

## Gaps and Challenges in the Legal Framework Regulating Corruption in Construction Procurement in Zambia

*L. Matakala,<sup>1</sup> M. Muya,<sup>2</sup> M. Macwan'gi,<sup>3</sup> J. Tambatamba,<sup>4</sup> B. Mwiya,<sup>5</sup> J. Kalyongwe,<sup>6</sup> N. Milapo,<sup>7</sup> B. Sidono,<sup>8</sup> K. Kazungu<sup>9</sup> and V. Byusa<sup>10</sup>*

### ABSTRACT

A strong legal framework is crucial to the efficient and effective running of any organisation, sector or country. This conference paper evaluated the legal framework regulating corruption in procurement of construction projects in Zambia. It assessed field data collected in 10 districts in Zambia from key stakeholders who participated in a national survey, in-depth interviews and focus group discussions; against the backdrop of eight laws. The goal of the study was to establish why corruption in construction procurement was rampant despite there being laws regulating the sector. The study evaluated the stakeholders' levels of awareness of the eight laws; whether the laws were so weak that they fuelled corruption; the overall effectiveness of the laws; and the gaps in and challenges around the legal framework. The conclusion of the evaluation was that the stakeholders' levels of awareness were fairly high; and that despite having few gaps, the legal framework was comprehensive and did not fuel corruption. Rather, it was challenges outside the legal framework – e.g. impunity and low levels of enforcement of the law – that contributed to high levels of corruption in construction procurement. It was recommended that the following measures could help reduce corruption in construction procurement: sensitisation of community members and relevant officers; enforcement of law; having independent monitoring mechanisms; stiffening punishment; and applying the principles of transparency, integrity, competition and accountability.

**Keywords:** Laws, Corruption, Procurement, Construction, Zambia

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<sup>1</sup>Dr L. Matakala is with the School of Law, University of Zambia, Lusaka, 10101, Zambia. (phone: +26 0964320710; fax: +26 0211 290733; email: lungowe.matakala@unza.zm).

<sup>2</sup>Prof. M. Muya is with the School of Engineering, University of Zambia, Lusaka, 10101, Zambia. (phone: +26 0966458096; email: mmuya@unza.zm).

<sup>3</sup>Prof. M. Macwan'gi is with the Institute of Economic and Social Research, University of Zambia, Lusaka, 10101, Zambia. (phone: +26 0977826823; email: mubianam2009@yahoo.com).

<sup>4</sup>Dr. J. Tambatamba is with the School of Engineering, University of Zambia, Lusaka, 10101, Zambia. (phone: +26 0966770593; email: Tambatamba.jonathan@gmail.com).

<sup>5</sup>Dr. B. Mwiya is with the School of Engineering, University of Zambia, Lusaka, 10101, Zambia. (phone: +26 0965837400; email: balimu.mwiya@unza.zm).

<sup>6</sup>Mr. J. Kalyongwe is with the School of Engineering, University of Zambia, Lusaka, 10101, Zambia. (phone: +26 0967791381; email: jestcbusiness@yahoo.com).

<sup>7</sup>Ms N. Milapo is with the Institute of Economic and Social Research, University of Zambia, Lusaka, 10101, Zambia. (phone: +26 0955185861; email: nalukui.milapo@unza.zm).

<sup>8</sup>Mr. B. Sidono is with Center for Project Management and Strategic Innovations, Lusaka, Zambia. (phone: +26 0963656069; email: sidonob@gmail.com).

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<sup>9</sup>Dr. K. Kazungu is with the Open University of Tanzania. (phone: +255 652001889; email: kazungukmn@yahoo.com).

<sup>10</sup>Mr V. Byusa is with the National University of Rwanda. (phone: +250 788771144; email: v.byusa@ur.ac.rw).

## 1.0. INTRODUCTION

The legal framework of a nation plays a critical role in reducing corruption. It is law that proscribes wrongful acts, punishes wrongdoers, and deters potential offenders from committing crime. In 2015, the Anti-Corruption Commission (ACC) of Zambia received 516 corruption related reports (ACC Annual Report: 2015). On 25 May 2015, on Africa Freedom Day, the President of Zambia lamented that “corruption is among the key challenges that Zambia must confront with urgency” (Post Newspaper: 2015). Transparency International’s Corruption Perception Index of 2016 shows that on a scale of 0 to 100, i.e. from highly corrupt to very clean, Zambia scored 38/100 indicating the perceived level of public sector corruption (Transparency International: 2016). In other words, Zambians perceive the public sector to be very corrupt. Of all the activities that any government engages in, ‘*public procurement has been identified as the government activity most vulnerable to corruption*’ (UN Conference: 2008). Mukumbwa and Muya confirm the prevalence of unethical practices in all phases of construction projects in Zambia (2013).

This conference paper outlines the key provisions of eight pieces of legislation, three treaties and one set of international regulations which form part of the legal framework that Zambia has put in place to curb corruption in construction procurement. It analyses the awareness levels, gaps and challenges inherent in the eight national laws, as identified by various stakeholders in Zambia’s construction industry. The objective of undertaking this study was to understand why corruption is rampant in construction procurement in Zambia despite their being strict laws regulating the sector.

There were two hypotheses that the study aimed to prove or disprove: First, that corruption in the construction sector was due to gaps in the legal framework; and second, that corruption in the construction sector in Zambia was due to inadequate enforcement of the existing legal framework. The ultimate goal is to propose possible solutions that will strengthen the legal framework and enhance its role in reducing corruption in construction procurement.

## 2.0. BRIEF OUTLINE OF LAWS REGULATING CONSTRUCTION, CORRUPTION AND PROCUREMENT IN ZAMBIA

Zambia has many laws in place which have an impact on construction, corruption and procurement. These include both national and international laws. Before delving into the provisions in the two sources of law, it is important to take note of a delimitation in this paper: While each one of the laws discussed herein focuses in general on either corruption, procurement or construction, this study brought the three together as it is interested in the intersection. Thus what follows is not a holistic analysis of each law, but an outline and explanation of specific provisions in different laws which all together impact on the regulation of corruption in construction procurement in Zambia.

## 2.1 International Law

Zambia is a dualist state. This means that the courts can only apply international treaty law after it is made part of national law through the process of domestication. It is encouraging to note that the *ACC Act of 2012* domesticates several treaties on corruption, to which Zambia is a states party. These include the *United Nations Convention against Corruption (UNCAC) of 2008*; the *Africa Union Convention on Preventing and Combating Corruption (2003)*; and the *Southern Africa Development Community Protocol against Corruption (2001)*. Thus, a person or institution guilty of corrupt practices in Zambia can be prosecuted in line with the provisions in these instruments.

It is outlined in the Preamble of the *African Union Convention on Preventing and Combating Corruption* that states parties are concerned about the negative effects of corruption and impunity; as well as its devastating effects on the economic and social development of the African people. Also, states parties acknowledge ‘that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development’; and that there is a need to address ‘the root causes of corruption’. During the United Nations Conference of the states parties to the *UNCAC* in 2008, it was accurately noted that:

In poorer countries corruption has a ... devastating and immediate impact. It diverts public expenditure away from areas such as health and education in which bribery returns may be small, to more lucrative sectors such as construction. The poor end up paying directly for the consequences of contracts that have been signed in corrupt circumstances.

Lastly, it is important to mention the *ISO 37001 Anti-bribery Management Systems* that was released in October 2016, which acknowledges that ‘bribery is one of the most destructive and complex problems of our times, and despite national and international efforts to combat it, it remains widespread’. *ISO 37001* addresses among others, bribery in the public, private and not-for-profit sectors; direct and indirect bribery; and bribery by organisations’ personnel acting on the organisations’ behalf or for its benefit. Though not a binding law, *ISO 37001* is a powerful guidance tool, which Zambia participated in during its creation; and the Zambia Bureau of Standards is currently considering implementing the system in Zambia. This is in line with its obligations as a member state of the United Nations and the African Union. To conclude, at the international level, Zambia has put in place a legal framework regulating the issue of corruption.

## 2.1 National Law

The national legal framework regulating the three matters at hand comprises of many pieces of legislation, statutory instruments, regulations and policies. Out of all these, the study focused on eight cardinal pieces of legislation. The goal was not to be exhaustive in the analysis of applicable national laws but rather assess the stakeholders' basic awareness and minimal understanding of the fundamental pieces of legislation regulating corruption in construction procurement. Below is a brief overview of what each of the eight selected laws provides:

### 2.1.1 *National Council for Construction (NCC) Act No.13 of 2003*

This Act establishes the body empowered to regulate construction nationwide – i.e. the National Council for Construction (NCC); and it defines the NCC's functions, most of which are listed in Section 5 of the Act. These functions include assessing the performance of contractors; regulating contractors' conduct; setting and promoting safety standards in the construction sector and issuing licenses to contractors. Section 21(1) of the Act prohibits a contractor from undertaking any construction works for a public-sector contract unless the contractor is registered with the Council and holds a valid certificate issued by the Council. The Act gives the NCC powers to punish erring construction companies, hence there are cases in which the NCC has withdrawn practicing licenses from contractors who are guilty of misconduct.

### 2.1.2 *Anti-Corruption Act No. 3 of 2012*

Part III of this Act outlines what conduct the law views as corrupt practices. This includes abuse of office (Section 21); possession of unexplained property (Section 22); and receipt of gratification for giving assistance with contracts (Section 29). The penalty for violating this part of the Act is an imprisonment term of not more than 14 years upon first conviction (Section 41). Section 49 provides that the effect of conviction is that one is disqualified for five years from being elected, appointed, or holding any office or position in any public body. Further, the Act allows any person to lodge a complaint with the Anti-Corruption Commission (ACC) against another person who has engaged in a corrupt practice (Section 51(1)). In the long title of the Act, it is stated that the ACC is there to provide for the prevention, detection, investigation, prosecution and punishment of corrupt practices based on the rule of law, integrity, transparency, accountability and management of public affairs and property.

### 2.1.3 *Public Procurement Act No.12 of 2008*

The main law regulating procurement in Zambia is the *Public Procurement Act*. The aim of this Act is 'to ensure transparency and accountability in public procurement; regulate and control practices relating to public procurement in order to promote the integrity of, fairness and public confidence in, the procurement

process' (long title of the Act). Part VI of the Act lays down the procedure that every procurement must undergo in order for it to be compliant with the law. Section 67(1) stipulates that a bidder or supplier shall be permanently barred from participating in procurement for misconduct relating to the submission of bids, including corrupt, fraudulent, collusive or coercive practices, price fixing, a pattern of under-pricing of bids and breach of confidentiality; and for substantial non-performance or under-performance of contractual obligations. Section 77(1) provides a penalty of a fine and/ or imprisonment not exceeding five years if found guilty.

#### *2.1.4 Public Interest Disclosure (Protection of Whistleblowers) Act No.4 of 2010*

Should a person be aware of any misconduct, such as corruption in procurement or construction, he or she must bring such misconduct to the attention of the relevant authorities. This Act promotes and protects 'the disclosure of conduct adverse to the public interest in the public and private sectors' (long title). It also provides for the framework within which public interest disclosures shall be dealt with. Furthermore, the Act outlines procedures for employees in the public and private sectors to disclose information on unlawful conduct by the employers and other employees, while safeguarding the rights – including employment rights – of persons who make public interest disclosures.

#### *2.1.5 Citizens Economic Empowerment Act No.9 of 2006*

In order to grow the economy in a manner that is sustainable, it is necessary to empower citizens. That is why this Act was passed. Its purpose is to promote equal opportunities for targeted citizens and for three types of companies (namely citizen empowered companies, citizen influenced companies and citizen owned companies) in accessing and being awarded procurement contracts and other services from state institutions (Section 3). Furthermore, the Act is there to encourage gender-equality in accessing, owning, managing, controlling and exploiting economic resources (Part III). Its goal is therefore to remove structural and discriminatory constraints and in so doing ensure equitable income distribution.

#### *2.1.6 Prohibition and Prevention of Money Laundering Act No.14 of 2001*

The Act provides a framework within which one can disclose information on suspicion of money laundering activities to the authorities and regulated institutions. Any person who willfully fails or refuses to disclose information or produce accounts during an investigation into an offence (Section 27); and any person who conspires with another to commit the offence of money laundering respectively (Section 9(2)), shall be guilty of an offence and shall be liable upon conviction to a fine or imprisonment of five years or both. The Act penalises both natural persons and corporate bodies (Section 8). The Act further provides for the forfeiture of property of persons convicted of money laundering (Section 17).

## 2.1.7 *Public Finance Act No.15 of 2004*

'Public monies' mean monies received by an officer in the course of the officer's employment on behalf of or for the benefit of the Republic (interpretation section). Section 30 states that a surcharge equivalent to the loss or wasteful expenditure should be imposed on the controlling officer for failure to perform duties assigned by the Act; and recommend to the secretary to the treasury that disciplinary action be taken. Section 44 provides that it is the duty of the Auditor General to audit the accounts of any statutory cooperation in accordance with the provisions of the *Public Audit Act* (Act No. 29 of 2016). Section 45 provides that the Auditor General shall carry out performance and specialised audits and shall prepare a report on the audit for submission to the National Assembly.

## 2.1.8 *Competition and Consumer Protection Act No.24 of 2010*

This Act aims at safeguarding and promoting competition; as well as protecting consumers against unfair trade practices. Section 46 prohibits unfair trading, which is defined in Section 45 as a practice which misleads consumers or compromises the standard. When applied to construction, this means that a contractor is not permitted by law to claim that he can deliver infrastructure of a particular quality, when in reality he cannot. Section 54 of the Act permits a person to lodge a complaint with the Commission on Competition and Consumer Protection if any part of the Act is violated. In addition, the Act establishes the Consumer and Protection Tribunal (Section 71(1)(b)). If one knowingly gives false evidence before the Tribunal, such a person commits an offence and is liable upon conviction to a fine or imprisonment of not more than one year or both (Section 72).

Looking at the above extracts of law, one can confidently say that Zambia has strong legal provisions in place which ought to suffice in its endeavour to curb corruption in construction procurement.

## 3.0. RESEARCH METHODS

The study devised a particular research methodology to help it arrive at scientifically valid conclusions on proving and disproving the two-hypothesis mentioned in section 1.0 above, i.e.: whether or not there were gaps in the legal framework regulating corruption in construction procurement; and if so, whether those gaps and failure to enforce the existing legal framework aided corruption in construction procurement to occur in Zambia. The two hypotheses of the study were tested using the Pearson Chi-square test. The Pearson Chi-square test ( $\chi^2$ ) is a statistical test applied to sets of categorical data to evaluate how likely it is that any observed difference between the sets arose by chance (Plackett: 1983). It is suitable for unpaired data from large samples.

The methodology used employed both qualitative and quantitative research methods; and data was collected

using three different tools – a focus group discussion (FGD) guide, an in-depth interview (IDI) guide and a survey questionnaire (SQ). This methodology allowed for triangulation. Seeing as ‘different data sources carry divergent threats to validity’ (Hammersley: 2008), Hammersley recommends triangulation; and notes that it is not possible to know with certainty that an account in qualitative research is true, unless one carefully examines all evidence to see whether it supports the interpretation (Hammersley:1992).



The stakeholders who participated in the study included members of the community, private institutions, government, statutory bodies, academic institutions, regulatory and enforcement agencies, civil society and cooperating partners. From the sample target of 893 respondents, 737 people took part in the national survey; 120 participants took part in the focus group discussions (FGD); and there were 135 interviewees who participated in the IDIs. The study participants and respondents were drawn from 10 different districts around the nation.

## 4.1. RESEARCH FINDINGS

There were several questions in the SQ, FGDs and IDIs whose responses were necessary to prove or disprove the two hypotheses, as well as understand what the gaps and challenges are in the legal framework regulating corruption, construction and procurement. The questions were:

- Are you aware of any laws regulating the construction industry?
- Do weak laws make it easier for individuals or organisations to engage in corrupt practices in construction procurement?
- Have the eight pieces of the legislation been effective in curbing corruption in construction procurement?
- Is failure to enforce laws one of the factors that cause corruption in construction procurement?
- What are the gaps and challenges in the legal framework regulating corruption in construction procurement?

Below is the analysis of the responses gathered:

### 4.1 Awareness of Laws

During the national survey, the respondents were shown the list of the eight laws and asked if they were 'aware' of them. To be aware of a law simply means that one has basic knowledge of its existence and perhaps some of its provisions. When asked if they knew the *NCC Act*, 58% of the 737 respondents answered affirmatively, while 40% were not aware of the Act. This means that 295 respondents did not know the main legislation regulating the construction sector. One wonders therefore if they knew of the NCC as a regulatory body, and the great role it can play in preventing corruption in construction procurement.

Unlike the *NCC Act*, awareness of the *Anti-Corruption Act* was very high: 80% of the respondents (i.e. 590 people) knew of its existence. During IDIs, the participants were asked to define corruption and confirm whether it existed in the construction sector. They defined it as follows:

- “Corruption is the misappropriation of funds or embezzlement of funds or just not doing things correctly”;
- “Corruption is where there is collusion with someone so that you get a kick back”; and
- “Corruption is the abuse of power/ responsibility for formal gain or gratification in a huge, petty or political sense, depending on amounts involved and where it happens or occurs”.

The above definitions are in line with the definition in the *Anti-Corruption Act* as well as the definition of a ‘corrupt practice’, which was given at the 2008 Conference of the States Parties to the UNCAC – i.e. the ‘offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence the action of a public official in the selection process or in contract execution’.

Also during the IDIs, the participants confirmed that “*prospective bidders provide favours to those involved in the procurement process in return for a contract*”. This finding is in tandem with Mukumbwa’s conclusion that the construction sector in Zambia is riddled with bribery, extortion, bid-rigging, collusion and many other forms of corruption (2012).

At face value, it is encouraging to note that 68% (i.e. 501 respondents) were aware of the *Public Procurement Act*. That notwithstanding, the fact that 32% of the respondents were not aware of this important law regulating procurement is cause for concern as it implies that they would not be able to utilise its protective provisions.

The *Public Interest Disclosure (Protection of Whistleblowers) Act* was the only legislation which those who were not aware of it (i.e. 55% of the respondents) outnumbered those who were (i.e. 41%). This is rather alarming because it implies that they majority of respondents were unaware of the main law that is there to protect them should they report cases of corruption and other misconduct to the relevant authorities. It is possible that some people are deterred from lodging such complaints and reports for fear that they might lose their jobs or be victimised in other ways. Simply knowing that this law exists and is effective could possibly propel such people into positive action, to the benefit of the nation. *The Public Finance Act* is another fundamental law that should be known by the people if you are to report abuse of public funds. Yet the study revealed that only 51% of respondents were aware of this Act.

During the survey, it was established that 501 respondents (i.e. 68%) were aware of the *Citizens Economic Empowerment Act*. One of the reasons why corrupt practices are prohibited is that they hinder development. This Act promotes holistic and inclusive development of the nation.

From the survey findings noted above, it appears that many of the respondents were aware of all the eight key laws regulating corruption, procurement and construction.

Also, during interviews, the participants were asked if they were aware of any laws regulating corruption in procurement in the construction industry; and if so, to name them. The laws that they named include the *Anti-Corruption Act*, *NCC Act*, *Public Procurement Act*, *Engineering Institution of Zambia Act* (Act No.17 of 2010), *Surveyors Institute of Zambia Act* (CAP 438), *Zambia Institute of Architect Act of Zambia* (CAP 442) and the *Finance (Control and Management) Act* (CAP 347). Thus during the IDIs, participants were able to name three laws from a list that they did not see; and four other laws – all of which were applicable to the matter, even though they were not among the eight Acts selected for the study. This was an affirmation that in general most participants were aware of some laws regulating corruption, procurement and construction. Furthermore, while naming the Acts, some of the IDIs participants also said the following:

- *“Yes, there is the NCC Act, the EIZ Act and the Surveyors Institute of Zambia Act. But maybe they should be redefined so that they are comprehensive. I think they are not strong enough. The penalties should be severe and we want to see convictions of culprits once found guilty. The laws should include severe penalties for the offenders”.*
- *“In my profession, we have statutory law which guides us in the way we provide our services. The Zambia Institute of Architects has ethics. We have the conditions of engagement which we are supposed to give to our clients for performing our services. We are told the do’s and don’ts; they are very clearly written. As professionals, we are not supposed to do this, we are not supposed to do that. If ethics were to be enforced, that would go a long way. It is enforcement which is a problem. Even with what we currently have, sanity can prevail if the laws are enforced strictly”.*
- *“The Public Procurement Act, NCC Act and the EIZ Act all regulate the work of engineers”.*
- *“The NCC Act regulates the construction sector”.*

From the above statements, it is clear that the participants were not only aware but also had a general appreciation of the laws governing corruption in construction procurement. Looking at the above statements and statistics, one can confidently say that the study’s finding was that there was a sufficient level of awareness of the relevant laws among stakeholders, which ideally should help reduce the problem of corruption in construction procurement.

## 4.2 Weak Laws

A weak law is one that fails to achieve its purpose because it is porous. A question was asked during the survey on whether weak laws were among the contextual factors that make it easier for individuals to engage in corruption in construction. The responses to this question were analysed using the Pearson Chi-square test, which generated a p-value of 0.001 that is significant, leading to the rejection of the null

hypothesis. This means that the study found that corruption in the construction sector was not fueled by weak laws. That is not to say that the laws outlined in section 2 above do not have any weaknesses, but rather that the weaknesses or shortcomings inherent in Zambia's laws are not the reason why corruption exists in the construction sector. This finding is in line with Ndulo's study finding that (2014, p6):

While identifying shortcomings in the legislations, the study concludes that Zambia has put in place a good frame work for the fight against corruption. The various pieces of legislation enacted are comprehensive and cover all the areas that are traditionally the subject matter typically covered by legal regimes designed to fight corruption throughout the world.

### 4.3 Effectiveness of Laws

During the national survey, the respondents were asked if the eight pieces of legislation were effective, i.e. were the laws achieving what they set out to achieve, which is reducing corruption? The Pearson Chi-square test revealed the following p-values for each of the Acts:

ACT	P-VALUE	MEANING
<i>Anti-Corruption Act No.3 of 2012</i>	0.005	Effective
<i>Public Procurement Act No.12 of 2008</i>	0.069	Not effective
<i>Public Interest Disclosure (Protection of Whistle Blowers) Act No.4 of 2010</i>	0.005	Effective
<i>Prohibition and Prevention of Money Laundering Act No.14 of 2001</i>	0.559	Not effective
<i>NCC Act No.13 of 2003</i>	0.539	Not effective
<i>Citizens Economic Empowerment Act No.9 of 2006</i>	0.144	Not effective
<i>Public Finance Act No.15 of 2004</i>	0.200	Not effective
<i>Competition and Consumer Protection Act No.24 of 2010</i>	0.909	Not effective

The above results mean that only the *Anti-Corruption Act* and the *Public Interest Disclosure (Protection of Whistle Blowers) Act* were found to be effective. Consequently, with the exception of the two, the conclusion is that though comprehensive, Zambia's laws regulating corruption in construction procurement are ineffective. This is because the result yield by the Pearson Chi-square test for six of the eight laws were not significant. As stated by one of the FGD participant: *"The laws are not effective. If the laws were effective there could have been change in terms of corruption practices"*. It is important to note that there are many factors that could make a law ineffective. One is the weaknesses inherent in a law (which is not the case here); and other are factors outside the four corners of the law itself. In his study on the Zambian anti-corruption legal framework, Ndulo observed that (2014, p6):

For the fight against corruption to succeed government efforts have to go beyond legislation. The fight against corruption requires strong institutions, the provision of adequate resources to those institutions and above all the existence of a determined political will to end corruption in all its forms regardless of the perpetrator.

In addition to the statistical test results presented above, and in line with Ndulo's observation, the findings analysed in sections 2.4 and 2.5 below confirm that the reason why Zambia's legal framework is ineffective is not because the law is weak; it is due to other factors outside the law.

#### **4.4 Enforcement of the Law**

One of the questions in the SQ read: 'Is failure to enforce laws one of the factors that cause corruption in procurement in construction?' The Pearson Chi-square test was used to analyse the responses and the analysis yielded a p-value of 0.601. This means that according the SQ respondents, corruption in the construction sector was due to inadequate enforcement of existing laws.

Further, the survey respondents were asked: 'Is failure to enforce laws one of the factors that makes it easier for individuals to engage in corrupt practices in the construction sector?' Again the responses to this question were analysed using the Pearson Chi-square test. In this analysis the p-value was 0.793, thus the null hypothesis was accepted. This means that failure to enforce laws is one of the factors that make it easier for individuals to engage in corruption and construction procurement. This finding is supported by statements from FGD participants who said:

- *"Laws are there but the problem is that they are not followed"*.
- *"Like they have said, laws are there but they should just be applied"*.

## 4.5 The Gaps in and Challenges around the Legal Framework

The participants and respondents were asked what the gaps and challenges were in regulating corruption in construction procurement. What follows is an assessment of the issues that they highlighted. In the study, the term ‘gap’ was used to denote a *lacuna* or something missing in the law which ought to be there. Such an omission or gap has the potential to make a law ineffective. The term ‘challenge’ meant an internal or external factor which inhibits the effective application of the law. An example of an internal challenge is a shortcoming in an Act, such as the one raised by Ndulo in his review of the *Public Interest Disclosure (Protection of Whistleblowers) Act*. He writes (2014, p 47):

Section 13(3) imposes criminal liability on a person who makes a public interest disclosure falling within the meaning of paragraphs 22(a, b, c) and 13(1), i.e. for disclosures which are malicious, frivolous, vexatious or made in bad faith or where the disclosure was made for pecuniary gain. This provision can put off whistleblowers. The penalty can be payment of a fine or even be as serious as imprisonment not exceeding seven years or both. Here, the law does not appear to consider the veracity of the claim that was made but rather depends on the intention of the whistleblower. One can envisage a situation where the disclosed information is true but the whistleblower would be disclosing it in bad faith. The bad faith of the discloser of the information should not be at issue.

Thus, although the Act is designed to protect whistleblowers, some of its provisions could in fact discourage them from making disclosures. That notwithstanding, a counter argument could be offered in support of section 13(3), which is that it is there to protect innocent officials from victimisation by non-*bona fide* whistleblowers.

Two internal challenges were noted by many participants and respondents: one pertained to punishment and another to sufficiency of law. The one external challenge which was raised by numerous participants and respondents was impunity.

### 4.5.1 Sufficiency of Laws

A law is sufficient or adequate if it comprises of all the necessary provisions. A gap in a law renders that law insufficient to some degree. The IDI participants were divided in opinion: some thought the laws were sufficient while others thought they were not:

- “The laws could be sufficient but they need to be improved”.
- “Only if implemented well and followed to the letter”.
- “They are not very different from the laws that are in other countries where there is no corruption”.

- *“Zambia has very good laws... The laws are adequate”.*
- *“The laws should be redefined so that they are comprehensive”.*

Some participants pointed out that the *NCC Act* had gaps and was therefore not comprehensive. In the 2014 report to the National Assembly, submitted by the Committee on Communications, Transport, Works and Supply (CCTWS), the CCTWS observed that the *NCC Act* limited the punishment of erring construction companies to those that undertook works for ‘public sector contracts’ only (CCTWS: 2014, p3). This implies that section 21(1) of the *NCC Act* does not apply to private sector contracts. Such an implication is illogical as contractors can and do engage in unethical practices even while executing contracts in the private sector. Thankfully, in practice, the NCC does hold such contractors accountable too. This however means that the NCC acts *ultra vires*, i.e. outside the law. This finding from literature review supports the view of many participants that the law regulating corruption in construction procurement has gaps which ought to be filled in order for the law to be comprehensive and therefore sufficient.

#### 4.5.2 Severity of Punishment

As can be seen in section 2.2 above, almost every Act lays out a punishment for violators in the areas of corruption, construction and procurement. During the study, many IDI participants were of the view that despite different Acts having various provisions on punishment that can be meted out for all sorts of corruption which can occur in construction procurement, the penalties were not severe enough:

- *“The laws should include severe penalties for the offenders”.*
- *“I think they are not strong enough. The penalties should be severe ... We want to see conviction of culprits once found guilty”.*
- *“The penalties should be severe. They should be redefined so that they are comprehensive”.*

In a way, one can understand the pessimism in the above statements. With the exception of forfeiture, it could be argued that though the law provides for penalties, these penalties are weak in that they do not match the gravity of the offence. Billions of dollars are squandered through corruption in construction procurement every year; it is possible for one to pay a fine and remain with lots of proceeds from the crime. For some offenders, even a five-year imprisonment term is nothing to fear if in return one gains lots of property or money.

Despite the views shared above, other IDI participants were of the view that the punishment provided for in law was sufficient and adequate. Rather, the problem was that the law was not enforced, hence the punishment was not meted.

### 4.5.3 The Problem of Impunity

Impunity is the freedom from punishment when one commits an offence that deserves retribution. The IDI participants said that:

- *“Zambia has very good laws, but we are not implementing them correctly. More especially when it comes to punishment, laws are adequate and quite good, but no one is punished”.*
- *“Maybe something needs to be done in the area of ensuring that people are punished, we need to implement punishment”.*

Additionally, it was observed by FGD participants that:

- *Civil servants are supposed to follow the rules but they are the ones who flout them”.*
- *“The law makers are the ones who are even in the forefront breaking the law”.*

From the above statements, it is evident that the participants were of the view that there was impunity among officials; hence even when they violated the law, nothing was done to punish them. During the survey, when asked what organisational factors caused corruption in procurement in the construction sector, 219 respondents said poor accountability; 96 said impunity; 140 said limited prosecution; and 90 mentioned failure to enforce laws. Although these factors can be analysed individually, they can also be looked at together, particularly when it comes to the issue of impunity. This is because when there is impunity law enforcers are aware of those who violate the law, yet they do nothing about it. Thus, there is no implementation and no enforcement of the punishment provisions embedded in the law. The problem of impunity casts a very grim light on the police, judiciary and other institutions tasked to enforce and apply the law.

Examples of impunity in Zambia abound in the Auditor General’s annual reports. For example, it is reported on page 20 of the Auditor General’s 2016 Report regarding the judiciary that ‘receipt books and cash books maintained at the headquarters and selected Provincial Stations revealed that amounts totaling K7, 338 were unaccounted for in that the cash was neither banked or on hand’. Yet, according to Section 47 of the *Public Finance Act*, a public officer is not permitted to use any public monies for any purpose not authorised by the Act or other written law. Upon conviction, such officers should be fined or imprisoned. Presently, there is no evidence showing that this matter has been investigated and that the officers involved have been prosecuted. In 2016, Transparency International noted that the lower-ranked countries in their corruption perception index (which is where Zambia falls) were ‘plagued by untrustworthy and badly functioning institutions like the police, judiciary. Even where anti -corruption laws are on the books, in practice they are often skirted or ignored’.



## 5.0. CONCLUSION

A strong legal framework is crucial to the efficient and effective running of any organisation, sector or country. This paper evaluated the legal framework regulating corruption in procurement of construction projects in Zambia. The study aimed at finding out whether corruption was due to the following reasons: low awareness of laws; weakness of laws; ineffectiveness of laws; lack of enforcement of the law; insufficiency of laws; non-severity of punishment; and the problem of impunity. It was established that corruption in construction procurement was not due to weak laws or lack of awareness of the laws. Most of the participants were aware of the laws; and despite the gaps in law, Zambia's legal framework is strong enough to regulate corruption in construction procurement. The study also found that six of the eight laws analysed were not effective. Perhaps that could be attributed to the other finding of the study, i.e. that there was poor enforcement of the law. Further, the analysis revealed that generally the laws were sufficient; though the participants did not agree on whether or not the punishment provided for in law was severe. Some argued that the punishment was severe, but that due to the problem of impunity, many law breakers went scot-free. The study therefore confirmed that the problem of corruption in construction procurement was indeed complex and multi-faceted; hence the solution equally ought to be multi-pronged.

## 6.1. RECOMMENDATIONS

The study participants recommended the following strategies to fight corruption in construction procurement:

- Decentralisation and establishment of relevant offices, especially in rural areas where construction works are going on (FGD);
- Sensitisation of the community about the evils of corruption (FGD);
- Promotion of integrity (SQ);
- Increase in penalties to make them more severe; and conviction of culprits once found guilty (IDI);
- Redefining national laws so that they are comprehensive (IDI);
- Firing employees who are found wanting, or else corruption will never end (FDG);
- Implementation of laws; and following the law to the letter (IDI);
- Improvement of laws (FGD);
- Parliament needs to send strong signals by prescribing stiffer punishment (SQ); and
- There is need to stop interfering in the work of law enforcement agencies (SQ).

All the above recommendations are indeed sound and necessary. Additionally, there is a dire need to sensitise the relevant officials on the devastating effects of official indifference on the development of the nation, as impunity cannot be eradicated through law alone.

Also, Parliament should fill the identified gaps in various pieces of legislation so the law is comprehensive. Regarding the issue of punishment, Zambia is here urged to work closely with other member states of the African Union Convention on Preventing and Combating Corruption ‘to formulate a common penal policy’ as desired and expressed in the preamble of the Convention.

Furthermore, as was highlighted during the UN Conference in 2008, in order to be effective, ‘a procurement system must incorporate both structure elements (specified rules, procedures and their objective application) and key qualitative principles of transparency, integrity, competition and accountability’. One cannot over-emphasise the importance of these principles and their positive impact on corruption. Naturally, these principles repel corruption.

Last but not least, Zambia desperately needs an independent monitoring mechanism which will ensure that all those who are found wanting are indeed prosecuted; and that punishment is effected. Without such a monitoring mechanism, whistle blowing will be pointless and reports and investigations such as those of the office of the Auditor General will be a sheer waste of time and tax payers’ money. Such reports look good on paper, but they are not worth the paper they are written on for as long as they lead to no real change on the ground.

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