
PARTICIPANTS' PAPERS

EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION

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I. INTRODUCTION

There is no doubt that the globalization of crime via internationally organized criminal syndicates has created an enabling environment for corruption to thrive. Corruption manifests itself in various forms and the causes of organized crime are also complex.¹

According to the World Bank, corruption hinders economic efficiency, diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditure and deters foreign investment.²

It has further been observed that corruption has the effect of distorting the allocation of resources by sharply increasing the cost of goods and services; diverting scarce resources to lesser or non-priorities and thereby seriously neglecting fundamental needs particularly basic needs such as food, health and education; acting as a disincentive by possibly deterring prospective economic activities and investment; and lastly, of increasing the likelihood of other crimes.³

This is even the case in democratic systems such as the one obtaining in Botswana. Although there is no clear correlation between levels of democracy and those of corruption, democratization leads to increased political and civil freedoms which often amounts to giving licence without responsibility to the benefit of existing and emerging political elites.⁴ It is further true that the effects of corruption are particularly harmful in developing countries in that the few available resources are not used in the most effective and equitable way. In this way it has been observed that corruption is the cause and consequence of under-development and poverty in general.⁵

In the 1960s, Botswana was listed among the world's least developed countries due to its lack of strong public sector institutions or qualified citizens or personnel. Today she is listed as the least corrupt country on the African continent and is further ranked number 37 globally.⁶ However, this should not be misconstrued to mean that these low levels of corruption are tolerable or that our public institutions are very effective in combating this phenomenon. Quite a number of government activities are vulnerable to corruption, including: public procurement, allocation of state land, revenue collection, appointment to posts in central and local government, and local government contracts.

In 1994, the Directorate on Corruption and Economic Crime (DCEC), whose primary function and mandate is to combat corruption, was established following general indications that corrupt practices were on the increase, as evidenced by incidents of illegal land dealings in Mogoditshane and the first biggest corruption case to be reported to the Directorate involving Botswana Housing Corporation.

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¹ World Bank, Report on governance and development, 1992 at P116.

² The World Bank Group, Corruption; a major barrier to sound and equitable development, 7 October 1996.

³ Lala Camere, *Costly crimes, commercial crime and corruption in South Africa*, ISS Monograph Series No 5 September 1997.

⁴ B. Harriss- White and G White, *Corruption, liberalization and democracy* IDS Bulletin 27 (2) 1996 at page 3.

⁵ Frisan, *Corruption and development* at page 4.

⁶ Transparency International, Corruption Perception Index, accessed on 2 August 2010.

It is apposite to mention that apart from the Botswana Police Service, which has powers to investigate acts of corruption as proscribed under the Penal Code,⁷ the DCEC is the only public institution in the country whose primary function and mandate is to combat corruption. The Directorate was created in terms of Section 3 of the Corruption and Economic Crime Act.⁸ Since its establishment, the DCEC has pursued its mandate through a three-pronged strategy based on investigation, prevention and public education.

II. FUNCTIONS OF THE DIRECTORATE

The functions of the Directorate as listed under Section 6 of the Act are as follows:

- (a) To receive and investigate any complaints alleging corruption in any public body;
- (b) To investigate any alleged or suspected offences under this Act, or any other offence discovered during such an investigation;
- (c) To investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of the country;
- (d) To investigate any conduct of any person, which in the opinion of the Director, may be connected with or conducive to corruption;
- (e) To assist any law enforcement agency of the government in the investigation of offences involving dishonesty or cheating of the public revenue;
- (f) To examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures which, in the opinion of the Director, may be conducive to corrupt practices;
- (g) To instruct, advise and assist any person, on the latter's request, on ways in which corrupt practices may be eliminated by such person;
- (h) To advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such public bodies which the Director thinks necessary to reduce the likelihood of the occurrence of corrupt practices;
- (i) To educate the public against the evils of corruption; and
- (j) To enlist and foster public support in combating corruption.

It can be observed that the Section confers a variety of functions on the Directorate, some of which are reactive and others proactive. The proactive functions listed in paragraphs (d), (i) and (j) have the potential to bring about the greatest rewards despite being too demanding at times.

III. DEFINITION OF CORRUPTION UNDER THE ACT (CECA)

At the outset it is important to point out that the word 'corruption' has its origins in the Latin word 'corruptus' which means 'to break'. It actually emphasizes the destructive tendency of corruption on the moral fabric of society and the confidence entrusted to those holding public and private office.⁹ The Oxford English Dictionary defines corruption as "the perversion or destruction of integrity in the discharge of the public duties by bribery or favour; the use or existence of corruption practices especially in a state, public corporation etc."

The United Nations Convention against Corruption (UNCAC) does not define corruption but acknowledges its link with other forms of crime, especially organized crime and economic crime as well as money laundering.¹⁰ On the other hand, the Southern African Development Community Protocol against Corruption¹¹ defines it as any act referred to in Article 3 thereof and includes bribery or any acts performed by persons entrusted with responsibilities in order to obtain undue advantage for themselves or others.

⁷ Sections 99-110.

⁸ Act 13 of 1994.

⁹ Collin Nicholas QC, Tim Daniel, Martin Polaine and John Hatchard (eds) *Corruption and misuse of public office* (2006) Oxford University Press at page 1.

¹⁰ See Preamble to the Convention.

¹¹ It was signed on 14 August 2001 in Malawi by all heads of state and Government of the SADC community.

The Corruption and Economic Crime Act (CECA) of 1994 does not define corruption but creates several offences of corruption committed in both the public sector and private sector.¹² The basic elements that run through almost all of these offences is the receiving and offering of valuable consideration. The receiver commits corruption if he or she accepts directly or indirectly, or agrees or offers to permit his or her conduct as a public officer to be influenced by any valuable consideration to be received by him or her, or by any other person or from any person. The giver also commits a similar offence if the valuable consideration or promise thereof is given with the same intention as above.

It matters not whether the gratification is received for personal gain or that of someone else. The Act makes reference to valuable consideration which in terms of Section 23 thereof, is wide enough to cover any conceivable thing of value that can be given to a person as an inducement to act in a certain way. The definition extends to:

- (a) Any gift, benefit, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in the property of any description;
- (b) Any office, employment or contract;
- (c) Any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- (d) Any other 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;
- (e) The exercise or forbearance from the exercise of any right or any power or duty; and
- (f) Any offer, undertaking or promise, whether conditional or unconditional, of any valuable consideration within the meaning of the provisions of the preceding paragraphs.

IV. OFFENCES OF CORRUPTION UNDER THE ACT (CECA)

Part IV of the Corruption and Economic Crime Act has five sections that deal with corruption of public officers as follows:

- Section 24 - Corruption by a public officer;
- Section 25 - Corruption in respect of an official transaction;
- Section 26 - Acceptance of a bribe by a public officer after doing the act;
- Section 27 - Promise of a bribe to a public officer after doing the act;
- Section 29 - Bribery for giving assistance in regard to contracts.

Four sections deal with corruption in relation to procurement, tendering and contracting namely:

- Section 28 - Corrupt transactions by or with agents;
- Section 30 - Bribery for procuring withdrawal of tender;
- Section 32 - Bribery in relation to auctions conducted by or on behalf of any public body.
- A 'public body' is defined under Section 2 of the Act as "any office, organisation, and establishment or body created by or under any enactment; and includes any company in which 51 per cent or more of the equity shares are owned by the Government of Botswana."

The other offences created by the Act are "cheating of public revenue" contrary to Section 33 and "possession of unexplained property" contrary to Section 34. With regard to the last offence, it is an offence for one to maintain a standard of living beyond one's available legal resources. Any property or pecuniary resources held in trust for or on behalf of an accused person, or given by the accused as a loan or gift without adequate consideration, shall be deemed to have been under the control or in the possession of the accused until the contrary is proved.

¹² Part IV of the Act, Sections 24 - 33.

The act does not seek to penalize the giving or acceptance of valuable consideration as a reward or compensation for something already done in the past, as a result of which, some acts of corruption may go unpunished.

V. CORRUPTION OFFENCES IN THE PENAL CODE (CAP 08:01) LAWS OF BOTSWANA

The Penal Code creates various offences under the heading “Corruption and the Abuse of Office” as follows:

- Section 99 - Official Corruption;
- Section 100 - Extortion by public officers;
- Section 101 - Public officers receiving property to show favour;
- Section 102 - Officers charged with administration of property of a special character or with special duties;¹³
- Section 103 - False claims by officials;
- Section 104 - Abuse of office;
- Section 384 - Corrupt practices by and of agents; and
- Section 385 - Secret commission on government contracts.

Other offences in the Penal Code include, “stealing by persons employed in the Public Service” (Section 276), ”stealing by clerks and servants” (Section 277), “stealing by Directors or officers of companies” (Section 278), and “stealing by agents,” etc. (Section 279). Perjury and subordination of perjury are proscribed by Section 111, conspiracy to defeat justice and interfere with witnesses is proscribed by Section 120 and various offences relating to judicial proceedings are proscribed by Section 123.

VI. CUSTOMS AND EXERCISE DUTY ACT (CAP 50:01) LAWS OF BOTSWANA

Section 90 (1) (j) and (k) make it a serious offence for any person to give or promise to give, directly or indirectly, any reward to an officer or person employed by the government in respect of the performance of duties under the Act. An officer who demands or receives such reward in the circumstances described above is also guilty of an offence. Upon conviction such person shall be liable to a fine not exceeding P20,000 or treble the value of the goods in respect of which the offence was committed, whichever is greater, or to imprisonment for a period not in excess of five years or to both.

In terms of Section 97 (A) the Director of Customs and Exercise may from time to time publish in the Government Gazette a list of names and addresses of persons who have been convicted of offences in terms of Sections 86 to 97 of the Act and the particulars of the fines or sentences imposed.

VII. CORRUPTION STATISTICS FOR 2007, 2008 AND 2009

Year	Total Reports	Report Investigated by the DCEC
2006	1778	617
2007	1460	487
2008	1851	613
2009	1992	669

Analysis of data published by the DCEC over the past four years reveals that most of the cases of corruption and fraud reported and prosecuted before the courts were perpetrated by very junior officers in central and local government such as accounts clerks, vehicle examiners, vehicle licensing officers, labour and immigration officers and low-ranking officers of the Police Service and Army.

¹³ It criminalizes the discharge of duties by persons employed in the public sector who are charged with judicial or administrative duties respecting property of special character or respecting the manufacture, trade or business of a special character whilst having, directly or indirectly, a private interest in the property, manufacture, trade or business referred to.

It may well be that this low-level corruption occurs as result of delegating authority to relatively junior and poorly paid public officials to control the collection of government revenue, issuance of licences, permits and other official documents. Lack of adequate supervisory and auditing mechanisms or absence of periodic inspections could be other contributing factors.

Other interesting cases worth mentioning which were investigated by the Directorate include fraud perpetrated by junior officials of the Government Central Medical Stores and certain individuals. The government lost P21 million in payment of pharmaceutical drugs that were never delivered. The case is still pending before court and the accused persons have been charged with several counts of obtaining by false pretences contrary to Section 308 of the Penal Code.

Another case involves a corporate body registered under the company laws of Botswana under the name and style "Daisy Loo (Pty) Ltd." The company, through its managing director, conspired with some senior technical officers of Gaborone City Council to defraud the latter of the sum of P24 million for providing bush clearance, tree trimming and grass cutting services under some dubious contracts. The cheque that was issued as payment by the City Council was subsequently seized by the Directorate of Public Prosecutions as an exhibit for the ongoing trial. The accused are facing charges of conspiracy to defraud¹⁴ and giving false information to a person employed in the public service¹⁵ in addition to a charge of obtaining by false pretences.

Another interesting case is one involving a company called "Tourism Consortium (Pty) Ltd" and its managing directors, one of whom committed suicide whilst proceedings were still pending before court, and was a former boss of Botswana's Debswana Mining Company. The case for the state is that the said accused persons and others made false presentations to the former President of the Republic of Botswana and Cabinet Ministers to the effect that Tourism Development Consortium (Pty) Ltd was a vehicle through which Debswana (a company partly owned by Botswana) intended to contribute to the diversification of Botswana's economy, as a result of which the government allocated it a very big piece of land in Gaborone when in actual fact such company was not in existence at that time.

The case is also still pending before court on charges ranging from giving false information to a person employed in the public service, forgery, obtaining registration of a title deed by false pretences, conspiracy to defraud, conspiracy to prevent lawful disposal of property for its lawful value, receiving unlawfully obtained property, stealing by servant and cheating of public revenue.¹⁶

A more recent case that has raised eye brows with regard to Government tendering procedures is one involving a company called "RFT Botswana (Pty) Ltd" which tendered for the supply to Botswana Police Service of aviation ground support equipment. One of the directors of this company is the current Minister of Defence, Justice and Security who holds various portfolios under his supervision, one of which is the Botswana Police Service.

It is alleged that the minister is guilty of corruption in violation of the provisions of Section 31(1) of the Corruption and Economic Crime Act by failing to declare his interest in the tendering as aforesaid, in his capacity as director and shareholder of the said company that won a Government tender worth millions of pula.¹⁷ The minister pleaded not guilty to the charge and has also resigned from his cabinet post.

VIII. CURRENT SITUATION OF PROBLEMS AND CHALLENGES IN THE INVESTIGATION, PROSECUTION, CONFISCATION AND RECOVERY OF ASSETS

A. Challenges in Investigation of Cases

Reports obtained from the Directorate on Corruption and Economic Crime indicate that, on a yearly

¹⁴ Contrary to Section 312 as read with 24 of the Penal Code.

¹⁵ Contrary to Section 131 of the Penal Code.

¹⁶ These offences are contrary to the provisions of Sections 131(a), 344 as read with 339, 314 as read with 24, 312 as read with 24, 393(c), 317 as read with 24, 271 as read with 277 of the Penal Code, respectively, as well as Section 33 of the CECA.

¹⁷ See Article 9(e) of UNCAC that, *inter alia*, calls for appropriate measures to be taken to deal with declaration of interest, in particular, public procurements.

basis, over 600 cases are classified for investigation and the proportion of such cases far exceeds the number of officers available to investigate them. This situation is brought about by the high attrition rate of experienced officers in search of better paying jobs. This results in low case completion rates.

Furthermore, the proportion of cases where the reporters prefer to remain anonymous has steadily increased over the years and currently stands at 21.69%.¹⁸ This is a great challenge for the Directorate in that it is very difficult to follow up this type of report and thus lose out on vital information that could advance the course against corruption. Factors that might be responsible for this unfortunate state of affairs could include the lack of a clear protection plan for whistleblowers and this might expose them to victimization and, in some cases, loss of employment.

Some cases of corruption and abuse of the office¹⁹ are investigated by the police, who often lack the necessary training and resources, resulting in compromised investigations. Legal and institutional constraints within which the DCEC operates might in certain circumstances hinder its effectiveness. In terms of Section 15 (2) of the CECA, the Directorate is prohibited from accessing any documents and information which the President deems to be likely to prejudice national security.

The Act further gives officers of the Directorate the power to arrest without warrant any person suspected of having committed an offence under the Act²⁰ but without making provision for post-arrest detention. As a result such persons have to be taken before the police to be dealt with in accordance with the provisions of the Criminal Procedure and Evidence Act. This means that accused persons have to be warned and cautioned for offences by officers who have not taken part in the investigations.

In terms of Section 16 of the Act the Director is required to apply to a magistrate for permission to seize travel documents of anyone suspected of having committed an act of corruption. This can lead to suspects skipping the country once allegations or investigations of corruption come to the fore.

Furthermore, there is no provision in the Act that empowers the DCEC to tap telephones in order to obtain evidence or further investigations as is the case in other jurisdictions with similar legislation.²¹

B. Prosecution of Cases

No prosecution of an offence committed under Part IV of the Corruption Act can be instituted without the written consent of the Director of Public Prosecutions²² who is the *dominis litis* in so far as prosecution of criminal matters at the public instance is concerned.²³ Such powers have been delegated to officers of the DCEC in terms of Section 8 of the Criminal procedure and Evidence Act. Currently there is only one officer handling prosecution as and when requested by the office of the DPP to assist due to manpower constraints.

Just like DCEC, the office of the DPP is also faced with massive resignations of experienced prosecutors. This in turn results in cases taking too long to be completed and consequently loss of public confidence in the prosecuting authority.

Lack of specialization does not only affect the magistracy but extends to the DPP's office as well. The absence of specialized training to deal with corruption related issues has a negative impact on capacity building for prosecutors. In the end the quality of prosecution is compromised.

C. Freezing and Confiscation of Proceeds of Crime

The Act empowers the Director of Public Prosecutions to apply for a restraining order whenever a person investigated for an act of corruption has been charged or is about to be charged for an offence. However, such application has to be made under Section 8 of the Proceeds of Serious Crime Act. In this connection, identification of property representing the proceeds of crime still remains a daunting task for investigators

¹⁸ DCEC Case Statistics, Source Type Status Report compiled on 2 August 2010.

¹⁹ This is with regard to offences under the Penal Code.

²⁰ Section 10 of CECA.

²¹ Article 50 of UNCAC encourages States Parties to use appropriate special investigative techniques in order to effectively combat corruption.

²² Section 39 of CECA.

²³ Section 7 of the Criminal Procedure and Evidence Act (Cap 08:02) Laws of Botswana.

and prosecutors alike. Failure to establish a connection or link between the alleged unlawful activity and the property concerned results in criminals getting away with proceeds of crime that they eventually use to commit more crimes.

It is also very difficult to prove that property is an instrumentality of an offence without sufficient evidence to show that it was used as a means or instrument in the commission of the offence, or that it was otherwise involved in the commission of the offence.²⁴

As far as confiscation orders are concerned, they can only be applied for by the Director of Public Prosecutions after conviction for acts of corruption or cheating of the public revenue under the Act. The application also has to be in terms of the provisions of the Proceeds of Serious Crime Act.²⁵ This means that criminals can get away with instrumentalities and proceeds of crime in the event they are acquitted. In this way our legal regime is not strong enough to ensure that criminals are completely stripped off the benefits of crime.

D. International and Regional Co-operation

The Mutual Assistance in Criminal Matters Act²⁶ enables Botswana to get assistance with regard to the provision and obtaining of international assistance in criminal matters. There is also the Extradition Act,²⁷ which allows for extradition to Botswana of persons accused of committing crimes in the country but present in the jurisdiction of other countries to which the Act applies.

The absence of an extradition treaty with a requested state often makes it difficult to get the required assistance. Even where these instruments are in place, various legal requirements and restrictions, jurisdictional problems and differences in criminal law and procedure often pose serious barriers to co-operation and mutual legal assistance.

Resort to informal requests which are less cumbersome and capable of yielding quick results may not always pass constitutional muster.

IX. CONCLUSION

Botswana is one of the countries on the African continent that is replete with laws, policies and regulations aimed at combating corruption. However, much still needs to be done to make these laws more effective in addressing modern trends of crime and conform to international best practice. For example, there is no law that addresses bribery of foreign public officials and officials of public international organizations, as recommended under UNCAC.

The absence of whistleblower and witness protection legislation makes it very difficult to get the full participation and co-operation of all stake holders, particularly the public.²⁸

Botswana's failure or reluctance to ratify the United Nations Convention against Corruption further makes it practically impossible to get international assistance from other countries since most of the instruments ratified so far are not of universal application like the UN Convention.

Lack of political will on the part of politicians to declare their investments, assets and substantial gifts or benefits is another area of great concern and this creates a lot of suspicion of corruption. This does not accord well with Article 9(e) of the Convention.

²⁴ See Article 31 of UNCAC which deals with freezing, seizure and confiscation of proceeds of crime, property, equipment or other instrumentalities used or to be used in the commission of crime.

²⁵ Section 3 of the Act.

²⁶ Act 20 of 1990 Cap 08:04, Laws of Botswana.

²⁷ Act 18 of 1990 Cap 09:03, Laws of Botswana.

²⁸ See Articles 33 and 32, respectively, of UNCAC.