and substantially increased in line with international procurement best practices and general principles of good governance.

Additionally, to ensure greater objectivity and minimize human influence and interaction in the procurement processes, Namibia should consider implementing an e-procurement system. For example, in 2002, the Public Procurement Service (PPS) of Korea introduced a fully integrated, end-to-end e-procurement system called KONEPS. KONEPS covers the entire procurement cycle electronically. This includes a one-time registration, tendering, contracts, inspection, payment, and documents exchanges, online. The system is linked to about 140 external systems to share and retrieve any necessary information and provide a one-stop service, including an automatic collection of bidders' qualification data, delivery reports, e-invoicing, and e-payment. Furthermore, the system provides related information on a real-time basis.<sup>256</sup>

Additionally, Korea introduced a “Fingerprint Recognition e-Bidding” in 2010, which enables each user to only tender for one company by using a biometric security token. All in all, e-procurement will boost efficiency in procurement, as well as significantly reduce transaction costs. Furthermore, the system will increase participation in public tenders and considerably improve transparency, eradicating instances of

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<sup>256</sup>Country case: Integrated e-procurement system KONEPS in Korea available at <https://www.oecd.org/governance/procurement/toolbox/search/integrated-e-procurement-system-koneps.pdf>, accessed 25 January 2022.

corruption by preventing illegal practices and collusive acts.<sup>257</sup>

### *3.2.1.10 Article 9 of the United Nations Convention Against Corruption (UNCAC)*

To assess and illustrate whether and to what extent Namibia's procurement Act, complies with the principles and requirements of UNCAC's article 9, a framework of interpretation approach will be adopted in this section. There are six requirements, that article 9 prescribes, namely;

- (a) the establishment of a sound procurement system;
- (b) transparency in procurement;
- (c) objective decision-making in procurement;
- (d) domestic review (or bid challenge) systems;
- (e) the integrity of public officials; and
- (f) the soundness of public records and finance

Article 9 of chapter II explicitly encourages Namibia to “take the necessary steps to establish appropriate systems of procurement, based on transparency, competition, and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. At the onset, the Public Procurement Act appears to speak to an intent to meet the requirements of Article 9, if one considers the objects of the

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<sup>257</sup>Country case: Integrated e-procurement system KONEPS in Korea, available at <https://www.oecd.org/governance/procurement/toolbox/search/integrated-e-procurement-system-koneps.pdf>, accessed 25 January 2022.

Act which amongst others “to promote integrity, accountability, transparency, competitive supply, effectiveness, efficiency, fair-dealing, responsiveness, informed decision-making, consistency, legality, and integration in the procurement of assets, works, and services.”

The first requirement of Article 9 calls for the establishment of a sound procurement system. If one analyses the procurement Act, one may concede that the Act has fulfilled that requirement, as the Act has established a new institutional framework in the country, being the Procurement Policy Unit, the Central Procurement Board, the Review Panel, the Procurement Committee, the Bid Evaluation Committee, the Procurement Management Unit and Inspection and acceptance Committee. However, creating institutions does not in itself create a sound system, and those institutions to be effective should be guided by adequate laws that create oversight and serve as administrative malfeasance to ensure the integrity of procurement systems and processes across sectors.

Secondly, Article 9 requires that a country should have a transparent procurement system. In terms of Part 3 of the Act the powers of the Central Procurement Board of Namibia are to receive and publicly open bids. The Act emphasizes that it aims to promote “integrity, accountability, transparency, competitive supply, effectiveness, efficiency, fair-dealing, responsiveness, informed decision-making and consistency, legality, and integration. That, therefore, sets the right tone for any procurement system. Additionally, throughout the Act, the legislature has made it clear that the Act is geared

towards enhancing transparency, by publicly calling for, accepting, and opening bids, and thereafter, making public the award, decisions, and the reasons for awards.

Thirdly, Article 9 calls for objective decision-making in procurement. The Act lays out a clear and detailed framework within which “objective decision-making” is to transpire towards ensuring the integrity of the public procurement system, at all levels. Therefore, the Act seems to ensure that decisions throughout the procurement system are not based on or influenced by biased, self-interested, or corrupt intentions and/or considerations. Additionally, the Act makes provision for the investigation and reviewing of suspicious transactions.

Fourthly, Article 9 calls for the integrity of public officials. Section 10 of the Act calls for fiduciary duties of members of the Board and improper conduct by members, part 10 regulates procurement integrity, and part 12, Disclosure of interest, Undue influence. Therefore, the Act has significant provisions ensuring that the integrity of public officials involved in procurement remains unquestionable. Sections 10 and 66 of the Act calls for staff and Board members to act with integrity and thus require individuals with proven integrity and sound decision-making abilities. The measures are further strengthened and backed up substantially by the comprehensive conflict of interest measures and codes of ethical conduct required across the procurement system.

Fifthly, part 7 of the Act provides for review. The Act thus creates a domestic review panel within the procurement framework, without precluding aggrieved parties from

eventually turning to the courts for redress when/if they are dissatisfied with the findings/rulings of the review panel.

Finally, the soundness of public records and finance state. Part of the objectives of the Policy Unit as outlined in section 7(1) of the Act is to monitor, report on the performance of the public procurement systems in Namibia, including preparing an annual report to be tabled in the National Assembly within six months after the end of each financial year, and advise on desirable changes. Furthermore, section 7(1)(ii) empowers the Policy Unit to conduct a performance audit after the completion of the contract in respect of any procurement, when it is necessary. One can therefore safely conclude that the Act has in its various provisions empowered the relevant and responsible bodies and officials to ensure the soundness of public records and finance as far as the procurement system is concerned.

The Public Procurement Act of 2015 appears to be in line with Article 9 of chapter 2 of the UNCAC's global framework. This clearly shows Namibia's willingness to follow universally accepted public procurement best practices. Nonetheless, as it will be demonstrated in this study there is still room for improvement with the application of the Act to ensure the smooth operation of the procurement system.

#### *3.2.1.11 Police Act 19 of 1990*

Section 33(b)(i) of the Police Act, 1990, states that any person who "persuades any member [officer or non-officer of the Police Force] to omit to carry out his or her duty or to do any act in conflict with his or her duty, shall be guilty of

an offense and liable on conviction to a fine not exceeding N\$4000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment. Additionally, in terms of section 35 (2) (b) of the same Act, it is an offense to compel a member of the police force to do or to abstain from doing any act in respect of the exercise of his or her powers or the performance of his or her duties or functions. Such an act is punishable by a fine not exceeding N\$2000.00 or imprisonment for a period not exceeding 12 months or both such fine and such imprisonment.

Considering the above provisions, it is clear that the police Act intended to deter members of the force from being unduly influenced and deterred from carrying out their duties by making such conduct punishable. However, what is worth noting is that those provisions intend on deterring and punishing external parties and not the members of the police force. Hence, it can be argued that the Act does not per se prohibit corrupt acts from the members of the force, even though one can still argue that that is combated by the Public Service Act which is much more strident.

#### *3.2.1.12 Powers, Privileges and Immunities Act of Parliament Act 17 of 1996*

Section 22 of the Act states that a Member of Parliament (MP) shall not take part “in any proceedings in which such member has any interest, whether direct or indirect, which precludes him or her from performing his or her functions in a fair, unbiased and proper manner.” In addition, MPs are also required to fully disclose the nature of any personal interest as soon as it appears that there is the possibility of a conflict. Section 22 goes on to state that these prohibitions

are not to be interpreted to prevent MPs from deliberating and voting on their salaries and benefits. The section makes provision for an MP to be disciplined if he/she fails to disclose their conflict of interest.<sup>258</sup>

It is common knowledge that a corrupt act by a member of parliament may result in a loss to the state revenue, when a public official conspires with someone else to assist them to evade taxes or duties, or when money due to the state is corruptly diverted elsewhere. Notwithstanding the above provision, section 2 provides immunity to MPs from legal proceedings.<sup>259</sup> Furthermore, section 4 of the same Act exempts MPs from certain obligations,<sup>260</sup> with section 3 prohibiting the service of process issued by any court of law to MPs.<sup>261</sup>

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<sup>258</sup> Section 22.

<sup>259</sup> 2. Notwithstanding the provisions of any law, no member shall be liable to any civil or criminal proceedings, arrest, imprisonment, or damages by reason of -

(a) anything done in the exercise of that member's right to freedom of speech in Parliament;

(b) any matter or thing which such member-

(i) brought by report, petition, bill, resolution, motion, or otherwise in or before Parliament;

(ii) said in Parliament, whether as a member or a witness, or otherwise may have communicated while taking part in any proceedings in Parliament.

<sup>260</sup> 4. (1) No member or officer shall be required to appear in any legal proceedings in any court of law while such member or officer is in attendance at Parliament

<sup>261</sup> (1) No process issued by any court of law shall be served or executed within the precincts of Parliament -

(a) while a sitting of the House is in progress; or

Immunities or jurisdictional privileges as the case may be is important in any democratic country as they provide persons or groups of persons some degree of protection against civil or criminal rules. <sup>262</sup>Immunity provisions ensure a better separation of judiciary, executive and legislative powers in any country. Thus, an immunity provision is put in place to ensure the unimpeded performance of public functions and to avoid targeted judicial proceedings or political persecution.<sup>263</sup>

The Organisation for Security and Cooperation in Europe (OSCE), in its recent Handbook on Fighting Corruption, lists the following legitimate purposes for immunity provisions.<sup>264</sup>

- to ensure that the elected representatives of the people can speak in the legislature without fear of criminal or civil sanctions (including claims for defamation.).

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(b) on or against any member or officer while such member or officer is in attendance at a committee.

(2) If a member is -

(a) arrested or detained in custody under a warrant or an order of a court; or

(b) sentenced by a court to a term of imprisonment, the registrar, in the case of the High Court, or the magistrate concerned, in the case of a magistrate's court, shall so inform the Speaker or Chairperson, as the case may be.

<sup>262</sup>The Practical Guide to Humanitarian Law, available at <https://guide-humanitarian-law.org/content/article/3/immunity/> accessed 02 July 2022.

<sup>263</sup> Ibid.

<sup>264</sup> Organization for Security and Co-operation in Europe Annual Report (2016) available at <https://www.osce.org/annual-report/2016> accessed 07 March 2022.

- to protect elected representatives from being arbitrarily detained and prevented from attending the legislature; and
- to act as a shield against malicious and politically motivated prosecutions.

Whilst the provision of immunity ensures the separation of powers and a functioning democracy, it can also pose serious corruption risks. This is because the independence required to ensure the separation of powers can result in a reduction of accountability for public officials.<sup>265</sup>

Furthermore, immunity provisions when applied to corruption cases minimises the cost to almost zero, therefore always yielding a net gain in the cost-benefit analysis of engaging in corruption. When one introduces immunity provisions into Klitgaard's formula:<sup>266</sup>

$$\text{Corruption} = \text{Monopoly} + \text{Discretion} - \text{Accountability}$$

The above formula demonstrates that immunity from prosecution substantially reduces the value of accountability, therefore unintentionally leaving the equation skewed towards a positive value of corruption. This is because providing immunity protection to public officials removes

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<sup>265</sup> Anti-Corruption Help desk: Immunity provisions for Ministers and members of parliament, available at <https://knowledgehub.transparency.org/assets/uploads/kproducts/2018-Immunity-Provisions-for-Ministers-and-MPs.pdf> accessed 30 June 2022.

<sup>266</sup> Klitgaard R. (1988) Controlling Corruption 26 available at <https://www.ucpress.edu/book/9780520074088/controlling-corruption> accessed 15 June 2022.

the legal constraint from the equation and therefore reduces the expected value for control of corruption.<sup>267</sup>

*3.2.1.13 The State Finance Act 31 of 1991*

The Act makes provision for the recovery of loss or damage to State property from a public servant or any other person responsible for the loss. Section 11(1) of the Act, reads as follows:

(1) Whenever-

(a) any person who is or was employed in an office, a ministry, or an agency caused any loss or damage to the State in that he or she;

(i) incurred an unauthorised expenditure or was responsible for incurring it;

(ii) failed to collect State money for the collection for which he or she was responsible;

(iii) is or was responsible for a deficiency in, or destruction of or damage to, State money stamps, securities, forms having a face or potential value, equipment, stores, or other movable goods owned or leased by the State;

(iv) due to an omission to carry out his or her duties properly, is or was responsible for the fruitless expenditure of State money or a claim against the State;

(b) any person-

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<sup>267</sup> Supra 264.

(i) in any manner caused any loss or damage to the State;

(ii) has as a result of unauthorised expenditure been unjustly enriched, the accounting officer concerned or, in a case where an accounting officer has caused such loss or damage or has been so unjustly enriched, the Treasury, shall determine the amount of such loss, damage or enrichment and, subject to the provisions of subsection (3), by notice in writing order such person to pay the amount so determined within thirty days as from the date of such notice.

The Act further makes a provision for recovery of the loss through deductions from the salary of a public servant, or court action in the case of other people.<sup>268</sup> What is worth noting, however, is that the Act does not make provision for forcing a public servant to turn a bribe over to the State. Additionally, there is no provision in the State Finance Act for criminal prosecution based on the loss or damage to the State and therefore this will depend on whether or not the conduct which caused the loss or damage constituted a crime under any other statute or at common law, to create a basis to institute criminal prosecution, which the Act does not make provision for.

#### *3.2.1.14 The Anti-Corruption Act, Act 8 of 2003*

The Anti-Corruption Act is the key piece of legislation dealing with the prevention and combating of corruption in Namibia, replacing the Prevention of Corruption Ordinance,

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<sup>268</sup> Section 11 (4) (a).

of 1928,<sup>269</sup> as amended by the Prevention of Corruption Amendment Act.<sup>270</sup> The Act was passed to establish the Anti-Corruption Commission and provide for its functions; providing for the prevention and punishment of corruption and making provision for matters connected thereof.<sup>271</sup>

Article 94A of the Namibian Constitution provides that the State shall put in place administrative and legislative measures necessary to prevent and combat corruption.<sup>272</sup> One such legislative measure was the promulgation of the Anti-Corruption Act,<sup>273</sup> which provides for the prevention and punishment of corruption.

The enactment of the Anti-Corruption statute embodies the separation of powers doctrine which is the bedrock of the Namibian Constitution. That is because the Act establishes the ACC which is obliged to report any contravention of offences to the Prosecutor-General for prosecution, and the Prosecutor-General can delegate the prosecution of such contraventions to the Commission, but the decision to prosecute lies with the Prosecutor-General, who is reviewable by court action. Therefore, the Act together with

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<sup>269</sup> Ordinance No. 2 of 1928.

<sup>270</sup> Act No. 21 of 1985.

<sup>271</sup> Section 2, Establishment of Anti-Corruption Commission.

<sup>272</sup> Article 94A(1) of the Namibian Constitution. As regards corruption in the public sector, art 91(f) mandates the Ombudsman with the duty to investigate vigorously all instances of the alleged or suspected misappropriation of public monies by officials and to take appropriate steps, including reports to the Prosecutor-General and the Auditor-General.

<sup>273</sup> Anti-Corruption Act 8 of 2003.

its legislation forms part of Namibia's arsenal against corruption and organised crime.

There is no doubt that the Anti-Corruption Act can be a powerful weapon in the fight against fraud, bribery, theft, and other corrupt practices. As such, it has perhaps unfortunately created unwarranted expectations in the eyes of many ordinary citizens, especially amongst those people who have been direct victims of fraud and embezzlement.<sup>274</sup> However, even if equipped with adequate human and financial resources, and with the best will in the world, the ACC alone cannot and will not be able to meet such high hopes satisfactorily.<sup>275</sup> Therefore, the fight against corruption should be a combined effort of every individual and organisation.

### 3.3 Institutional Framework on Corruption in Namibia

#### *3.3.1 Introduction*

The term “institutional framework” refers to a set of formal organisational structures, rules, and informal norms for service provision. According to Wiktionary free dictionary, institutional framework refers to the systems of formal laws, regulations, and procedures, as informal conventions,

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<sup>274</sup> The global programme against corruption un anti-corruption toolkit, 3rd Ed Vienna September 2004 8-19.

<sup>275</sup> According to a report by the Namibia Institute for Democracy (NID), the media mentioned 467 cases of corruption between 1990 and 2004: Namibia Institute for Democracy (Ed.). 2005. Actual instances of corruption as reported in the Namibian print media, 1990-2004. Windhoek: NID. This report mentions that most cases of corruption involve government offices since this is where more resources are available and where controls are the weakest.

customs, and norms, that shape socioeconomic activity, and behaviour.<sup>276</sup>

It is against the above definition that the below are identified and discussed as the institutional frameworks mandated to corruption in Namibia.

### *3.3.2 The Executive*

The Constitution of the Republic of Namibia establishes Namibia as a multiparty democracy functioning under the Rule of Law. The Constitution follows the principle of separation of powers between the Executive, the Legislature, and the Judiciary. The Constitution seeks to provide a system of checks and balances.<sup>277</sup> In terms of Article 27 (2) the executive power of the Republic of Namibia shall vest in the President and the cabinet and in terms of Article 32 (1) as the Head of State, the President shall uphold, protect and defend the Constitution as the Supreme Law, and shall perform with dignity and leadership all acts necessary, expedient, reasonable and incidental to the discharge of the executive functions of the Government, subject to the overriding terms of this Constitution and the laws of Namibia, which he or she is constitutionally obliged to protect to administer and to execute.

The constitution thus places an inherent responsibility on the President and cabinet to uphold the rule of law and ensure

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<sup>276</sup> Wiktionary the free dictionary 'Institutional framework' available at [https://en.wiktionary.org/wiki/institutional\\_framework](https://en.wiktionary.org/wiki/institutional_framework) accessed 10 May 2022.

<sup>277</sup> Article 1 (3) of the Namibian constitution.

compliance with Namibian legislation, thus inclusive anti-corruption laws.

### *3.3.3 The Legislature*

Parliament can play a crucial role in overseeing the actions of the executive branch of Government and thus help reduce corruption.<sup>278</sup> Their power is built on the fact that they can hold state institutions accountable, represent the people at the highest level of government, and exercise legislative powers, which they can utilize to press for effective anti-corruption legislation.<sup>279</sup> To do so, though, Parliament itself must strive for the highest degree of accountability, integrity, openness, and ethics.<sup>280</sup>

### *3.3.4 The Judiciary*

Article 78 of the Namibian constitution vest the administration of justice in the judiciary. The courts are independent and only subject to the constitution and the law.<sup>281</sup> To ensure the independence of the judiciary, Article 78 (3) explicitly states that:

*“No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require*

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<sup>278</sup> Harutyunyan K (2021) The Role of Parliaments in the Fight Against Corruption WFD 19-22.

<sup>279</sup> Ibid.

<sup>280</sup> Ibid.

<sup>281</sup> Article 78 (2) of the Namibian constitution.

*protecting their independence, dignity, and effectiveness, subject to the terms of this Constitution or any other law”*

With that said, the Judiciary is therefore independent of the influence of the Executive and Legislature and is only subject to the constitution and the Law. One can therefore safely conclude that Namibia has a capable judiciary to deal with corruption matters provided that the legal framework is in place.

### *3.3.5 The Anti-Corruption Commission (ACC)*

The Anti-Corruption Commission (ACC) is an independent agency established by an Act of Parliament, the Anti-Corruption Act, 2003<sup>282</sup> to combat and prevent corruption in Namibia. The ACC is the leading agency in Namibia that investigates corruption offences and is tasked with the obligation of ensuring that offenders are brought to justice.<sup>283</sup> The ACC is also responsible for taking measures for the prevention of corruption in public bodies and private bodies including revision of practices, systems, and procedures that may be prone or conducive to corrupt practices, advising such bodies on ways to prevent corruption, and educating the public on the evils and dangers of corruption.<sup>284</sup>

The ACC consists of a Director-General, a Deputy Director-General, and other staff members of the Commission.<sup>285</sup> The

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<sup>282</sup> Section 3 of Act No. 8 of 2003.

<sup>283</sup> See section 2 of the Anti-Corruption Act, Act 8 of 2003.

<sup>284</sup> See section 3 of the Anti-Corruption Act, Act 8 of 2003.

<sup>285</sup> See section 4 of the Anti-Corruption Act, Act 8 of 2003.

Director-General is appointed by the National Assembly upon nomination by the President,<sup>286</sup> for five years.

The ACC began operating in February 2006, as an independent agency equipped with wide-ranging powers of investigation and refers its findings to the Prosecutor-General.<sup>287</sup> The ACC works closely with the Namibian Police Force, the Office of the Auditor-General, and the Namibian Financial Institutions Supervisory Authority. The ACC is accountable to the National Assembly and also submits its annual report to the prime minister.<sup>288</sup>

The establishment of an independent agency to deal with corruption in Namibia helps the country to carry out its duties under the United Nations Convention against Corruption, the African Union Convention on Preventing and Combating Corruption, and the SADC Protocol Against Corruption.<sup>289</sup>

Notably, the ACC has been criticized and regarded as ineffective, often linked to a lack of capacity, favouritism, and lack of resources.<sup>290</sup> According to an Article in the Namibian News study,<sup>291</sup> it was reported that the ACC needs

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<sup>286</sup> Article 94A(5) of the Namibian Constitution.

<sup>287</sup> See Chapter 3 of the Anti-Corruption Act, Act 8 of 2003.

<sup>288</sup> See Section 16 of the Anti-Corruption Act, Act 8 of 2003.

<sup>289</sup> UNODC, Country Review Report of Namibia.

<sup>290</sup> Editorial Team ACC 'Keeps on Wasting Resources' *The Namibian* 27 August 2021 available at <https://www.namibian.com.na/6212842/archive-read/ACC-Keeps-on-Wasting-Resources> accessed 16 May 2022.

<sup>291</sup> Tjivikua JB 'We Need to Improve the ACCs Capacity' *The Namibian* 12 March 2021 available at <https://www.namibian.com.na/99823/read/We-Need-to-Improve-the-ACCs-Capacity> accessed 17 May 2022.

N\$30 million in additional funding to execute key investigations. According to the article, there are key areas that the government must take into account for the ACC to improve its effectiveness, and those were highlighted as, the selection and appointment of ACC leadership and staff; the importance of the law to grant the ACC extensive power to investigate and arrest the corrupt; full freedom to discharge their legal mandate impartially, without interference from any quarters; and, most importantly, that there be an independent oversight mechanism to monitor the ACC's functions and practices, for example, a parliamentary oversight committee and/or a committee comprised of a cross-section of professional groups and civil society; and adequate resources to allow the ACC to execute its mandate effectively.

Additionally, the article highlighted that the ACC is expected to demonstrate an ability and willingness to investigate cases involving grand corruption (the 'big fish'), and to impose appropriate sanctions. Furthermore, the ACC should lead by example and ensure that its officials and staff are proactive in the disclosure of assets and undertake public reporting of their activities. The article also expressed the sentiment that the ACC should engage with the citizenry to educate them on the negative consequences of corruption and mobilize support for their anti-corruption drive.

In addition to the above, the ACC is also considered a waste of state resources due to its purported inefficiency.<sup>292</sup> This came after Namibia Wildlife Resorts (NWR) employee

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<sup>292</sup> Supra 222.

Esther Ndilula celebrated winning a case in the magistrates' court against the ACC in which she was accused of lying about a driver's license.<sup>293</sup> The case, which dragged on for years, had always looked minor even if the crime was committed. In addition to Ndilula's case the ACC was criticized for wasting resources on another minor case of arresting Oniipa Town councilors for allegedly influencing the hiring of a motor vehicle driver who was listed third in the recruitment process. According to the article, even though such cases might fit a broad and general description of corruption, the ACC should not be spending scarce resources dealing with allegations of straightforward crimes or matters that the police and administrators in state institutions should be dealing with in the ordinary course of their work, but rather focus on grand, sophisticated corruption, especially by people in top positions of authority for the commission to demonstrate its effectiveness.<sup>294</sup>

### *3.3.6 The Ombudsman*

The Namibian Ombudsman is a hybrid institution incorporating the public protector, human rights protections, anti-corruption, and environmental protection mandates.<sup>295</sup> In addition to the investigation of cases of maladministration and corruption by public authorities at the national and local

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<sup>293</sup> Ndeyanale Emmanuel 'NWR manager acquitted on corruption charge' *The Namibian Newspaper* 25 August 2021 at 1-2.

<sup>294</sup> Kadjungu Maria 'Three Oniipa Councillors remanded in custody' *Namibia Press Agency* 11 August 2021 at 1-2.

<sup>295</sup> IPPR, Roles and Responsibilities of the Ombudsman available at <https://ippr.org.na/blog/role-and-responsibilities-of-the-ombudsman/> accessed 16 July 2022).

levels, the Ombudsman has the power to investigate<sup>296</sup> the following:

- i. complaints of human rights infringements;
- ii. abuse of power, unfair, harsh, insensitive, or discourteous treatment;
- iii. manifest injustice or corruption by government officials;
- iv. complaints of human rights violations by private persons/entities;
- v. complaints against administrative organs, the defence force, the police force, and the prison service relating to their failure to achieve a balanced structuring of such service, equal access in recruitment matters, or fair administration; and
- vi. over-utilization of living natural resources, irrational exploitation of non-renewable resources, degradation, and destruction of ecosystems, and failure to protect the beauty and character of Namibia.

Broadly speaking, the Ombudsman in Namibia investigates complaints about the violation of fundamental rights and freedoms, and about the administration by all organs of government. Violations are corrected by attempting a compromise between the parties concerned, bringing the matter to the attention of the authorities, referring the matter to the courts, or seeking judicial review.<sup>297</sup> It is worth noting that The Office of the Ombudsman cannot investigate

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<sup>296</sup> See Ombudsman Act 7 of 1990, Article 3(1).

<sup>297</sup> IPPR, Roles and Responsibilities of the Ombudsman available at <https://ippr.org.na/blog/role-and-responsibilities-of-the-ombudsman/> accessed 16 July 2022.

complaints regarding the judiciary. The Ombudsman has relatively broad mandates and corresponding powers.<sup>298</sup>

A constitutional amendment in 2010 shifted corruption investigation power from the functions of the Ombudsman to the ACC. The ACC was established in 2006 under section 2 of the Anti-Corruption Act, 2003, under the Constitution's ambit. The ACC thus became a constitutionally enshrined institution in 2010.

### *3.3.7 The Office of the Prosecutor General*

The office of the Prosecutor-General in Namibia is a constitutional establishment in terms of Article 88 of the Namibian Constitution, which declares that:

*[t]here shall be a Prosecutor-General appointed by the President on the recommendation of the Judicial Service Commission.*

Under Article 88(2)<sup>299</sup>, the Prosecutor-General has the powers:

*(a) to prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings;*

*(b) to prosecute and defend appeals in criminal proceedings in the High Court and the Supreme Court;*

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<sup>298</sup> Ruppel-Schlichting KG. The independence of the Ombudsman in Namibia available at [https://www.kas.de/c/document\\_library/get\\_file?uuid=0dab1a5f-ac8c-dfc7-a594-106cb2c288a6&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=0dab1a5f-ac8c-dfc7-a594-106cb2c288a6&groupId=252038) accessed 12 May 2022.

<sup>299</sup> See Article 88 (2) of the Namibian Constitution.

*(c) to perform all functions relating to the exercise of such powers;*

*(d) to delegate to other officials, subject to his or her control and direction, authority to conduct criminal proceedings in any Court;*

*(e) to perform all such other functions as may be assigned to him or her in terms of any other law*

In the matter of *Ex Parte: Attorney-General, Namibia. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*<sup>300</sup>, it was ruled that the Prosecutor-General was independent and not subject to any superintendence or direction by anybody or any organ. The Prosecutor General is therefore independent and clothed with full power to investigate and prosecute corruption matters.

### *3.3.8 The Office of The Attorney General*

The Attorney General of Namibia is the chief legal adviser of the President and government of Namibia. They are responsible for upholding and protecting the Namibian constitution. The Namibian Attorney General holds no prosecutorial power and is independent of the Prosecutor General. The Attorney General is appointed in terms of Article 86 of the Namibian constitution and has the following powers:<sup>301</sup>

*(a) to exercise the final responsibility for the office of the Prosecutor-General;*

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<sup>300</sup> SA 7 of 1993) [1995] NASC 1 (13 July 1995).

<sup>301</sup> See Article 87 of the Namibian constitution.

(b) to be the principal legal adviser to the President and Government;

(c) to take all action necessary for the protection and upholding of the Constitution;

(d) to perform all such functions and duties as may be assigned to the Attorney General by the Act of Parliament.

Clothed with advisory powers, the Attorney General is in a position to advise on the need for law reform and can therefore play a crucial role in the anti-corruption legal sphere.

### *3.3.9 The Namibian Police*

The Namibian Police Force (NAMPOL) is the national police force of Namibia. It was established by the Namibian Constitution<sup>302</sup> and enacted by an act of Parliament. The Namibian Police Force replaced the South West African Police as the national police force of the country in 1990. The power of the Police includes amongst others, the investigation of any offence or alleged offence, the prevention of crime; and the maintenance of law and order.<sup>303</sup>

Nampol works in collaboration with the ACC, FIC, and Prosecutor General amongst others, to investigate and ensure the prosecution of culprits including those facing corruption allegations.

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<sup>302</sup> See Article 118 of the Namibian constitution as amended.

<sup>303</sup> See section 13 of Act, 19 of 1990.

### *3.3.10 The Financial Intelligence Centre*

The FIC's primary mandate is to protect the integrity and stability of the Namibian financial system by monitoring and supervising controls required to be implemented by corporations that are vulnerable to money laundering and the financing of terrorism and proliferation activities, including other financial crimes.<sup>304</sup> The Centre receives and collects information including suspicious transaction and activity reports from such corporations, analyses the received information, and where there is a reasonable suspicion that a crime has been committed, disseminates the analysed information to the ACC and Namibian Police for investigation and further action as the Centre does not have investigatory powers.<sup>305</sup> Even though FIA does not define the prevention of corruption as a direct object, the collaboration with the Anti-Corruption Commission and the Namibian Police Force strengthens the country's legislative framework in the fight against corruption.

### *3.3.11 Conclusion*

It is clear from the above that Namibia has a policy, legal and institutional framework to combat corruption. Namibia has ratified several regional and international treaties in its effort to curb corruption. Nonetheless, corruption remains a matter of concern in Namibia, and one can therefore safely conclude that the challenge facing Namibia is not the absence of a framework but rather the enforcement of such. In the next

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<sup>304</sup> Section 8 read with s 9(1)(h) of the Financial Intelligence Act 13 of 2012.

<sup>305</sup> Section 9 of the Financial Intelligence Act 13 of 2012.

chapter, the author will compare Namibia's anti-corruption framework to other jurisdictions and assess the need for law reform.

## CHAPTER FOUR

### COMPARISON OF THE NAMIBIAN POLICY, LEGAL, AND INSTITUTIONAL FRAMEWORK TO OTHER JURISDICTIONS IN AFRICA AND GLOBALLY

#### 4.1 Introduction

Many African nations, including South Africa, Botswana, and Nigeria, have implemented institutional, legal, and policy frameworks to fight corruption, similar to Namibia. Since corruption is a social ill that affects societies regardless of their level of development, as was already mentioned in the previous chapters, it is a problem not just in developing nations but, as will be described in this chapter, also in developed nations. To highlight the seriousness of corruption in industrialized nations, a comparison to the United Kingdom will be drawn in this chapter. All the aforementioned countries have laws, frameworks, and government agencies that are accountable for fighting corruption. Nonetheless, high-level corruption remains to a large degree unabated. The analysis in this chapter seeks to provide a comparative analysis of the Namibian policy, legal, and institutional frameworks to South Africa, Botswana, Nigeria, and the United Kingdom.

4.2. A detailed evaluation of Namibia's institutional, policy, and legal framework in comparison to South Africa

South Africa is widely regarded as Africa's leading liberal democracy and most industrialised country.<sup>306</sup> In 2021, South Africa was the only African nation invited to the 2021 G7 summit in the United Kingdom.<sup>307</sup> Nonetheless, despite its global reputation, current uprisings, specifically after the arrest of former South African President Jacob Zuma in July 2021, have resulted in unrest that were described as one of the worst since apartheid.<sup>308</sup> Briefly, Jacob Zuma was elected President of South Africa in 2009 and maintained that position until 2018.<sup>309</sup> Zuma was arrested for refusing to appear before the Judicial Commission of Inquiry into Allegations of State Capture, a corruption inquiry probing Zuma's alleged sale of influence over the government.<sup>310</sup> It is worth mentioning that, reports have demonstrated that

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<sup>306</sup> Lishivha W '25 years of democratic South Africa' *Mail & Guardian* 03 May 2019 available at <https://mg.co.za/article/2019-05-03-00-25-years-of-democratic-south-africa/> accessed 19 May 2022.

<sup>307</sup> GOV-UK UK Welcomes South Africa as G7 Guest available at <https://www.gov.uk/government/publications/g7-climate-and-environment-ministers-meeting-may-2021-presidency-statement-on-guest-participation> accessed 20 May 2022.

<sup>308</sup> Cotterill J. 'South Africa counts the cost of its worst unrest since apartheid' *Times* 24 July 2021 available at <https://www.ft.com/content/1b0badcd-2f81-42c8-ae09-796475540ccc> accessed 25 May 2022.

<sup>309</sup> Smith D 'Jacob Zuma the chameleon brings South Africans joy and fear' *Guardian* 20 April 2009 available at <https://www.theguardian.com/world/2009/apr/20/zuma-south-africa-politics> accessed 20 May 2022.

<sup>310</sup> Eligon J. 'Jacob Zuma, Former South African President, Is Arrested' *N.Y. Times* 7 July 2021 available at <https://www.nytimes.com/2021/07/07/world/africa/jacob-zuma-arrested-south-africa.html> accessed 20 May 2022.

since the launch of the State Capture Inquiry in 2018, corruption came into the spotlight in South Africa.<sup>311</sup>

According to Cotterell during the decade of Zuma's presidency, levels of corruption within the ANC government increased significantly, with Zuma being personally implicated in several corrupt dealings.<sup>312</sup> President Zuma began losing electoral support in 2016, and South Africa's current President Cyril Ramaphosa seized the opportunity to launch a campaign for the ANC leadership premised on rooting out corruption within the ANC ranks and reviving foreign and domestic investment.<sup>313</sup> Notably, Ramaphosa was a trusted associate of the then South African President, Nelson Mandela during the transition from apartheid and was, President Zuma's deputy from 2014 to 2018.<sup>314</sup>

Thereafter, in February 2018, Ramaphosa assumed leadership of the ANC and the country after narrowly winning enough support to force President Zuma to stand

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<sup>311</sup> Gevisser M 'State Capture': the corruption investigation that has shaken South Africa' *Guardian* 11 July 2019 available at <https://www.theguardian.com/news/2019/jul/11/state-capture-corruption-investigation-that-has-shaken-south-africa> accessed 20 May 2022.

<sup>312</sup> Cotterell J 'Shadow of jailed Zuma hangs over 'dysfunctional ANC' *Fin. Times* 08 July 2021 available at <https://www.ft.com/content/e4ba9fbe-10d9-470d-a751-d663202b4612> accessed 20 May 2022.

<sup>313</sup> Ramaphosa C. (2019) 'South African union leader, mine boss president' *BBC News* 24 May 2019 available at <https://www.bbc.com/news/world-africa-20767093> accessed 20 May 2022.

<sup>314</sup> BBC News 'South Africa's Jacob Zuma resigns after pressure from party' 18 February 2018 available at <https://www.bbc.co.uk/news/world-africa-43066443> accessed 20 May 2022.

down under the threat of a parliamentary vote of no confidence.<sup>315</sup>

Since his election into power, President Ramaphosa positioned himself as an anti-corruption activist, and in 2020, he took several key anti-corruption steps.<sup>316</sup> In August 2020, at the height of the COVID-19 pandemic and amid allegations of corruption involving the government's COVID-19 relief fund and the procurement of personal protective equipment (PPE), Ramaphosa took decisive steps to confront corruption within the ANC.<sup>317</sup>

In a letter written to ANC members in August 2020, Ramaphosa listed certain anti-corruption steps taken since 2017, but noted that the 2020 National Executive Committee (NEC) had recognised “the justifiable public outrage caused by recent reports of corruption”.<sup>318</sup> President Ramaphosa went on to write that the party needed to “have the political

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<sup>315</sup> Supra note 312. Gevisser, M ‘State Capture’: the corruption investigation that has shaken South Africa’ *Guardian* 11 July 2019 available at <https://www.theguardian.com/news/2019/jul/11/state-capture-corruption-investigation-that-has-shaken-south-africa> accessed 20 May 2022

<sup>316</sup> SA People News ‘Who’s Been Arrested so Far in Staggering Swoop on Corrupt Officials in South Africa’ 2 October 2020 available at <https://www.sapeople.com/2020/10/02/whos-been-arrested-so-far-in-staggering-swoop-on-corrupt-officials-in-south-africa/> accessed 21 May 2022.

<sup>317</sup> Magome M ‘South Africa’s president fights own party over corruption’ *Associated Press* 19 February 2021 available at <https://apnews.com/article/coronavirus-pandemic-cyril-ramaphosa-africa-south-africa-courts-9536bc1063cc5cb748a7b16b0081dff3> accessed 21 May 2022.

<sup>318</sup> Premium BL, President Cyril Ramaphosa’s letter to ANC members about corruption, available at <https://www.businesslive.co.za/fm/opinion/2020-08-24-read-in-full-president-cyril-ramaphosas-letter-to-anc-members-about-corruption/> accessed on 21 May 2022.

courage and the honesty to acknowledge that ANC leaders, public representatives, and members have on several occasions been implicated in forms of corruption.”<sup>319</sup>The ‘step aside’ rule, which is an ANC rule that forces criminally-charged leaders to step down, led to the suspension of, amongst others, the ANC’s Secretary General, Elias ‘Ace’ Magashule, in May 2021 following his 2020 arrest on 74 charges of fraud, corruption, and money laundering.<sup>320</sup>

Other notable anti-corruption efforts and policies that were implemented during the leadership of President Ramaphosa included:

- i. Enhancing the functions of the Special Investigating Unit (SIU). The SIU is South Africa’s dedicated anti-corruption agency focusing on the recovery of misappropriated state resources. This resulted in the establishment of a Special Tribunal to speed up the recovery of state funds and civil claims.<sup>321</sup>
- ii. Establishing a new multi-disciplinary anti-corruption investigating directorate within the National Prosecuting

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<sup>319</sup> Premium BL ‘Letter from Cyril Ramaphosa, President, Republic of South Africa to ANC members’ *Finance Mail* 24 August 2020 available at <https://www.businesslive.co.za/fm/opinion/2020-08-24-read-in-full-president-cyril-ramaphosas-letter-to-anc-members-about-corruption/> accessed 21 May 2022.

<sup>320</sup> Tandwa L ‘Court rules that the ANC step-aside rule is in line with the Constitution as it dismisses Magashule’s application’ *Mail & Guardian* 09 July 2021 available at <https://mg.co.za/politics/2021-07-09-court-rules-that-the-anc-step-aside-rule-is-in-line-with-the-constitution-as-it-dismisses-magashules-application/> accessed 21 May 2022.

<sup>321</sup> Evans S ‘Ramaphosa announces SIU Special Tribunal to fast-track recovery of state funds’ *News24* 24 February 2019 available at <https://www.news24.com/news24/SouthAfrica/News/ramaphosa-announces-siu-special-tribunal-to-fast-track-recovery-of-state-funds-20190224> accessed 21 May 2022.

Authority (NPA) to investigate and prosecute high-level corruption.<sup>322</sup>

- iii. Replacing leadership at key institutional bodies, including the NPA; the South African Revenue Service; the State Security Agency (SSA); and the Directorate for Priority Crime Investigation, which targets organised crime, and economic crime, corruption, and other serious crime.<sup>323</sup>

Corruption has become widespread in South Africa; hence, South Africa identified a need to integrate anti-corruption initiatives across the country to mitigate corruption's impact and to outline the government's responsibility to achieve the vision of the National Development Plan 2030 of South Africa without corruption.<sup>324</sup>

South Africa, like Namibia, is a party to multiple international rules and treaties that are meant to demonstrate the country's commitment to eradicating corruption. These conventions are, inter alia, the United Nations Convention Against Corruption,<sup>325</sup> the Organisation for Economic

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<sup>322</sup>Rall S 'We have the power to make arrests and prosecute corruption cases: Investigating Directorate' *IOL News* 07 October 2020 available at <https://www.iol.co.za/news/politics/we-have-the-power-to-make-arrests-and-prosecute-corruption-cases-investigating-directorate-3d230007-487f-4d24-bda6-b70ad9f52901> accessed 21 May 2022.

<sup>323</sup>Presence C 'Godfrey Lebeya appointed new Hawks boss' *IOL News* 24 May 2018 available at <https://www.iol.co.za/news/politics/godfrey-lebeya-appointed-new-hawks-boss-15138920> accessed 21 May 2022.

<sup>324</sup>Republic of South Africa (2020), National Anti-Corruption Strategy (2020-2030) available at [https://www.gov.za/sites/default/files/gcis\\_document](https://www.gov.za/sites/default/files/gcis_document) accessed 25 May 2022.

<sup>325</sup> The Convention introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption.

Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,<sup>326</sup> the African Union's Convention on Preventing and Combating Corruption,<sup>327</sup> the Southern African Development Community's Protocol against Corruption,<sup>328</sup> and the United Nations Convention against Transnational Organised Crime.<sup>329</sup> These conventions display South Africa's commitment to avert and fight against corruption.<sup>330</sup>

#### *4.2.1 The Constitution of the Republic of South Africa (1996)*

The Constitution of the Republic of South Africa contains a Bill of Rights.<sup>331</sup> The Bill of Rights includes socio-economic

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<sup>326</sup> The Organisation for Economic Co-operation and Development (OECD) is an international organisation that works to build better policies for better lives. The goal is to shape policies that foster prosperity, equality, opportunity and well-being for all.

<sup>327</sup> African Union Convention on Preventing and Combating Corruption objectives are to: Promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.

<sup>328</sup> The SADC Protocol Against Corruption aims to promote and strengthen the development, within each Member State, of mechanisms needed to prevent, detect, punish and eradicate corruption in the public and private sector.

<sup>329</sup> There are two principal objectives of the Treaty: (1) eliminate differences among national legal systems; and (2) set minimum common standards for domestic law to achieve effective global cooperation.

<sup>330</sup> Republic of South Africa (2020), National Anti-Corruption Strategy (2020-2030) available at <https://www.gov.za/sites/default/files/document> accessed 25 May 2022.

<sup>331</sup> Chapter 2 of the constitution.

rights, as well as rights to dignity, equality,<sup>332</sup> and freedom<sup>333</sup> amongst others. Amongst the many effects of corruption is that corruption can weaken the rights in the Bill of Rights of a country. Article 217 of the Constitution deals with procurement and calls for the state in the national, provincial, or local government to contract for goods or services in accordance with a system which is fair, equitable, clear, competitive, and cost-effective system.<sup>334</sup> This provision aims to deter corruption in the country's procurement system. This is one provision that Namibia does not have enshrined in its constitution, even though one can argue that it is remedied by sections 38 and 42 of Namibia's Anti-corruption Act, 2003. However, sections 38 and 42 of the Anti-Corruption Act talk specifically about the bribing of a public officer and bribery for assisting in relation to contracts, respectively, but do not explicitly call for a fair, equitable, clear, competitive, and cost-effective procurement system.

Additionally, the Namibian Public Procurement Act, of 2015, does not contain a provision that explicitly obligates the government or other Namibian entities to contract for goods or services in accordance with a system which is fair, equitable, clear, competitive, and cost-effective system. However, inference on such can be made from various sections in the Procurement Act such as section 6,<sup>335</sup> section

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<sup>332</sup> Article 9.

<sup>333</sup> Article 7.

<sup>334</sup> Article 217 (1).

<sup>335</sup> "The fundamental principles referred to in subsection (1)(d), include as a minimum, the principle of transparency, integrity, competitive

66 (1) (a)<sup>336</sup> and section 67 (2) (a),<sup>337</sup> amongst others. Nonetheless, Namibia should learn from South Africa and explicitly regulate private, national, and government entities to contract for goods or services in agreement in a fair, equitable, clear, competitive, and cost-effective system.

#### *4.2.2 The Prevention and Combatting of Corrupt Activities Act, Act 12 of 2004*

The Prevention and Combatting of Corrupt Activities Act (PRECCA) is the key legislation combating corruption in South Africa. It outlines acts of general corruption and specific offences.<sup>338</sup> The Act also provides for, factfinding procedures,<sup>339</sup> and preventative actions to mitigate corruption. Section 12 of PRECCA provides for offenses in respect of corrupt activities relating to contracts.<sup>340</sup> Section 13 of PRECCA provides for offenses in respect of corrupt activities relating to procuring and withdrawing tenders. Which amounts to ‘gratification’ under PRECCA.

The offense of corruption under the PRECCA encompasses:

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supply, effectiveness, efficiency, fair-dealing, responsiveness, informed decision-making, consistency, legality, integration, and accountability and such other aspects as the Minister may determine.

<sup>336</sup> to discharge his or her functions fairly and impartially and without fear, favour or prejudice to anyone so as to ensure fair competitive access to procurement by suppliers.

<sup>337</sup> A bidder who engages in collusion, before or after a bid submission, designed to - establish bid prices at artificial non-competitive levels.

<sup>338</sup> Section 3.

<sup>339</sup> Section 2 (b).

<sup>340</sup> Chapter 2 of the Act.

- i. Someone giving (offering to give) / Someone receiving (or agreeing to receive)
- ii. Someone in a position of power
- iii. Gratification
- iv. To use their power illegally or unfairly

Under PRECCA, corrupt practices can involve money, a donation, a fee, a reward, property, the avoidance of loss, the discharge of a loan, a privilege, a discount, etc.<sup>341</sup> PRECCA also addresses manipulating a person to act illegally; dishonestly; unauthorised or biased.<sup>342</sup> In addition to creating the general crime of corruption; PRECCA also criminalises specific corrupt activities<sup>343</sup>:

- a) Offences involving contracts: it is a crime for anyone to accept gratification to influence who gets a contract.<sup>344</sup>
- b) Offences involving a public official: if anyone in the private sector offers a public official any gratification to give them a benefit, they will be guilty of corruption.<sup>345</sup>
- c) Offences that involve members of legislative bodies: it is an offence to offer any member of a legislative authority any gratification to act in an illegal or biased manner.<sup>346</sup>

PRECCA can be compared to Namibia's Anti-Corruption Act. Like PRECCA the Anti-Corruption Act aims to take

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<sup>341</sup> Section 1 (iv) and (ix) (b).

<sup>342</sup> Section 3 (b).

<sup>343</sup> Section 3 of the Act.

<sup>344</sup> Section 12.

<sup>345</sup> Section 5.

<sup>346</sup> Section 7.

measures for the prevention of corruption. However, significant variances can be observed between the two Acts. For example, PRECCA contains a provision offence relating to specific persons,<sup>347</sup> that is absent in the Anti-Corruption Act. Additionally, a significant variance is PRECCA's chapter 3 which encompasses the investigation regarding possession of property relating to corrupt activities, which are not catered for in the Anti-Corruption Act. Similarly, PRECCA<sup>348</sup> contains a section on presumption and defences which is not in the Anti-Corruption Act.

Considering the above analysis, one can therefore suggest for Namibia to revise and amplify its anti-corruption act to strengthen its corruption prevention measures. However, it should be noted that the Anti-Corruption Act is complemented by various legislation such as the Prevention of Organised Crime Act, Act 29 of 2004, (POCCA) as amended. The POCCA, which empowers the confiscation of benefits of crimes<sup>349</sup> and offences under the Anti-Corruption Act, 2003 are listed as schedule 1 offences under POCCA.

From the above discussions, there are notable differences between the South African Prevention and Combatting of Corrupt Activities Act and the Namibian Anti-corruption Act. The following highlights can be made:

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<sup>347</sup> Part 2 of Chapter 2.

<sup>348</sup> Section 24 and 25 of PRECCA.

<sup>349</sup> Chapter 5.

- i. The South African Act has identified and classified offences relating to specific persons while the Namibia Act only has general corrupt practices, irrespective of the perpetrator.<sup>350</sup>
- ii. The South African Act does not establish an Anti-Corruption Commission like the Namibian Act.<sup>351</sup> Rather, in January 2018, the Former President of South Africa established the Judicial Commission of Inquiry into Allegations of State Capture, Corruption, and Fraud in the Public Sector including Organs of State, better known as the Zondo Commission or State Capture Commission. The Commission is a public inquiry established to investigate allegations of state capture, corruption, and fraud in the public sector in South Africa.

The State Capture Inquiry is a public inquiry led by then Deputy Chief Justice Raymond Zondo, which was launched a month before Zuma's ouster from the presidency in 2018<sup>352</sup> and mandated to "investigate allegations of state capture, corruption, fraud, and other allegations in the public sector, including organs of state."<sup>353</sup> The Inquiry was commissioned as a result of a 2016 report on unethical conduct in the appointment of certain cabinet ministers by the Public Protector, an independent government watchdog

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<sup>350</sup> Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 and. Act Chapter 4 of Anti-Corruption Act, Act 8 of 2003.

<sup>351</sup> Section 2.

<sup>352</sup> Tromp B and Patel K 'Time's up: Zuma has resigned' *Mail & Guardian* 14 February 2018 available at <https://mg.co.za/article/2018-02-14-zuma-address/> accessed 25 May 2022.

<sup>353</sup> Parliamentary Monitoring Grp., Judicial Commission of Inquiry Into Allegations of State Capture (Call for evidence/Information) (2018) available at <https://pmg.org.za/call-for-comment/694/> accessed 25 May 2022.

established under South Africa's Constitution.<sup>354</sup>The Public Protector's report stopped short of asserting criminal behaviour, but called for an investigation into whether Zuma, some of his cabinet members, and certain State-Owned Enterprises (SOEs) had acted improperly.<sup>355</sup>

The State Capture Inquiry's mandate has three prominent areas of focus. First, 'state capture' – a type of systemic political corruption through which private interests influence a state's decision-making processes to their advantage.<sup>356</sup> Second, Zuma's relationship with members of the Gupta family, a wealthy Indian-born family of businessmen with significant and extensive business ties in South Africa.<sup>357</sup> Third, Zuma's misappropriation of public funds and abuse of power over the State Security Agency (SSA) to shield himself from scrutiny and prosecution during his presidency.<sup>358</sup>

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<sup>354</sup> Public Protector of South Africa State of Capture, A Report of the Public Protector (2016) available at [http://www.publicprotector.org/sites/default/files/legislation\\_report/State\\_Capture\\_14October2016\\_0.pdf](http://www.publicprotector.org/sites/default/files/legislation_report/State_Capture_14October2016_0.pdf). accessed 25 May 2022.

<sup>355</sup> Supra note 349.

<sup>356</sup> Arun N 'State capture: Zuma, the Guptas, and the sale of South Africa' *BBC News* 15 July 2019 available at <https://www.bbc.co.uk/news/world-africa-48980964> accessed 25 May 2022.

<sup>357</sup> Supra note 353. Tromp B and Patel K 'Time's up: Zuma has resigned' *Mail & Guardian* 14 February 2018 available at <https://mg.co.za/article/2018-02-14-zuma-address/> accessed 25 May 2022

<sup>358</sup> The State Capture Inquiry has received testimonies from multiple members of the SSA, all of whom allege that Zuma used the intelligence service as a personal protective force, ordering them to disrupt negative press attention about his corruption and to recruit members of the judiciary for favourable judgments. Greg Nicolson 'SSA Official tells State Capture Commission of millions paid to Mahlobo and MK Military

(iii) The South African Act has made provision for the investigation regarding the possession of property relating to corrupt activities,<sup>359</sup> which does not feature in the Namibian Act.

(iv) Additionally, worth noting is the provision of registering tender defaulters which the South African Act makes provision for<sup>360</sup> which is not in the Namibian Act. This is a very crucial milestone in the fight against corruption. As was discussed in prior chapters, procurement is one area that is prone to corruption, hence, the South African government should be commended for making a provision in its Act specifically on tenders.

#### *4.2.3 The Public Finance Management Act (1999) and Regulations.*

The Treasury Regulations enacted in terms of the Public Finance Management Act 1 of 1999 ('PFMA') set out specific obligations on organs of state to investigate corruption within the sphere of public procurement.<sup>361</sup> The PFMA and Treasury Regulations apply to national or provincial government departments.<sup>362</sup>

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Veterans Association' *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2021-05-14-ssa-official-tells-state-capture-commission-of-millions-paid-to-mahlobo-and-mk-military-veterans-association/>. accessed 25 May 2022.

<sup>359</sup> Section 22.

<sup>360</sup> Chapter 6 of the Act.

<sup>361</sup> Regulation 3.

<sup>362</sup> Regulation 18 (b).

Additionally, supply chain management officials must ensure that they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality, or any other act<sup>363</sup> and must assist accounting officers or accounting authorities in combating corruption and fraud in the supply chain management system.

Treasury Regulations also provide that the “accounting officer”, who in terms of section 36 of the PFMA is the head of the relevant government department, must:

- a. take steps against such an official or other role player and inform the relevant
- b. treasury of such steps; and
- c. report any conduct that may constitute an offence to the South African Police Service.’

Most notably, in 2020, the Judicial Commission of Inquiry into Allegations of State Capture, Corruption, and Fraud in the Public Sector including Organs of State investigated elite-level corruption and collusion between government figures and the private sector in South Africa in public procurement, did not end up holding any punches either.<sup>364</sup> The subsequent reports highlight hundreds of businesspeople and public officials in South Africa whom it alleged were involved in substandard practices.<sup>365</sup>

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<sup>363</sup> Regulation 10 (1) and Section 38(1)(d) of the PFMA.

<sup>364</sup> Madonsela T (2016) State of Capture - A Report of the Public Protector, 14 October 2016.

<sup>365</sup> The Government Printer. (2020). The Government Printer Government Gazette Staatskoerant REPUBLIC OF SOUTH AFRICA

The Commission made 10 key recommendations which the government has pledged to respond to by June 2022.<sup>366</sup> The recommendations are:

- i. Create a National Charter Against Corruption in Public Procurement.
- ii. Establish an independent anti-corruption agency to act as a watchdog in public procurement.
- iii. Legislation to protect whistleblowers must be introduced and upheld.
- iv. Deferred prosecution agreements should be enacted to encourage collaboration.
- v. Legislation should enact a body that governs how professionals in public procurement should behave.
- vi. All public procurement entities should adopt and incorporate OECD standards of transparency and data.
- vii. Legislation that dictates duties and responsibilities of how accounting officers act and behave should be amended to remove criminal liability.
- viii. Anti-bribery legislation should be strengthened.
- ix. Cash-for-tenders donations to political parties from the private sector should be outlawed.
- x. The 10th recommendation combines “better guidance” for public procurement officials, “harmonisation” of legislation,

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REPUBLIEK VAN SUID AFRIKA Vol. 661 28 July Julie 2020 No. 43563 available at file:///C:/Users/hp/Downloads/43563\_28-7\_JustConDev%20(1).pdf accessed 14 January 2022.

<sup>366</sup> MacBeth A. ‘South Africa: A window of opportunity to accelerate public procurement reforms after Zondo Commission lays bare shortcomings’ available at <https://www.open-contracting.org/2022/04/11/south-africa-a-window-of-opportunity-to-accelerate-public-procurement-reforms-after-zondo-commission-lays-bare-shortcomings/> accessed 14 January 2022.

and “centralisation” of certain aspects of procurement management.

In summary, South Africa like Namibia has enacted various legislations to fight corruption. These include the following:

- a) The Financial Intelligence Centre Act, 2001 (FICA), which is aimed at fighting financial crime such as money laundering, tax evasion, and terrorist financing activities.
- b) The Public Finance Management Act, 1999 (PFMA) and the Local Government: Municipal Finance Management Act, 2003 (MFMA), which regulate and monitor government spending to reduce wasteful and unauthorised spending of public funds and seek to prevent corruption in the procurement process.
- c) The Prevention of Organised Crime Act, 1988 (POCA), which was introduced to combat organised crime, (including money laundering and criminal gang activities), and provides for the preservation and forfeiture of property implicated in these offenses.
- d) The Protected Disclosures Act, of 2000, which provides protection to employees who disclose information relating to corrupt activities within the workplace, in both the private and public spheres.
- e) The Criminal Procedure Act, 1977 (CPA), which provides for procedures relating to all crimes, including domestic bribery.
- f) The Companies Act, 2008 (Companies Act), which seeks to provide protection for whistleblowers and to stop corrupt activities within companies through the practice of good corporate governance.

- g) Various international agreements and conventions to which South Africa is a party, which oblige South Africa to address corruption and bribery in the public and private spheres.
- h) From the above, one legislation that stands out and this study will encourage Namibia to leverage from is The Protected Disclosures Act<sup>367</sup>, the Act is crucial in encouraging employees to report corrupt activities within their workplaces, without fear of repercussion. The Act provides procedures in terms of which any employee may disclose information relating to an offence or malpractice in the workplace by his or her employer or fellow employees and provides for the protection of an employee, who disclosed by the procedures provided for by the Act, against any reprisals as a result of such a disclosure. That protection will encourage employees to report corruption in their workplaces.

#### 4.3 An extensive comparison of the Namibian legal, policy, and Institutional framework to Botswana

In 1966, Botswana gained independence from the United Kingdom. At the time of its independence, Botswana was one of the poorest countries in the world.<sup>368</sup> Since then, the country has seen tremendous growth, mainly through the discovery of diamonds.<sup>369</sup> Botswana has since become the largest producer of diamonds by volume in the world.<sup>370</sup> The

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<sup>367</sup> Protected Disclosures Act, 2000 (Act 26 of 2000).

<sup>368</sup> The World Bank overview report on Botswana available at [https://web.worldbank.org/archive/website01321/WEB/0\\_\\_CONTE.HTM](https://web.worldbank.org/archive/website01321/WEB/0__CONTE.HTM), accessed on 14 July 2022

<sup>369</sup> Revenue Watch 2013.

<sup>370</sup> Badham-Jones, M Overview of corruption and anti-corruption in Botswana 27 November 2014 available at

government of Botswana is hailed for its management of corruption. According to the Global Competitiveness Report 2011-2012, corruption is the 7th most problematic factor when doing business in Botswana.<sup>371</sup> The following are domestic laws implemented to combat corruption in the country.

#### *4.3.1 Botswana Domestic Laws*

The Corruption and Economic Crime Act 1994<sup>372</sup> is Botswana's strongest domestic law on corruption. With it came the creation of the Directorate on Corruption and Economic Crime (DCEC).<sup>373</sup> The Act prohibits the soliciting, receiving, or agreement of payment to cause a public servant to depart from normal behaviour or to impact their lawful decisions.<sup>374</sup> Furthermore, the Act makes it unlawful for public officials not to assert private benefits when procuring a government contract.<sup>375</sup> The act implicates any individual participating in a government contract that gives corrupt payments<sup>376</sup>.

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[https://www.transparency.org/files/content/corruptionqas/Country\\_Profile\\_Botswana\\_2014.pdf](https://www.transparency.org/files/content/corruptionqas/Country_Profile_Botswana_2014.pdf) accessed on 14 July 2022.

<sup>371</sup> World Economic Forum 2011-2012.

<sup>372</sup> Corruption and Economic Crime Act, Act no 13 of 1994.

<sup>373</sup> Section 3.

<sup>374</sup> Section 23.

<sup>375</sup> Section 31.

<sup>376</sup> Transparency International, Anti-Corruption Helpdesk, Overview of Corruption and Anti-Corruption in Botswana available at [https://www.transparency.org/files/content/corruptionqas/Country\\_Profile\\_Botswana\\_2014.pdf](https://www.transparency.org/files/content/corruptionqas/Country_Profile_Botswana_2014.pdf) accessed on 15 July 2022.

Similar to Namibia, in 2019 Botswana passed its Financial Intelligence Act, Act no 11 of 2019.<sup>377</sup> The Act created the Financial Intelligence Agency (FIA).<sup>378</sup> The Act also set out a framework that financial institutions must follow.<sup>379</sup> The Financial Intelligence Act creates a structure that improves the discovery of money laundering. According to Badham-Jones, Botswana lacks transparency laws. This has caused Botswana to receive a “weak” score from Revenue Watch.<sup>380</sup> Moreover, the country has limited regulations requiring the declaration of assets by public officials.<sup>381</sup>

It is said that there are exacerbated high levels of nepotism and patronage amongst Botswana’s elites. Family members and friends of the elites often own the companies that government ministers would tender with. As a result, conflicts of interest are frequent, and not often disclosed.<sup>382</sup>

For example, in 2011, Botswana’s then minister of finance and development planning, Kenneth Matambo was charged

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<sup>377</sup> Financial intelligence act, 2009 - Bank of Botswana available at <https://www.bankofbotswana.bw/sites/default/files/Financial-Intelligence-Act-2009.pdf> accessed on 16 July 2022.

<sup>378</sup> Financial Intelligence Agency Ministry of Finance, available at [https://www.finance.gov.bw/index.php?option=com\\_content&view=article&id=39&catid=20&Itemid=159](https://www.finance.gov.bw/index.php?option=com_content&view=article&id=39&catid=20&Itemid=159) accessed on 14 July 2022.

<sup>379</sup> Section 6

<sup>380</sup> Revenue Watch. 2013. Botswana: The 2013 Resource Governance Index available at [https://resourcegovernance.org/sites/default/files/rgi\\_2013-webreport.pdf](https://resourcegovernance.org/sites/default/files/rgi_2013-webreport.pdf) accessed on 15 July 2022.

<sup>381</sup> Ibid.

<sup>382</sup> Sebudubudu D (2014) The Evolving State of Corruption and Anti-Corruption Debates in Botswana: Issues in Good Governance available at [http://anticorrrp.eu/wp-content/uploads/2014/03/BotswanaBackground-Report\\_final.pdf](http://anticorrrp.eu/wp-content/uploads/2014/03/BotswanaBackground-Report_final.pdf) accessed on 15 July 2022.

with corruption. The state alleged that between July and September 2005, while Matambo was managing director of the Botswana Development Corporation (BDC), he failed to declare his private dealings with a company that did business with the corporation. According to the charge sheet, Matambo had an “indirect interest” in a company called Tuwana Construction in that it was building a house on a Gaborone plot that belonged to him and his wife. This was at the same time as the BDC “proposed to deal with Tuwana Construction”. Matambo did not declare the interest to the BDC.<sup>383</sup>

Additionally, Mr Amando Lionjanga, the managing director of the Public Procurement and Asset Disposal Board (PPADB), was charged with sitting in a meeting that awarded a close relative, his nephew, a tender without declaring his relationship to the recipient of the award. Mr Lionjanga, however, was cleared of wrongdoing, on appeal.<sup>384</sup> One would have expected that Mr Lionjanga is held accountable by being present in a meeting where he was conflicted and not disclosing his conflict. However, even though he was convicted on one count of corruption in the Magistrate Court and received a three-year suspended sentence, both the conviction and sentence were set aside on appeal. The court of appeal found that the state had failed to

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<sup>383</sup> Ntibinyane N ‘Mr. Clean’ in court for corruption’ *The Mail & Guardian* 10 June 2011 available at <https://news.trust.org/item/20110610144400-ph1i9> accessed 12 July 2022.

<sup>384</sup> Sunday standard online news ‘Lionjanga to be sentenced tomorrow’ *All Africa* 21 January 2009 available at [sentenced tomorrow/#:~:text=Gaborone%20Chief%20Magistrate%20Lot%20Moroka,of%20a%20si](https://www.africanews.com/2009/01/21/lionjanga-to-be-sentenced-tomorrow/) accessed 10 July 2022.

prove Lionjanga's defence false beyond a reasonable doubt.<sup>385</sup>

From the above two cases, which are just some of the many cases implicating elites in Botswana, one is inclined to agree with Badham-Jones that Botswana lacks transparency laws,<sup>386</sup> even though according to the 2021 Transparency International Corruption Perceptions Index Botswana received a corruption perceptions index score of 55, where 100 is the most clean and 0 is the most corrupt. Botswana was the 45th country on a list of 180 countries, ranked by the perception of the corruption from least corrupt to most corrupt.<sup>387</sup>

#### *4.3.2 Botswana International and Regional Laws*

On the international and regional landscape, Botswana ratified the United Nations Convention against Corruption (UNCAC) on 27 June 2011. As already explained, the UNCAC is meant to establish international benchmarks in stopping and outlawing corruption in compliance with the Convention. The Convention encourages international

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<sup>385</sup>Morewagae I 'Botswana: Lionjanga Clears the Jungle of Corruption' *All Africa*. 05 June 2009 available at <https://allafrica.com/stories/200906080939.html> accessed 10 July 2022.

<sup>386</sup>Badham-Jones, M (2014) Overview of corruption and anti-corruption in Botswana available at [https://knowledgehub.transparency.org/assets/uploads/helpdesk/Country\\_Profile\\_Botswana\\_2014.pdf](https://knowledgehub.transparency.org/assets/uploads/helpdesk/Country_Profile_Botswana_2014.pdf) accessed 10 July 2022.

<sup>387</sup>Transparency International. Corruption Perceptions Index 2021 Results available at [https://www.transparency.org/en/gcb?gclid=Cj0KCCQjw8uOWBhDXARIsAOxKJ2E3Y\\_UoWaFYV4uT5ElUvkXE85rXdXGsywlaQULN3rO15FibmybHqzAaAruSEALw\\_wcB](https://www.transparency.org/en/gcb?gclid=Cj0KCCQjw8uOWBhDXARIsAOxKJ2E3Y_UoWaFYV4uT5ElUvkXE85rXdXGsywlaQULN3rO15FibmybHqzAaAruSEALw_wcB) accessed 10 July 2022.

cooperation for developing countries where the proceeds of corruption often end up in international countries (UNODC).

To date, Botswana has not signed the African Union Convention on Preventing and Combating Corruption, which is similar to the UNCAC.

#### *4.3.3 Botswana's Institutional framework to combat corruption*

In 1994 the Directorate on Corruption and Economic Crime (DCEC) was created, with the obligation to fight corruption and economic misconduct. The DCEC is responsible for investigations, the prevention of corruption, and public education. The unit investigates all areas of corruption.<sup>388</sup>

The Financial Intelligence Agency (FIA) became operational in 2011 with the passing of the Financial Intelligence Act.<sup>389</sup> FIA requests to receive, evaluate, and distribute data on questionable contracts and financial disclosures.<sup>390</sup> The FIA has been linked to a lack of regulations that allows the FIA to receive and review accounts from banks and certain other financial institutions (US Department of State 2013)<sup>391</sup>.

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<sup>388</sup> Directorate on Corruption and Economic Crime available at <https://www.gov.bw/ministries/directorate-corruption-andeconomiccrime#:~:text=The%20responsibility%20of%20the%20DCEC,of%20corruption%20and%20prevent%20corruption.&text=The%20Division%20investigates%20allegations%20of,crimes%20reported%20to%20the%20DCEC> accessed 10 March 2022.

<sup>389</sup> Part 2 of the FIA.

<sup>390</sup> Section 11.

<sup>391</sup> U.S. Department of State. 2013. 2013 Investment Climate Statement Botswana available at <http://www.state.gov/e/eb/rls/othr/ics/2013/204607.htm> accessed 19 May 2022.

Furthermore, the Office of the Auditor General (OAG) is responsible for performing financial audits, performance audits, local government audits, and information technology audits. The OAG ensures that finances are not stolen, and that money provided for national priorities is allocated in an effective and transparent manner.<sup>392</sup> The OAG is answerable to the Ministry of Finance and Development Planning and is mandated to report to it.<sup>393</sup>

The Director of Public Prosecution (DPP) is associated with the office of the attorney general.<sup>394</sup> The Office of the Ombudsman was established in 1995 by an Act of Parliament<sup>395</sup> and became operational in late 1997 (Office of the Ombudsman). The Ombudsman's duty involves examining citizen complaints about problems of the abuse of power by public officials.<sup>396</sup> The Office of the Ombudsman

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<sup>392</sup> Transparency International. 2007. National Integrity Systems Country Study: Botswana 2006/7 available at [http://archive.transparency.org/policy\\_research/nis/nis\\_reports\\_by\\_country](http://archive.transparency.org/policy_research/nis/nis_reports_by_country) accessed 10 March 2022.

<sup>393</sup> Article 124 of the Botswana Constitution.

<sup>394</sup> Khan R Effective Legal and Practical Measures for Combating Corruption available at <http://www.unafei.or.jp/english/pages/RMS/No83.htm> accessed 10 March 2022.

<sup>395</sup> The Office of the Ombudsman, Botswana: Office of the Ombudsman available at <https://www.eisa.org/wep/botagency.htm> accessed 10 March 2022.

<sup>396</sup> Olowu, B. Combatting Corruption and Economic Crime in Africa: An Evaluation of the Botswana Directorate of Corruption and Economic Crime. (1999) 12 (7) *The International Journal of Public Sector Management* 604-614.

is seeking greater independence for increased credibility and autonomy to examine grievances against the government<sup>397</sup>.

The Corruption and Economic Crime Act (CECA)<sup>398</sup> was passed into law in 1994. It created the Directorate on Corruption and Economic Crime (DCEC).<sup>399</sup> It was formed in response to several corruption scandals involving senior officials in the ruling Botswana Democratic Party (BDP). The scandals had caused public outrage and threatened to harm the country's reputation as an African model of good governance. The DCEC has since benefited from strong political backing and has enabled Botswana to feature as the best performing African country in Transparency International's 2016 Corruption Perceptions Index.<sup>400</sup>

Botswana has a relatively functional democratic system with entrenched political, judicial and watchdog institutions.<sup>401</sup> The culture of democratic freedom has allowed citizens and their organisations to express their views through private

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<sup>397</sup> Electoral Institute for Sustainable Democracy in Africa. (2009) Botswana: Office of the Ombudsman. from Electoral Institute for Sustainable Democracy in Africa, 27.

<sup>398</sup> Botswana Corruption and Economic Crime Act 1994 available at [https://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Botswana\\_Corruption%20and%20Economic%20Crime%20Act\\_1994\\_EN.pdf](https://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Botswana_Corruption%20and%20Economic%20Crime%20Act_1994_EN.pdf) accessed 10 March 2022.

<sup>399</sup> Directorate on Corruption and Economic Crime available at <https://www.gov.bw/ministries/directorate-corruption-and-economic-crime> accessed 10 March 2022.

<sup>400</sup> Fombad, CM (2001) The Enhancement of Good Governance in Botswana: A Critical Assessment of the Ombudsman Act, 1995, Taylor & Francis, Ltd, Vol. 27, No. 1 (March 2001), 57-77.

<sup>401</sup> Batlang S and Kesaobaka (2017) Botswana's dominant party system: Determinants in the Decision to Vote for the Ruling Party, DOI: 10.20940/JAE/2017/v16i2a1 *Journal of African Elections* 2-23.

media and other formal mechanisms. Both the political and economic systems promote a culture of inclusiveness, participation and consultation.<sup>402</sup>

In general, the system displays relatively high levels of consensus-building across the different sections of the population. Visionary leadership and relatively good economic endowment in the form of minerals have provided resources that the state has used to carry out a basic development programme that has benefited different sections of the population. Schools, health facilities, water supply, and roads have been widely provided to the general population.<sup>403</sup>

#### 4.4 An extensive comparison of the Namibian legal, policy, and Institutional framework on corruption to Nigeria

##### *4.4.1 Domestic Laws in Nigeria to combat corruption*

According to Okondjo-Iweala, Nigeria has become virtually synonymous with the word corruption.<sup>404</sup> Consequently, Nigeria acquired a dubious reputation across the globe as one of the most corrupt countries in the world as Nigerian

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<sup>402</sup>The Office of the Ombudsman, Botswana: Office of the Ombudsman available at <https://www.eisa.org/wep/botagency.htm> accessed 10 March 2022.

<sup>403</sup> Sebudubudu, D (2014) *Anti-Corruption Policies Revisited: Background study on Botswana*, Hertie School of Governance publisher, 28.

<sup>404</sup> Obi P (2016) Workers shut down health ministry, raise the alarm over corruption, misconduct available at <http://www.thisdaylive.com/index.php/2016/06/01/workers-shut-down-health-ministry-raise-the-alarm-overcorruption-misconduct/> accessed 2 June 2021.

corruption has also extended well beyond Nigeria's borders.<sup>405</sup>

Nigeria is considered a key power on the African continent, not only because of its size, but also because of its political and economic role in the region.<sup>406</sup> It has the largest population in Africa with more than 187 million people, which means that one in five people in Sub-Saharan Africa calls Nigeria home, and Nigerians compose the largest African diaspora group in the United States and many other western countries.<sup>407</sup> As will be demonstrated below, Nigeria has anti-corruption policies, laws and institutional frameworks in place. However, the country is regarded as one of the most corrupt.<sup>408</sup> It is therefore important for an analysis to be carried out on Nigeria and identify possible causes and shortfalls, in order for Namibia to learn from Nigeria and guard against such catastrophes. The widespread international perception of Nigeria as a corrupt country has

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<sup>405</sup> The Anchor Online 49 years after the first coup: The unending problems Nzeogwu tried to solve available at <http://theanchoronline.com.ng/49-years-after-the-first-coup-the-unending-problems-nzeogwu-tried-to-solve/> accessed 12 May 2022.

<sup>406</sup> Akinlabi O M (2015, September 15). Young people, procedural justice and police legitimacy in Nigeria. *Policing and Society: An International Journal of Research and Policy* available at <http://www.tandfonline.com/doi/full/10.1080/10439463.2015.1077836> accessed 2 June 2021.

<sup>407</sup> See Testimony of CRS Specialist Lauren Ploch Blanchard, House Foreign Affairs Subcommittee on Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations, The Unfolding Conflict in Ethiopia, hearing, 116th Cong., 2nd Sess., December 1, 2020; see also CRS In Focus IF10185, Ethiopia.

<sup>408</sup> Obi P (2016) Workers shut down health ministry, raise the alarm over corruption, misconduct available at <http://www.thisdaylive.com/index.php/2016/06/01/workers-shut-down-health-ministry-raise-the-alarm-overcorruption-misconduct/> accessed 2 June 2021.

caused incalculable damage to the dignity and honour of many honest and diligent Nigerians and the country's global competitiveness.<sup>409</sup>

Another excellent source of information on views about the extent of corruption in Nigeria can be found in the 2015 Africa surveys conducted by Afrobarometer and published as part of the Global Corruption Barometer reports of Transparency International. Amongst African countries, Nigeria had the third-highest proportion (75%) of citizens that said corruption had increased over the past year and the bribery rate (the percentage of those who had paid a bribe at least 'once or twice' to obtain public service) was 43%.<sup>410</sup>

The institutional strategic model for anti-corruption is based on the premise that anti-corruption agencies are created in Nigeria to manage the anti-corruption policies related to "deterrence, prevention, and public sector reforms"<sup>411</sup> which include:

4.4.1.1 To create and sustain standards of public ethics in the conduct of national business and to make certain that actions and behaviours of public officials correspond to the greatest standard of public ethics and culpability. To this end, The Code of Conduct Bureau and Code of Conduct Tribunal was established to create codes of conduct and applicable penalties for

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<sup>409</sup> Mayah E. and Olufemi J. (2016) 'Panama Studys may strengthen case against powerful Nigerian leader' *Mail & Guardian* available at <http://mg.co.za/article/2016-04-19> accessed 01 March 2022.

<sup>410</sup> Pierce S (2016). *Moral economies of corruption: State formation and political culture in Nigeria*. Durham: Duke University Press, 27.

<sup>411</sup> Richard O and Okechukwu E (2015). *Analyses of Legal Frameworks for Fighting Corruption in Nigeria: Problems and Challenges*. Kuwait Chapter of *Arabian Journal of Business and Management Review* 5.

breach of conduct(s). Public Officers are regarded as elected or appointed public office holders.<sup>412</sup> To mitigate public sector corruption, through capacity building and prevention by investigating, evaluating, and implementing correction of corruption-susceptible systems and processes of public bodies.

4.4.1.2 To guarantee that government contracts are granted in agreement with best practices for tendering and procurement of international contracts.

The Economic and Financial Crimes Commission (EFCC) (Establishment) Act, 2004 was promulgated to combat corruption and financial crimes in Nigeria. The EFCC was created because of international pressure as a means to remove Nigeria from the list of Non-Cooperative Countries and Territories (NCCTs) of the Financial Action Task Force (FATF) on Money Laundering.<sup>413</sup>

Moreover, EFCC is responsible for enforcing other laws and regulations relating to economic and financial crimes.<sup>414</sup> The Commission is the coordinating agency for combating economic and financial crimes.<sup>415</sup> Anti-corruption legislation in Nigeria has been organised in sections of the

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<sup>412</sup> Code of Conduct Bureau and Tribunal Act (No. 1 of 1989) (Chapter 56).

<sup>413</sup> Kenton W (2021) "Financial Action Task Force (FATF)". Investopedia available at <https://www.investopedia.com/terms/f/financial-action-task-force-fatf.asp#:~:text=Will%20Kenton%20is%20an%20expert.in%20English%20literature%20from%20NYU> accessed 20 July 2022.

<sup>414</sup> Section 7 (1).

<sup>415</sup> Section 6 (vi).

criminal code and penal code ordinance.<sup>416</sup> The EFCC is an inter-agency commission; it is the co-coordinating agency for the enforcement of all economic and financial crime laws in Nigeria. Apart from the administration of the EFCC Act, the Commission is vested with powers of enforcement of all other laws relating to economic and financial crimes in Nigeria, including the following:

- i. Relevant sections of the criminal code and penal code.<sup>417</sup>
- ii. Banks and other Financial Institutions Act of 1991, as amended in 2002.<sup>418</sup>
- iii. Money laundering Act of 1995, as amended in 2002 and 2004<sup>419</sup>
- iv. Failed Bank and Financial Malpractices in Banks Act of 1994 as amended in 1999.<sup>420</sup>
- v. Advance Fee Fraud<sup>421</sup> and Related Offences Act of 1995.<sup>422</sup>

Additionally, under the EFCC (Establishment) Act 2004, the Commission is mandated to explore and prosecute corruption offences.<sup>423</sup> Although the first separate law that imposes offences and penalties is the Miscellaneous

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<sup>416</sup> "The Establishment Act". Economic and Financial Crimes Commission. (2008) available at <https://www.efcc.gov.ng/about-efcc/the-establishment-act> accessed 20 July 2022.

<sup>417</sup> Section 2 (f).

<sup>418</sup> Section 2 (d).

<sup>419</sup> Section 2 (a).

<sup>420</sup> Section 2 (c).

<sup>421</sup> Otherwise known as 419.

<sup>422</sup> Section 2 (b).

<sup>423</sup> Section 6 (m).

Offences Act of 1985.<sup>424</sup> The following legislations are targeted to Nigerian anti-corruption. Hence, the principal legal framework for corruption in Nigeria is made up of the following legislation:

- i. The Criminal Code Act, 1990: Chapter 12 specifically deals with ‘Corruption and Abuse of Office’ and others also make specific provisions for various types of corrupt behaviour and appropriate sanctions.
- ii. The Code of Conduct Bureau and Tribunal Act, 1990: This legislation provided for the establishment of the Code of Conduct Bureau and the Code of Conduct Tribunal (CCT) to deal with complaints of corruption by public servants for breaches of its provisions. In 2004, the Act was amended to, amongst other things, compel every Public Officer to make declarations of assets to the Bureau and provide for the Bureau to examine the assets declarations and ensure that they comply with the requirements of the Act and any law for the time being in force.
- iii. Constitution of the Federal Republic of Nigeria, 1999: The constitution is the supreme law that contains extensive provisions regarding public probity.
- iv. The Corrupt Practices and Other Related Offences Act, 2000: This Act seeks to prohibit and prescribe punishment for corrupt practices and other related offences, and it established the Independent Corrupt Practices and Other Related Offences Commission (ICPC) while describing the offences and penalties that should apply.
- v. The Economic and Financial Crimes Act, 2002/2004: This Act established the Economic and Financial Crimes

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<sup>424</sup> Section 2 (e).

Commission (EFCC) in 2002. The Act was amended in 2004 to provide for, amongst other things, the establishment of a Nigerian Financial Intelligence Unit (NFIU) within the EFCC.

- vi. Money Laundering Prohibition Act, 2004: This Act (i) provided for the repeal of the Money Laundering Act, 2003; (ii) made comprehensive provisions to prohibit the laundering of the proceeds of a crime or an illegal act; and (iii) provided appropriate penalties and expanded the interpretation of financial institutions and scope of supervision of regulatory authorities on money laundering activities, amongst other things.
- vii. Public Procurement Act, 2007: This Act established the National Council on Public Procurement and the Bureau of Public Procurement (BPP) as the regulatory authorities responsible for the monitoring and oversight of public procurement, harmonising the existing government policies and practices by regulating, setting standards, and developing the legal framework and professional capacity for public procurement in Nigeria, and for related matters.
- viii. Nigeria Extractive Industries Transparency Initiative (NEITI) ACT, 2007: This Act provided for the establishment of the Nigeria Extractive Industries Transparency Initiative (NEITI) and also requires extractive industry companies doing business in Nigeria, under the penal sanction, to make full disclosure of revenues and costs of operations to NEITI Auditors.
- ix. Other Legislation: Several other bills were passed into law that will also be very critical in the fight against corruption in Nigeria. These include a Whistleblower Protection Act and a Proceeds of Crime Act. The latter, which received a

presidential ascent in July 2015, provides for the recovery of illegally acquired property through forfeiture, confiscation, or civil recovery. It also provides the powers to seize, freeze, and restrain criminals from having access to such property (U.S. Department of State 2015).

The Nigerian Criminal Code<sup>425</sup> has requirements prohibiting corruption. However, the Code focuses on corruption in the public sector and has no mention of the private sector. The Code refers to official corruption<sup>426</sup> which is described in section 98B(ii) as “*anything to be afterward done or omitted, or any favour or disfavour to be afterward shown to any person, by a public official in the discharge of his official duties or relation to any such matter as aforesaid*”. The offences of bribery are mainly contained in sections 98 and 116 of the Criminal Code<sup>427</sup> and the elements common to both sections are as follows:

- i. the public officer corruptly solicits, collects, acquires, agrees, or tries to get a bribe.
- ii. The act of requesting, agreeing, or attempting to accept or obtain the bribe by the public officer “corruptly” and
- iii. They should be presented, demanded, or obtained ‘any property or benefit of any kind for the public officer or any other person on account of anything already done or omitted

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<sup>425</sup> Chapter 12 of the code.

<sup>426</sup> Section 98B (ii).

<sup>427</sup> Criminal Code Act of Nigeria available at <http://lawsofnigeria.placng.org/laws/C38.pdf> accessed 20 July 2022.

to be done or to be afterward done or omitted to be done by him<sup>428</sup>

The Public Procurement Act, Act No. 14 of 2007<sup>429</sup> targeted to eradicating corruption in Nigeria's procurement system.<sup>430</sup>

The Act encompasses public sector procurement of goods and services. The Act established the National Council on Public Procurement (The Council) and the Bureau of Public Procurement (The Bureau) as regulatory organisations accountable for the administration, oversight, and standardisation of public procurement. The Act is meant to ensure that procurement policies adhere to. Section 53(1) of the Act<sup>431</sup> enables the Bureau to evaluate and advocate for the investigation of any issues linked to procurement processes by any ministry or agency of government.<sup>432</sup>

#### *4.4.2 Nigeria's Institutional Framework to combat corruption*

Concerning the institutional framework and other initiatives, these have primarily resulted in the creation of several anti-corruption institutions as discussed below:

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<sup>428</sup> Criminal Code Act of Nigeria available at <http://lawsfnigeria.placng.org/laws/C38.pdf> accessed 20 July 2022.

<sup>429</sup> Public Procurement Act, 2007 No. 14 available at <https://ncdmb.gov.ng/images/Downloads/Public-Procurement-Act-2007.pdf> accessed 20 July 2022.

<sup>430</sup> Section 4 (b).

<sup>431</sup> Public Procurement Act, 2007 No. 14 available at <https://ncdmb.gov.ng/images/Downloads/Public-Procurement-Act-2007.pdf> accessed 20 July 2022.

<sup>432</sup> TUGAR (Technical Unit on Governance and Anti-Corruption Reforms). (2012). Report of scoping survey of anti-corruption initiatives in Nigeria. Abuja: TUGAR.

- i. The Public Complaints Commission (PCC): The PCC, Nigeria's Ombudsman, is supposedly an autonomous body with the mandate to investigate and redress complaints of citizens relating to administrative injustice and anomalies against the government or private entities. The Commission aims at promoting social justice for individual citizens. The Commission also has the role of improving public administration in the laws, procedures, practices, rules and regulations, and standard behaviour of officials. These are provided for in the PCC Act, 2004. The primary function of the PCC is to provide impartial investigation on behalf of the complainants who feel aggrieved by the action or inaction of the government or local government or private companies.
- ii. The Code of Conduct Bureau and Tribunal: The CCB enforces the code of conduct for public officers. Its mandate is to establish and maintain a high standard of morality in the conduct of government business and to ensure that the actions and behaviour of public officers conform to the highest standards of public morality and accountability. The CCT is a quasi-judicial body that hears cases referred to it by the CCB and determines punishment, if any, as provided for in the Act. The CCB is a unit of the Presidency and has therefore been accused of partisan and selective investigation and prosecution.
- iii. The Economic and Financial Crimes Commission: The EFCC was first established by an Act in 2002 which was repealed and replaced by the Economic and Financial Crimes Commission (Establishment) Act, 2004. The Act mandates the EFCC to combat financial and economic crimes and empowers it to prevent, investigate, prosecute, and penalise economic and financial crimes including money laundering,

embezzlement, bribery, looting, and any form of corrupt practices, illegal arms dealing, smuggling, illegal bunkering, illegal mining, tax evasion, and foreign exchange malpractices including counterfeiting of currency.

- iv. The Nigerian Financial Intelligence Unit: The NFIU is domiciled within the EFCC as an autonomous unit. The core mandate of the NFIU is to serve as the national centre for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences, and terrorist financing, and for the dissemination of the results of the analysis to law enforcement and anti-corruption agencies. Special Control Unit Against Money Laundering (SCUML): SCUML was established in 2005 to serve as a structure for the curtailment of money laundering and terrorist financing in the Designated Non-Financial Institutions sector. SCUML works in collaboration with the EFCC and the NFIU.
- v. The Bureau of Public Procurement: The BPP is charged with the responsibility to, amongst other things, provide the legal and institutional framework and professional capacity for public procurement in Nigeria. It has the mandate to ensure probity, transparency, and accountability in the procurement process.
- vi. The Nigeria Extractive Industry Transparency Initiative: The NEITI was established with the mandate of ensuring transparency and accountability and eliminating corrupt practices in payments and receipts within the extractive sector.
- vii. The Technical Unit on Governance and Anti-Corruption Reforms (TUGAR): TUGAR is a research, monitoring, and evaluation unit established in 2006 to respond to the critical

need for a rigorous approach to policymaking grounded on empirical data collection and analysis; and in-depth country-specific diagnostics on corruption and related governance issues. It is housed in the NEITI Secretariat in the Presidency.

- viii. The Inter-Agency Task Team (IATT): The IATT is the coordinating platform of various government agencies with anti-corruption or accountability mandates in Nigeria. The IATT came into being with the inauguration of the TUGAR and was established as a mechanism to address the challenge of accountability and anti-corruption mandates in multiple institutions. The TUGAR serves as the IATT's secretariat.
- ix. The Auditor-General: The Office of the Auditor-General (OAG) for the Federation is a separate and independent entity whose existence, powers, duties, and responsibilities are provided for under section 85 of the Constitution of the Federal Republic of Nigeria 1999. The OAG is responsible for auditing the public accounts and presenting periodic reports to the National Assembly on fraud and waste, ensuring value for money in government financial activities for the benefit of the Nigerian people.
- x. The Nigeria Police Force: The laws of Nigeria, including the Police Act, provide that the NPF is employed for, amongst other things, the prevention, detection, and investigation of crimes and due enforcement of all laws and regulations for which they are directly charged. Consequently, the Police have a primary duty for the investigation of crimes including corruption cases. Moreover, in several of the ACIs, it is police officers seconded to those agencies who directly undertake the investigation of offences.

Although the ACIs are many, as shown above, they have been established precisely because succeeding governments felt the need to put them in place to stem the corruption epidemic in the country. Some recommendations have been made in some quarters to eliminate or merge such institutions as the ICPC and the EFCC as they were deemed to be performing the traditional functions of the NPF. However, it would be a grave mistake for the government to accept such recommendations.

Bearing in mind the fact that the NPF is consistently rated as the most corrupt institution in Nigeria, as discussed above, the ICPC and the EFCC were established, amongst other reasons, to provide the capacity, not found in the NPF, to investigate and prosecute corruption. Moreover, the establishment of these institutions was consistent with the UNCAC, Articles 6 and 36, on the need for each State Party, by the fundamental principles of its legal system, to ensure the existence of a body or bodies, as appropriate, that prevent and combat corruption through law enforcement. Their merger or elimination would therefore impair the anti-corruption drive and send the wrong signal, both nationally and internationally.

#### *4.4.3 International Conventions and Treaties*

- i. Nigeria became a member of the United Nations Convention against Corruption on 14 December 2004. The Convention introduces a comprehensive set of standards, measures, and rules that all countries can apply to strengthen their legal and regulatory regimes to fight corruption. It calls for preventive measures and the criminalization of the most prevalent forms of corruption in both the public and private sectors. And it

makes a breakthrough by requiring the Member States to return assets obtained through corruption to the country from which they were stolen. These provisions the first of their kind introduce a new fundamental principle, as well as a framework for stronger cooperation between States to prevent and detect corruption and to return the proceeds. Corrupt officials will in the future find fewer ways to hide their illicit gains. This is a particularly important issue for many developing countries where corrupt high officials have iv plundered the national wealth and where new Governments badly need resources to reconstruct and rehabilitate their societies.

In conclusion, despite all the measures that have been deployed in the fight against corruption in Nigeria, corruption remains rampant in the country which is also saddled with an international reputation for such. Amongst the drivers are ‘major political parties’ office seekers, elected officials, and public officers [who] use their positions of authority and access to power to engage in corrupt activities.<sup>433</sup> What one can learn from Nigeria’s failure to curb corruption irrespective of all promulgated legislations is that regulations are not entirely sufficient to curb corruption but enforcement of such is equally important. There should be a good balance between regulation and enforcement. Furthermore, several tools other than legislation should be employed to fight corruption, such other tools are public enlightenment and education.

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<sup>433</sup> Ogbu O N (2008). Combating corruption in Nigeria: A critical appraisal of the laws, institutions, and the political will. *Annual Survey of International & Comparative Law*, 14(1), 99–149.

Therefore, curbing corruption requires a country to adopt a multi-dimensional approach.

This section has identified the weakness of institutions, including an analysis of the contributing factors for their weaknesses, and the culture of corruption that has developed in Nigeria as the core reasons that corruption remains untamed in the nation. The country will cease to be as corrupt when corruption is difficult and inconvenient, hampered by leadership that does not tolerate it, and by institutions that are given the independence and capacity to act.<sup>434</sup>

In South Africa for instance, the office of the Public Protector demonstrated its independence when it investigated the country's then President Jacob Zuma and found that he used public funds to renovate his home. This finding was published by that office. In Nigeria however, the Anti-Corruption Institutions have been unable to muster the courage to conduct such investigations.<sup>435</sup>

#### 4.5 An extensive comparison of the Namibian legal, policy, and Institutional framework on corruption to the United Kingdom

The UK has a strong track record of tackling corruption and bribery, with the level of corruption in the UK far lower than

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<sup>434</sup> Obuah E (2010). Combating corruption in Nigeria: The Nigerian Economic and Financial Crimes Commission (EFCC). *African Studies Quarterly*, 12(1), 17–44.

<sup>435</sup> Ardzard H S The legal and institutional measures in combating corruption in Nigeria: issues, challenges, and prospects (unpublished PHD Thesis Ahmadu Bello University 2017) 78-105.

most other countries around the world.<sup>436</sup> The UK government's strategic response to corruption adopts four components used in the Serious and Organised Crime Strategy, being prosecuting and disrupting people engaged in corruption (Pursue); preventing people from engaging in corruption (Prevent); increasing protection against corruption (Protect), and reducing the impact of corruption where it takes place (Prepare).<sup>437</sup>

The UK Anti-Corruption Plan recognises the threat that corruption poses across different sectors both in the UK and overseas. It sets out the actions government will take to: make it harder for criminals in the UK to use corruption to carry out their crimes; strengthen the integrity of institutions across the public and private sectors; make the best use of the UK's position as a leading international aid donor and centre of world trade and investment to re-enforce the global fight against corruption; stamp out bribery and corruption and raise global standards.<sup>438</sup>

#### *4.5.1 The UK Anti-Corruption Plan*

The Plan aims to build a better picture of the threat of corruption and the UK's vulnerabilities; to increase protection against the use of corruption by organised criminals and strengthen integrity in key sectors and institutions, including the criminal justice system and

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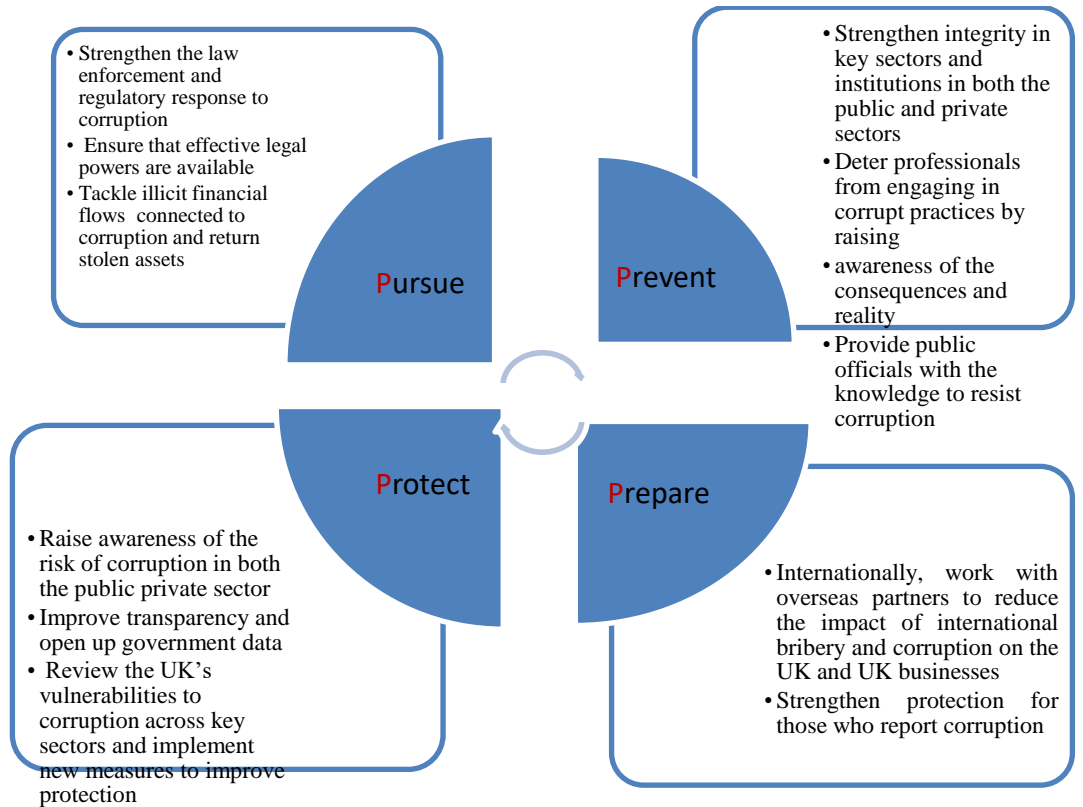
<sup>436</sup> UK Anti-Corruption Plan 2014 publication available at [www.gov.uk](http://www.gov.uk) accessed 20 July 2022.

<sup>437</sup> Serious and Organised Crime Strategy, 2013, available at [enquiries@homeoffice.gsi.gov.uk](mailto:enquiries@homeoffice.gsi.gov.uk) accessed 20 July 2022.

<sup>438</sup> UK Anti-Corruption Plan, 2014, publication available at [www.gov.uk](http://www.gov.uk) accessed 20 July 2022.

regulated professions; and strengthening the country’s law enforcement response so that the country can pursue more effectively those who engage in corruption or launder their corrupt funds in the UK.<sup>439</sup>

The UK government’s strategic response to corruption can be demonstrated as follows:<sup>440</sup>



**Table 1 The UK anti-corruption plan**

<sup>439</sup> EU Anti-Corruption Report (2014): UK Chapter available at [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_united\\_kingdom\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_united_kingdom_chapter_en.pdf) accessed 20 July 2022.

<sup>440</sup>UK government’s strategic response available [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/388894/UKantiCorruptionPlan.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/388894/UKantiCorruptionPlan.pdf) accessed 20 July 2022.

*(source:[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/388894/UKantiCorruptionPlan.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/388894/UKantiCorruptionPlan.pdf) accessed 20 July 2022).*

From the above Plan, one can safely conclude that the UK government aims to reduce corruption by prosecuting and disrupting people from engaging in corruption. This, the government can achieve by strengthening the UK's ability to investigate, prosecute and disrupt those who engage in corruption by ensuring that the country has agencies better coordinated and with effective legal powers in place, to combat corruption. Additionally, that can be achieved by putting measures in place to strengthen the integrity of key institutions such as the police and financial institutions. Those institutions will be strengthened by equipping professionals in both the public and private sectors with the knowledge and tools required to prevent themselves from either wittingly or unwittingly becoming involved in corruption.

What can also be illustrated by the above plan is that the UK government aims to improve transparency through open data, which can be achieved through conducting risk assessments and reviewing its vulnerabilities to corruption. Furthermore, the government aims to work with international partners to raise global standards which in turn will reduce the impact of corruption on the UK and improve the conditions for UK businesses operating overseas.

In summary, the plan aims to prosecute and disrupt people engaged in corruption, to prevent people from engaging in

corruption, to increase protection against corruption and to reduce the impact of corruption where it takes place.<sup>441</sup>

#### *4.5.2 UK Anti-Corruption Strategy 2017-2022*

The strategy sets out a vision of a safer, much more prosperous, and more confident future based on concerted UK action against corruption. It establishes an ambitious and long-term framework for tackling corruption. The strategy builds to supplement the UK's 2014 'Anti-Corruption Plan and the Serious and Organised Crime Strategy'.<sup>442</sup>

The strategy has three (3) vision(s) which is to reduce the threat to the national security, including from instability caused by corruption overseas, to increase prosperity in the UK and abroad, including for UK businesses and to enhance public confidence in the UK's domestic and international institutions.

For 2022, the strategy identified six priorities that will be the focus of its efforts:

1. Reduce the insider threat in high-risk domestic sectors
2. Strengthen the integrity of the UK as an international financial centre
3. Promote integrity across the public and private sectors

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<sup>441</sup> Available at <https://www.gov.uk/government/consultations/company-ownership-transparency-and-trust-discussion-study> accessed 22 July 2022.

<sup>442</sup> United Kingdom Anti-Corruption strategy 2017-2022, Executive Summary.

4. Reduce corruption in public procurement and grants

5. Improve the business environment globally

6. Work with other countries to combat corruption

The strategy aims to achieve its priority focuses by improving the understanding of corruption to address any weaknesses in the evidence base and to ensure that the government effectively targets its efforts and resources. By working together with domestic and international partners, including civil society and the private sector to deter and fight corruption in the UK and by promoting international standards and partnerships, showing global leadership against corruption, supporting international agreements, and partnering with others to tackle corruption.

#### *4.5.3 Bribery Act 2010*

On 08 April 2010, the United Kingdom Bribery Act of 2010 was approved by Parliament to forbid bribing foreign officers and business delegates and to make provisions about offences relating to bribery; and for connected purposes. The Act covers UK citizens, residents, and businesses that derive from the UK or operate a business in the country. The Act grants the UK government extraterritorial jurisdiction that it permits for the pursuit of crimes committed internationally by persons with a “close connection”<sup>443</sup> to the UK, which is

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<sup>443</sup> Bowden T. Burlingame et al (2021) The Anti-Bribery and Anti-Corruption Review: United Kingdom - England & Wales, *The Law Reviews* available at [https://thelawreviews.co.uk/title/the-anti-bribery-and-anti-corruption-review/united-kingdom-england--wales#:~:text=The%20Bribery%20Act%20contains%20three,prevent%20bribery%20\(Section%207\)](https://thelawreviews.co.uk/title/the-anti-bribery-and-anti-corruption-review/united-kingdom-england--wales#:~:text=The%20Bribery%20Act%20contains%20three,prevent%20bribery%20(Section%207) accessed 20 July 2022.) accessed 20 July 2022.

a term defined in the Act. The Act extends to England and Wales, Scotland, and Northern Ireland. By section 9(3) of the Act, the Scottish Ministers<sup>444</sup> have been consulted regarding the content of this guidance. The Northern Ireland Assembly has also been consulted<sup>445</sup>.

The crime of bribery undermines democracy and the rule of law and poses threats to economic development. The Bribery Act, of 2010 was therefore promulgated to respond to those risks and to an array of which bribery can be perpetrated. The Act does this by providing numerous offences, increased sentencing options for the courts, and wide jurisdictional powers.

The Act contains two common offences covering the offering, promising, or giving of a bribe and the requesting, agreeing to receive, or accepting of a bribe.<sup>446</sup> Furthermore, the Act also sets out two further offences which address commercial bribery.<sup>447</sup> Section 6 of the Act makes an offence concerning bribery of a foreign official to obtain or keep business or a benefit in the conduct of business, while section

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<sup>444</sup> United Kingdom, (2010), Bribery Act 2010 available at <https://www.legislation.gov.uk/ukpga/2010/23/scotland/2011-06-30> accessed 20 July 2022.

<sup>445</sup> United Kingdom (2020), Ministry of Justice, The Bribery Act 2020 available at <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> accessed 20 July 2022.

<sup>446</sup> Section 1 and section 2 of the Act.

<sup>447</sup> Section 6, section 7, and section 8 of the Act.

7 generates a corporate liability for neglecting to thwart bribery on behalf of a commercial business<sup>448</sup>.

#### *4.5.4 International Agreements in relation to corruption in the UK*

The UK recognises that tackling corruption requires collective international action by governments, businesses, and civil societies. In 2016 the UK hosted the world's first leaders' Anti-Corruption Summit to galvanise a truly global response.<sup>449</sup> Additionally, in December 2017 the UK co-hosted the first meeting of the Global Forum on Asset Recovery, focusing on accelerating international asset recovery efforts. The effort of the UK to combat corruption is evident in the number of international agreements that the country signed in its effort to fight corruption as summarised below:

*i. The UN Convention Against Corruption 2005.*

This has been noted as the primary internationally, legally binding universal anti-corruption treaty. The UK ratified the UN Convention Against Corruption in 2006 and has been appraised for compliance with the Convention in 2012 and 2019.

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<sup>448</sup> United Kingdom, (2010), Bribery Act 2010 available at <https://www.legislation.gov.uk/ukpga/2010/23/scotland/2011-06-30> accessed 20 July 2022.

<sup>449</sup> United Kingdom Anti-Corruption Strategy 2017-2022 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/667221/6\\_3323\\_Anti-Corruption\\_Strategy\\_WEB.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667221/6_3323_Anti-Corruption_Strategy_WEB.pdf) accessed on 03 November 2022.

- ii. *The OECD Convention Against Bribery of Foreign Public Officials in International Business transactions and Related Instruments 1999.*

The Convention is the first and only international anti-corruption instrument focused on the “supply side” of the bribery transaction, the person or entity offering, promising, or giving a bribe.<sup>450</sup> This Convention requires OECD state parties to criminalise and punish foreign bribery of public officials. The Convention is an open instrument and Parties hope that other countries will join this initiative. In particular emerging economies which once were buyers of goods and services are now increasingly the homes to businesses that sell in the international market. The UK ratified this Convention in 1999 and it has been evaluated 11 times since.<sup>451</sup>

- iii. *The Council of Europe’s Group of States Against Corruption (GRECO) Criminal and Civil Law Conventions on Corruption 1999.*

The Group of States against Corruption (GRECO) was established by the Council of Europe in 1999 to monitor compliance with the Council of Europe’s anti-corruption instruments. The main objective of GRECO is to enhance

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<sup>450</sup> OECD Anti-Bribery Convention available at <https://www.oecd.org/corruption-integrity/explore/oecd-standards/anti-bribery-convention/#:~:text=The%20Convention%20on%20Combating%20Bribery,promising%20or%20giving%20a%20bribe> accessed on 04 November 2022.

<sup>451</sup> Ehlermann-Cache N n.d The impact of the OECD Anti-Bribery Convention available at <https://www.oecd.org/mena/competitiveness/39997682.pdf> accessed 03 November 2022.

member states' capacity to tackle corruption using a process of peer evaluation.<sup>452</sup> The UK became a member in 1999 and is an active participant in its proceedings. GRECO conducted its fourth-round evaluation of the UK's efforts to prevent corruption in respect of Members of Parliament, Judges and Prosecutors in 2012. The evaluation report was adopted in October 2012 and published on GRECO's website in March 2013. The Report made eight recommendations, five of which were for the legislatures, two for the Judiciary and one for Prosecutors. On 10 November 2017, GRECO issued a report indicating that the UK has implemented measures in respect of corruption prevention amongst Members of Parliament, Judges, and Prosecutors findings from 2012.<sup>453</sup>

The OECD fights a very specific form of corruption. Parties to the OECD Anti-Bribery Convention are committed to combat the supply of bribes by their nationals (individuals and companies) to foreign public officials i.e. also officials operating in countries not Party to the Anti-Bribery Convention (also referred to as "supply-side" bribery or "active" bribery). The main objectives are to limit unfair competition in international business transactions and support development.<sup>454</sup>

iv. *The Financial Action Task Force (FATF) Recommendations on Money Laundering and Terrorist Financing*

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<sup>452</sup> Available at <https://www.coe.int/en/web/greco/home>, accessed 20 July 2022.

<sup>453</sup> Available at <https://publicsearch.coe.int/#k=GRECO#f=%5B%5D#s=101> accessed 20 July 2022.

<sup>454</sup> Supra note 446.

The FATF is an inter-governmental organisation that started in 1989 and issued recommendations in 1996, 2001, 2003, and 2012 and is recognised as the international standard for tackling money laundering and terrorist funding. The UK has examined these recommendations three times since 1996. Since the 2018 assessment of the United Kingdom's measures to tackle money laundering and terrorist financing, the country has taken several actions to strengthen its framework.<sup>455</sup> In line with the FATF Procedures for mutual evaluations, the country has reported back to the FATF on the action it has taken since their mutual evaluation. Consequently, to reflect the United Kingdom's progress, the FATF has now re-rated the country on recommendation 13 from partially compliant to compliant.<sup>456</sup> Today, the UK is compliant on 24 recommendations and largely compliant on 15. The country remains partially compliant on 1 recommendation.<sup>457</sup> The United Kingdom will remain in regular follow-up and will continue to inform the FATF of progress achieved on improving the implementation of its AML/CFT measures.

Most recently, in 2017 the UK created the UK Anti-Corruption Strategy 2017-2022 to offer an agenda to direct government anti-corruption rules and procedures, with

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<sup>455</sup> Anti-money laundering and counter-terrorist financing measures United Kingdom Follow-up Report &

Technical Compliance Re-Rating, May 2022 available at <https://www.fatf-gafi.org/media/fatf/documents/reports/fur/Follow-Up-Report-United-Kingdom-2022.pdf> accessed on 04 November 2022.

<sup>456</sup> Supra note 447.

<sup>457</sup> Supra note 447.

the stated aim to support national security, prosperity, and trust in institutions.<sup>458</sup>

It is also noted that the UK legislative and regulatory framework is robust to ensure that the UK tackles corruption and other serious offences. Furthermore, the UK has strengthened its law enforcement response, including by establishing the National Crime Agency in 2013 to disrupt and bring to justice those serious and organised criminals who present the highest risk to the UK.<sup>459</sup> Since March 2012, the UK has successfully concluded 14 foreign bribery-related cases.<sup>460</sup>

To sum up, the UK has implemented various strategies to set out the need for concerted action against corruption, to ensure that the people of the UK, and those abroad, are safer and have greater confidence in UK institutions, both public and private. The strategies also highlight the extent to which integrity underpins the UK's reputation as a fair, open, and rule-based society.

Namibia can leverage the UK by reducing inside threats in high-risk domestic sectors. Namibia can do this by improving the integrity of its public and private institutions,

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<sup>458</sup> United Kingdom, (2021), Policy study, Anti-corruption strategy: year 3 update available at, <https://www.gov.uk/government/publications/anti-corruption-strategy-year-3-update/anti-corruption-strategy-year-3-update-accessible-version> accessed 20 July 2022.

<sup>459</sup> Transparency International 2017 UK Press Briefing: Unexplained Wealth Orders, The Prime Minister briefing, 17 January 2017.

<sup>460</sup> including landmark Serious Fraud Office (SFO) cases representing the first conviction of a company for foreign bribery after a contested trial, the first conviction of a company for failure to prevent bribery (under section 7 of the Bribery Act) and, following their introduction in 2014, the UK's first three Deferred Prosecution Agreements

procurement systems, and global business environment. This can be achieved by reducing vulnerability to corrupt insiders in critical sectors such as borders, fishing and mining, policing, defence and procurement. Identifying those critical sectors will require the country to conduct a risk assessment. In so doing, Namibia will reduce the opportunities for corrupt insiders to operate and exploit weaknesses. Additionally, another takeaway from the UK is how the UK focuses on educating and equipping its society with knowledge on corruption and organised crimes and rolls out prevention and early detection measures to improve awareness of detected corruption threats by ensuring that organisations have systems in place to detect corruption early and punish wrongdoers.

#### 4.6 CONCLUSION

This chapter has highlighted the various legislations, policies, frameworks, and strategies adopted by Botswana, South Africa, Nigeria, and the United Kingdom. What stands out is the demonstration of the complexity of the crime of corruption and the need for multi-dimensional approaches to curb it. The chapter has also demonstrated that corruption is a worldwide challenge and not only a third-world pandemic, hence, countries across the globe should also continue to strategize on curbing corruption.

Furthermore, anti-corruption efforts need the appropriate political will to adequately minimise acts of corruption. This analysis is founded on the observation that the UK has a minimum number of domestic corruption laws, yet it has a significantly less corruption rating than Nigeria, Namibia, Botswana, and South Africa, which indicates that the

implementation of laws, policies and creation of institutions are not the primary mechanisms to fight corruption.<sup>461</sup> Contrary to the UK, Nigeria has several anti-corruption laws and institutions in place. However, the country is considered one of the corruption-infested nations in the world. This is a clear demonstration that laws, policies, and institutions are not enough to curb corruption, but countries need to ensure that they have strong enforcement mechanisms in place.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

The study sought to assess the efficiency of Namibia's anti-corruption laws by evaluating the efficacy of the policy, legal and institutional frameworks to fight corruption in Namibia. The study concludes that in Namibia there is no written National Anti-Corruption Strategy, similar to the one implemented in the United Kingdom.<sup>462</sup> The absence of a strategy that specifically aims to prevent people from engaging in corruption; increase protection against corruption; reduce the impact of corruption where it takes place, has at one point led to disharmony, duplicity, and overlapping in the anti-corruption efforts and initiatives

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<sup>461</sup> Namibia Institute of Democracy (2003), Tackling Corruption, Opinions on the Way Forward available at [https://www.nid.org.na/images/pdf/good\\_governance/Tackling\\_Corruption.pdf](https://www.nid.org.na/images/pdf/good_governance/Tackling_Corruption.pdf) accessed 20 July 2022.

<sup>462</sup> UK Anti-Corruption Action Plan (2014) available at [www.gov.uk](http://www.gov.uk) accessed on 11 July 2022.

carried out by various institutions in the fight against corruption in Namibia.<sup>463</sup>

The study also concludes that Namibia has laws and institutions in place to fight corruption. However, corruption remains a challenge in the country. Before offering a solution to the failure of those legislations or institutions, there is a need to analyse and identify where the failure emanates from. That takes one back to the hypothesis of this study, which aims to assess whether a sound and adequate regulatory framework of laws governing corruption is likely to reduce corruption in Namibia. To test that hypothesis, one should evaluate whether the existing policy, laws, and institutions are effective in tackling corruption and if not, whether lacunae exist in the provisions of the law, policies, institutional frameworks, or externally.

In its introduction, the study acknowledged that there is no universally accepted definition of corruption. However, corruption is generally understood to involve the abuse of office and position to benefit a third party to the detriment of another party, in most cases in return for payment or other rewards. The preceding definition aligns with the definition of corruption by Transparency International as “the misuse of entrusted power for personal gain.”<sup>464</sup>

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<sup>463</sup> Article 89 of the Namibian constitution establishes the Ombudsman and Article 91 empowered the Ombudsman with the duty to investigate vigorously all instances of alleged or suspected corruption and the misappropriation of public monies by officials and to take appropriate steps, including reports to the Prosecutor-General and the Auditor-General pursuant thereto. At the same time, the Anti-Corruption Act (No 8 of 2003) also gives the ACC the same powers in terms of chapter four.

<sup>464</sup> The Global Coalition Against Corruption available at <https://www.transparency.org/> accessed 20 July 2022.

In the study, the negative effects of corruption have been highlighted and in summary, corruption affects businesses, the country's economy, national security, and society at large. Corruption impedes economic growth and investment and corrodes the trust in government and erodes the efficient use of public resources.

With the negative effect of corruption in mind, countries across the globe are regulating corruption. Nonetheless, as was demonstrated in the preceding chapters of this study, corruption remains a global challenge. In some countries, the effect of corruption is profound.<sup>465</sup> For example, Libya has a population of only six million and annual oil revenues of US \$32 billion, in 2010. With such wealth and population, one would expect Libya to be a wealthy country. However, most Libyans endure living conditions characteristic of a much poorer country.

Unemployment is estimated to be around 30% or more in Libya and at least five major international corruption cases are being investigated; more than \$60 billion had already been identified and seized by banks in the United States, Germany, and the United Kingdom.<sup>466</sup> As already explained, corruption has a significant impact on society, governance, and economic growth. Corruption is also a threat to poverty reduction, as in the case of Libya. Corruption can divert vital funds from essential services such as schools, roads, and

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<sup>465</sup> MF 2016 Corruption: Costs and Mitigating Strategies. A 2015 estimate, extrapolated from Kaufmann (2005)11-27.

<sup>466</sup> BBC 20 October 2011 Gadaffi's quixotic and brutal rule; Revealed: where Libya invests \$53 billion; G Dell 28 May 2014 Libya's top five corruption Scandals; LA Times 21 Oct 2011 As Libya takes stock .

hospitals and thus hinder development and promote poverty in society.

Additionally, corruption has the potential to weaken critical state functions such as border controls and the prison system and thus allowing criminality and corrupt insiders to operate unfettered and undermining the justice system's effort to reform convicted individuals. Corruption, by its nature, is very broad and if undeterred it has the potential to destroy economic growth, fuel instability, and terrorism, and creates a breeding ground for organised crimes to flourish in society.

Considering the various legislations, policies, and frameworks that countries such as Namibia came up with to combat corruption, is a clear demonstration that for countries to combat corruption they need concerted, sustained, and joined-up efforts. Like all other crimes, corruption is also an evolving crime and thus combating it, will require countries to regularly review their performances against those laws, policies, and frameworks and adopt new strategies as the case may be. This study has also demonstrated that corruption does not respect national or organisational boundaries and it is against that background that international organisations such as the United Nations have also joined forces to combat corruption.

Therefore, to combat corruption countries, need strong partnerships involving governments, the private sector, and civil society at local and global levels, as corruption is a shared challenge. Therefore, tackling corruption requires a collective effort. There is also a need to improve society's understanding of corruption, as a targeted approach to tackling corruption requires a better understanding of the

scale and impact of corruption on society, as well as the ability to measure the effectiveness of available anti-corruption efforts.

The study concludes from the above findings that the failure to effectively tackle corruption in Namibia partly has been a result of the lack of a comprehensive national anti-corruption strategy which should provide a clear roadmap on the nature of legislation, structures of institutions, and tactics for tackling corruption. The strategy will also enable the country to conduct an extensive risk assessment of the various industries and obtain a conclusive result of the extent and impact of corruption in each of those industries. In so doing, the country will understand which industry to focus its resources on in combating corruption, as well as understand the possible driving force of corruption in those industries.

The study further concludes that the prevalence of corruption in Namibia can be attributed to the institutional failures and enforcement machinery in the system which is attributed to uncoordinated approaches to the fight against corruption. Having concluded that corruption has continued to prevail due to institutional failure, this study orates there is a need for institutional reform for the Anti-Corruption Commission, being the main institution empowered to fight corruption in Namibia. There is a need for the institution to be visibly at the forefront of eradicating corruption in Namibia. This can be demonstrated by the number of investigations undertaken and arrests made to curb grand corruption in the country and

the institution should cease to be seen as going after “the small fish”.<sup>467</sup>

Additionally, the ACC has an obligation to take measures to prevent corruption in public bodies and private bodies.<sup>468</sup> In the ACC’s obligation to take measures to prevent corruption, the ACC is required to educate the public and disseminate information on the evil and dangers of corruption, including through the publication and distribution of brochures and pamphlets or the holding of public conferences.<sup>469</sup> From the above obligations, it is clear that it is the duty of the ACC to spearhead the development of an appropriate national anti-corruption policy, to workshop such policy, and ensure that private and public sectors are equipped to execute such policy. The study recognizes the various surveys conducted by the ACC, with the latest one being the National Corruption Perception Survey Report 2016, and the various anti-corruption strategies, with the latest being the National Anti-Corruption Strategy and Action Plan, 2021-2025. However, the study encourages the ACC to leverage from the United Kingdom’s corruption strategy 2017 to 2022, which is very extensive. The UK strategy has a clear broad vision and a roadmap on how to deliver that vision, something that is not visible in the Namibian strategy.

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<sup>467</sup> NAMPA News National ‘DTA lambasts ACC focus on ‘small fish’ *The Namibian* 11 May 2017 available at <https://www.namibian.com.na/164450/archive-read/DTA-lambastsACC-focus-on-small-fish> accessed 20 July 2022.

<sup>468</sup> Section 3 (f) of the Anti-Corruption Act, 2003.

<sup>469</sup> Section 3 (f) (iii) of the Anti-Corruption Act, 2003

It is also important to note that the Namibian strategy for fighting corruption only includes a vision and mission that are specific to Namibia. Nevertheless, the study showed that a nation cannot eradicate corruption on its own. Because of the rise in international trade in recent years, a nation's efforts to combat corruption should also focus on enhancing the global business climate. As a result, there will be less of an impact of corruption on international trade and investment, improved international development finance and export finance practices, and increased investment by Namibian businesses in the challenging international markets with integrity while strengthening business-led collective action to reduce corruption.

Namibia should also strategize on how to work with other countries to combat corruption and not only have a strategy that is confined to its borders. In so doing, the country will enhance international transparency, especially in beneficial ownership, extractives, public finance, and contracting. As well as reduce the levels of corruption in partner countries. In return, it will also enable Namibia to have greater use of information to deter, identify, track and prosecute corruption. Namibia will be able to access more advice and support to address corruption and have a stronger focus on the role of corruption in driving conflict and fragility.

The study also demonstrates that there is a need for the judiciary to send a stern message through the sentencing of those convicted of corruption, especially those accused of abusing their offices or positions. For example, in the matter

of *S v Hanse-Himarwa*<sup>470</sup> the accused was sentenced to a fine of N\$50 000 or in default of payment, to 24 (twenty-four) months' imprisonment, plus a further 12 (twelve) months' imprisonment, which imprisonment is suspended for a period of 5 (five) years on condition that the accused is not convicted of a contravention of section 43(1) of the Anti-Corruption Act of 2003, committed during the period of suspension. The accused in the matter was the Governor and the accused used her office to benefit a family member. Consequently, giving leeway to beneficiaries of corruption to get away with benefits derived from corruption.

Additionally, in the matter of *S v Tobie Aupindi and another*<sup>471</sup> the accused Mr. Aupindi, a former Namibia Wildlife Resorts managing director, and a co-accused, businessman Antonio di Savino, each paid a fine of N\$50 000 after being found guilty on a charge of corruptly providing false information to an officer of the Anti-Corruption Commission. Considering the seriousness of the offence of corruption and the need to deter would-be offenders especially those in public offices, one would argue for a more severe sentence, especially considering the benefit derived from the crime and the effect it had on those victimised.

Nonetheless, the study well understands that the court in sentencing does not only consider the crime committed but all other mitigating factors before it. Still, on the judiciary, there is also a need for corruption cases to be expedited and

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<sup>470</sup> (3) (CC 5 of 2018).

<sup>471</sup> Unreported case of the Magistrate court.

concluded within a reasonable time. Currently in Namibia, cases take long before they are finalised. An example of that is *S v Lameck and Others*<sup>472</sup> which was reported in 2010 and was only finalised in 2019, with the accused persons acquitted.

From the above analysed cases, this study confirms the hypothesis that as things stand now, the continued existence of corruption is also being fuelled by the failure of enforcement institutions and not necessarily the absence of laws. The institutions tasked with the fight against corruption should ensure that effective policies are in place and that law is enforced by deterring those found guilty of corruption.

Chapter 1 of this study outlined the research project by providing the background of the study while highlighting some major corruption scandals that Namibia faced over the years. The chapter also highlighted the various definitions accorded to corruption by scholars and delved into available theories on the cause and roots of corruption. Chapter 1 included the problem statement, nature of the study, research questions and hypothesis, purpose of the study, theoretical foundation, and significance of the study.

Chapter 2 of this study highlighted the historical background of the legal, policy, and institutional framework of corruption in Namibia. The chapter looked at the evolvement of corruption policies, legal, and institutional frameworks while assessing their respective shortfalls. In chapter 2 the study concluded that there has been a significant evolution in

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<sup>472</sup> (5) (CC 11 of 2010).

corruption laws in Namibia, with the country in 2003 passing its first Anti-Corruption Act. However, the country continues to battle corruption cases. Likewise, it was found that the country does have institutional frameworks in place, even though there is still room for improvement to ensure that the institutions function optimally. This study found that currently Namibia does not have an anti-corruption policy and is in the process of reviewing its National Anti-Corruption Strategy 2021-2025 which will replace the National Anti-Corruption Strategy 2016-2019. Chapter 2 highlighted significant efforts that the country is making in strengthening its legal, policy, and institutional framework, while noting that there is still room for improvement.

Chapter 3 provided an in-depth analysis of the current laws, policies, and institutional framework in Namibia. The chapter identified the various legislation that the country enacted to fight corruption and highlighted their shortfalls. The chapter also looked at the various international instruments that Namibia has ratified in its effort to combat corruption. An analysis on the current institutional framework and their shortcomings were also highlighted. In the absence of an anti-corruption policy, the chapter extensively analysed the National Anti-Corruption Strategy 2021-2025. The chapter concluded that Namibia has a policy, legal and institutional framework to combat corruption in place and the country has ratified several regional and international treaties in its effort to curb corruption. However, corruption remains a matter of concern in the country.

In chapter 4 the study highlighted the various legislations, policies, frameworks, and strategies adopted by Botswana, South Africa, Nigeria, and the United Kingdom while highlighting the complexity of the crime of corruption and the need for countries to adopt a dimensional approach to eradicate corruption. Chapter 4 demonstrated that corruption is a global challenge and that regulations are not entirely sufficient to curb corruption, but enforcement of regulations is equally important. Therefore, countries must ensure that they have a good balance between regulation and enforcement.

The conclusion and recommendations of the study were provided in chapter 5. The overall objective of this study was to assess the efficacy of the policy, legal and institutional frameworks to fight corruption in Namibia. The study made several noteworthy findings. Amongst those findings is that Namibia does not have a National Anti-Corruption Policy. The study also found that there was an overlap between the anti-corruption institutions in Namibia, which was rectified by the Constitutional amendment in 2010. Having assessed the legal framework, this study also concludes that there are some lacunae in the prescriptive elements of the law that do not address the subject of corruption well and there is a need for law reform, such as the amendment of the Public Service Act to categorise corrupt practices as “major offenses”.

## 5.2 Recommendations

In combating corruption, Namibia will achieve three long-term outcomes, reduced threat to its national security, including instability caused by corruption globally, increased business prosperity, and enhanced public confidence in its

domestic and international institutions. The above conclusion has illustrated that there is a need for Namibia to improve its understanding of corruption to address weaknesses in its legislation, policies, and institutions for Namibia to effectively target its effort and resources. Secondly, the conclusion also demonstrated that there is a need for Namibia in implementing its strategies to collaborate with domestic and international partners, including civil society and the private sector, and to promote international standards and partnerships.

The strengthening of anti-corruption practices in Namibia will include improving governance and assurance regimes to allow for a continuance assessment of the country's legislation, policies, and institutions; setting up networks to identify and mitigate corruption risk; educating and rolling out awareness of the nation as well as public and private institutions.

Having come to the above conclusion, this study proposes several recommendations on policy, legal and institutional frameworks.

#### *5.2.1 Policy Framework*

The study concludes that there is a need for the country to revise its National Anti-Corruption Strategy and Action Plan 2021-2025 and have an extended vision that not only focuses on Namibia but also on the global environment. Additionally, the strategy should provide means and ways of pursuing, preventing, protecting, and preparing. In so doing

the strategy will emulate the UK strategy, which is extensive. The Namibian strategy should, therefore, protect against corruption, by building open and resilient organisations across the public and private sectors, prevent people from engaging in corruption, including strengthening professional integrity, pursuing and punishing the corrupt, and reducing the impact of corruption where it takes place, including redress from injustice caused by corruption.

### *5.2.2 Strengthening the legal framework*

To strengthen the legal framework for anti-corruption in Namibia there is a need to review the current legislation and underpin the anti-corruption struggle. It is recommended that relevant legislation be enacted such as whistleblower legislation, which should include measures to protect whistleblowers from victimisation for exposing corrupt and unethical practices and protection against false reports by whistleblowers and complainants.

### *5.2.3 Independence and resourcing of Institutions fighting corruption*

To be effective, institutions tasked to fight corruption should be independent, resourced and skilfully equipped. The independence will enable the institution to carry out its mandate without interference either from the legislature or the executive. In Namibia, the Director General of the Anti-Corruption Commission is appointed by the National Assembly on the recommendation of the President.<sup>473</sup> It is

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<sup>473</sup> Section 4(1) of the Anti-Corruption Act “The National Assembly appoints the Director-General and Deputy Director-General upon nomination by the President”.

for this reason that in Namibia, the Director-General of the ACC is deemed as a SWAPO affiliate and a ‘puppet’ of the ruling party.<sup>474</sup> There is therefore a need for the ACC to be entirely independent as that will insulate the institution against any interference with its powers and functions.

Considering the mandate of the ACC, which is also to educate, there is a need to create awareness and promote an anti-corruption culture to the public. Public awareness and attitude change are critical in the fight against corruption, and this can be achieved if the ACC carries out public education on corruption and create awareness. This, the ACC can do by setting up committees to spearhead anti-corruption campaigns in public and private institutions. The ACC cannot fight corruption in isolation and should therefore empower and involve the public in the fight against corruption.

#### *5.2.4 The Judiciary*

The courts play a key role in the fight against corruption. There is a need for a paradigm shift for the courts to deal with corruption with the seriousness it deserves. Therefore, the courts should condemn corruption by imposing severe sentences on those convicted of corruption in order to deter corruption. Additionally, the Judiciary should consider having special courts to deal with corruption cases. Considering the complexity of organised crimes, magistrates dealing with those cases should be skilled to adjudicate such cases. Having a special court for corruption cases will also

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<sup>474</sup> The Namibian Newspaper, 03 August 2021.

ensure that cases are finalised without causing undue delays or disruptions.

### 5.3 Conclusion

In conclusion, the study recommends that there is a need to improve the policy, legislative and institutional framework to fight corruption in Namibia. The importance of imposing severe punishment on those convicted of corruption has been identified in this study. The effectiveness of institutions in a country to some extent depends on the independence of such institutions. When an institution is independent, it is deemed stronger and gains the nation's confidence. Additionally, financial and human resources should be availed to investigate and handle corruption cases.

The impact of the absence of an anti-corruption policy in Namibia cannot be overemphasised. There is, therefore, a need for the ACC to come up with a national anti-corruption policy which will provide a framework for developing ways and means of preventing and combating corruption in a comprehensive, coordinated, inclusive and sustainable manner. Notably, a policy will bring harmony in the Namibian laws relating to corruption and enhance harmonisation amongst institutions engaged in the fight against corruption.

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