

# Corruption and Corporate Governance in Namibia: An Analysis of the Strategic Approaches in the 4th Industrial Revolution

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## Abstract

The advent of new technology and the 4<sup>th</sup> Industrial Revolution has introduced new facets of corporate crimes and regulatory challenges for the enforcement of anti-corruption laws. Acknowledging the negative effects of corruption on the private sector, corporate governance mechanisms may help reduce corruption in the private sector by ensuring that corporations are managed in the best interest of the corporation and the shareholders or investors. This article aims to evaluate the adequacy of the regulatory measures intended to promote good corporate governance in Namibia thereby cushioning the Namibian financial market from the negative effects of corporate corruption. It provides an exposition of the concepts of corporate corruption and corporate governance by considering the relationship between the two. It further provides an analysis of the Namibian corporate governance regime and the anti-corruption legislative framework. It is submitted that if Namibia is to realise the financial market objectives set out in its policy documents, there is a need for the introduction of robust strategic approaches in corporate governance directed at curbing and/or reducing corporate corruption responsive to the 4<sup>th</sup> Industrial Revolution challenges, amongst others.

## Keywords

Corporate corruption; corporate governance; financial sector regulation; financial crimes; ICT regulation.

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## 1 Introduction

In 2004 Namibia adopted Vision 2030, a long-term National Development Programme document that spells out the country's developmental programmes and its strategies to achieve national objectives.<sup>1</sup> The primary objective of Vision 2030 is to improve the quality of life of the Namibian people and raising it to levels found in the developed world.<sup>2</sup> Vision 2030 *inter alia* sets out various financial sector objectives with a view to achieving a more efficient, competitive and resilient financial system that is vital to securing the prospects of sustainable economic growth and development.<sup>3</sup> Vision 2030 also identifies good governance as a cross-cutting value that Namibia upholds as a nation. To realise the financial objectives spelt out in Vision 2030, the Ministry of Finance launched the Namibian Financial Sector Strategy in 2011 as a guide to the development of the Namibian financial sector and the achievement of the financial-sector objectives as set out in the various National Development Plans as well as Vision 2030.<sup>4</sup> The Namibian Financial Sector Strategy emphasises the importance of an effectively functioning financial system to the country's general economic growth.<sup>5</sup> However, it noted several structural weaknesses that must be addressed for the financial sector to contribute meaningfully to the overall performance of the national economy,<sup>6</sup> such as inadequate and less effective regulation of the financial sector, limited access to financial services, low financial literacy and a lack of consumer protection.<sup>7</sup>

The Namibian Financial Sector Strategy seeks to obviate the identified weaknesses and ensure a dynamic, effective, competitive and resilient financial system with best practices that will fully contribute to sustained

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<sup>1</sup> Office of the President *Namibia Vision 2030*; Asheela *Towards Responsible Lending* 71.

<sup>2</sup> Office of the President *Namibia Vision 2030* 9. See also the Preamble to the *Constitution of the Republic of Namibia*, 1990 (the Namibian Constitution), which reflects the aspirations of the Namibian people.

<sup>3</sup> Office of the President *Namibia Vision 2030* 41.

<sup>4</sup> See Ministry of Finance *Namibia Financial Sector Strategy* 5; Brouwers et al 2014 <https://pdf4pro.com/amp/view/microfinance-regulatory-and-policy-assessment-in-sadc-445c35.html> 37; Asheela *Consumer Credit Law in Namibia* 71.

<sup>5</sup> Ministry of Finance *Namibia Financial Sector Strategy* 5; Asheela *Towards Responsible Lending* 71.

<sup>6</sup> Ministry of Finance *Namibia Financial Sector Strategy* 5; Asheela *Towards Responsible Lending* 71.

<sup>7</sup> Ministry of Finance *Namibia Financial Sector Strategy* 5; Asheela *Towards Responsible Lending* 71.

economic growth and the achievement of the socio-economic objectives of poverty reduction and wealth creation.<sup>8</sup> To promote financial stability by the year 2021, the strategy promised that regulatory and supervisory efforts would be geared towards the maintenance of the stability of the financial system. In this regard, robust financial institutions, infrastructure and prudential regulation would be important necessities to ensure that the system was able to withstand sudden adverse economic and financial shocks that emanated from within and outside the system without significantly disrupting the intermediary function and the functioning of the economy.<sup>9</sup> However, since the launch of the Namibian Financial Sector Strategy, another structural weakness has appeared that could hamper the realisation of the objectives of the Namibian financial market: corruption.

On 21 March 2019, the High-level Panel on the Namibian Economy (HLPNE) was inaugurated to analyse the state of the Namibian economy and provide recommendations.<sup>10</sup> In its report, the HLPNE acknowledged that there are cases of serious corruption and mismanagement across all sectors and that the Anti-Corruption Commission established through the *Anti-Corruption Act* has not prevented the spread of corruption and has resulted in a few court cases only.<sup>11</sup> However, it is unknown how many investment opportunities in Namibia have been lost due to corruption and other factors.<sup>12</sup> To this, the HLPNE Report recommended that the enforcement of the rule of law had to be supported by strengthening existing institutions such as the Anti-Corruption Commission and that the fight against corruption had to be stepped up with an enforced "zero tolerance" approach across all sectors and institutions. It, therefore, identified the rolling out of lifestyle audits as one of the various means to support this drive.<sup>13</sup>

It is in the light of the above findings that this paper aims to investigate the adequacy of the regulatory measures intended to promote good corporate governance in Namibia, thereby cushioning the Namibian financial market from the negative effects of corporate corruption amidst global financial woes. The paper is structured as follows: firstly, an exposition of the concepts corporate corruption and corporate governance is given.

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<sup>8</sup> Ministry of Finance *Namibia Financial Sector Strategy* 5; Asheela *Towards Responsible Lending* 71.

<sup>9</sup> Ministry of Finance *Namibia Financial Sector Strategy* 11; Asheela *Towards Responsible Lending* 72.

<sup>10</sup> HLPNE *Final Report* 1.

<sup>11</sup> HLPNE *Final Report* 30.

<sup>12</sup> HLPNE *Final Report* 47.

<sup>13</sup> HLPNE *Final Report* 30.

Secondly, the relationship between the two is considered. Thirdly, an analysis of the Namibian corporate governance regime and of the legislative framework on the prevention of corruption follows and thereafter, are concluding remarks are made.

## 2 Corporate corruption and corporate governance defined

Corruption has been defined as the misuse of public office for private gain.<sup>14</sup> The broader definition of corruption refers to the use of one's official position for personal or group gain.<sup>15</sup> This includes unethical actions like "bribery, nepotism, conflict of interest, divided loyalty, moonlighting, misuse or stealing of government property, selling of favours, receiving kickbacks, embezzlement, fraud, extortion, misappropriation, under- or over-invoicing, tampering with court documents and the use of regulation as bureaucratic capital".<sup>16</sup> Two key elements of corruption are bribery and fraud. Bribery is defined as corrupt action which involves payers and receivers, in terms of which payment, in money or in kind, that imposes a reciprocal obligation between the two parties is involved.<sup>17</sup> Corporations in general bribe when they are dealing with licensing and procurement processes and when dealing with institutions where they have inside information.<sup>18</sup> While corporations may benefit from corrupt acts, the benefit can potentially turn into future risks such as legal suits, fines and impairment to the reputation of the corporation.<sup>19</sup> Corruption also causes informality which can limit the growth of businesses because a firm that is involved in underground practices limits its growth and productivity and therefore will not have the same advantage in the market as a firm that is operating in the formal system.<sup>20</sup> Further, corruption allows the managers to exploit the corporations' resources for their benefits in the form of higher compensation as a reward and at the expense of the shareholders and/or investors.<sup>21</sup>

At the national and international level, corruption causes economic inefficiency and distorts economic growth.<sup>22</sup> This is so because global development and the efficient allocation of social resources depend on free

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<sup>14</sup> Rangaswamy, Prabhakar and Prabhakaran 2011 *SSRN Electronic Journal* 5; Bradhan 1997 *JEL* 1321.

<sup>15</sup> World Bank 1997 <http://www.worldbank.org/eca/ecspeExt.nsf/ExtECADocByUnid/9-10>.

<sup>16</sup> Rangaswamy, Prabhakar and Prabhakaran 2011 *SSRN Electronic Journal* 5-6.

<sup>17</sup> Wijayati, Hermes and Holzhacker "Corporate Governance and Corruption" 268.

<sup>18</sup> Coetzee *Role of the Private Sector in Tackling Corruption* 12-13.

<sup>19</sup> Wu 2005 *Governance* 153.

<sup>20</sup> Forgues-Puccio 2013 [https://assets.publishing.service.gov.uk/media/57a08a0440f0b652dd00050a/Corruption\\_and\\_the\\_Private\\_Sector.pdf](https://assets.publishing.service.gov.uk/media/57a08a0440f0b652dd00050a/Corruption_and_the_Private_Sector.pdf) 3.

<sup>21</sup> Wu 2005 *Governance* 155.

<sup>22</sup> Rose-Ackerman 2008 *International Peacekeeping* 332.

and fair competition among independent actors. Corruption through state capture, for example, has the effect of distorting markets, as it poses threats to the long-term development of the country and may create economic instability, ultimately undermining the opportunity for smaller firms to grow and for multinational companies to have an incentive to operate.<sup>23</sup> Notwithstanding these negative effects, empirical evidence indicates that the private sector has always been on the supply side of bribery.<sup>24</sup> This is evident from the fact that state capture has been the norm in a large number of transition economies, whereby public officials and politicians sell lucrative advantages and preferences to private firms, such as competitive advantages in government contracts, access to limited governmental goods such as permits and licences, lower taxes and regulatory leniency.<sup>25</sup> In some cases, bureaucrats manipulate the legal and regulatory systems and establish laws and regulations that create opportunities for private wealth accumulation,<sup>26</sup> as is alleged to be the case in the *Fishrot* scandal.

Corporate governance denotes the structure and process of how a corporation is directed and controlled.<sup>27</sup> It specifies the distribution of rights and responsibilities among different participants in the corporation such as the board of directors, management, employees, suppliers, shareholders and other stakeholders, such as community members.<sup>28</sup> Due to the separate legal personality of corporations, there is a separation between ownership of the corporation and its control. Corporations are therefore represented by two bodies, namely the shareholders who own the companies and the board of directors who run the day-to-day business operations of the corporation.<sup>29</sup> While this relationship is determined by the law, in the Namibian context by the *Companies Act*,<sup>30</sup> common law and articles of associations, managers may still conceal relevant information to mask their actions, which may include fraud and corrupt practices. This is where corporate governance mechanisms fill the gaps by ensuring that corporations' management will behave in the best interest of the corporation

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<sup>23</sup> Puri and Nichol 2015 *Osgoode Hall LJ* 166.

<sup>24</sup> Forgues-Puccio 2013 [https://assets.publishing.service.gov.uk/media/57a08a0440f0b652dd00050a/Corruption\\_and\\_the\\_Private\\_Sector.pdf](https://assets.publishing.service.gov.uk/media/57a08a0440f0b652dd00050a/Corruption_and_the_Private_Sector.pdf) 8.

<sup>25</sup> Forgues-Puccio 2013 [https://assets.publishing.service.gov.uk/media/57a08a0440f0b652dd00050a/Corruption\\_and\\_the\\_Private\\_Sector.pdf](https://assets.publishing.service.gov.uk/media/57a08a0440f0b652dd00050a/Corruption_and_the_Private_Sector.pdf) 8; Sullivan, Wilson and Nadgrodkiewicz 2013 [https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/finance/role\\_corporate\\_governance\\_sullivan\\_eng.pdf](https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/finance/role_corporate_governance_sullivan_eng.pdf) 4.

<sup>26</sup> Ndikumana *Private Sector as a Culprit and Victim of Corruption* 7.

<sup>27</sup> Wijayati, Hermes and Holzacker "Corporate Governance and Corruption" 265.

<sup>28</sup> Wijayati, Hermes and Holzacker "Corporate Governance and Corruption" 265; Wu 2005 *Governance* 153.

<sup>29</sup> Van den Berg and Van Zyl "Namibia" 230.

<sup>30</sup> *Companies Act* 28 of 2004.

and the shareholders by making it difficult to give and conceal bribes while injecting transparency and accountability at the management level.<sup>31</sup>

Three dominant research academic theories are underpinning corporate governance models.<sup>32</sup> Firstly, the "principal agent" model or the "agency theory" addresses the division of the corporate property between the principal/shareholder and the agent/management team.<sup>33</sup> The second theory, which is referred to as the shareholders' view of the corporation, sees the division of the corporation between the suppliers of finance (the shareholders) and those responsible for handling this financial support adequately (the management).<sup>34</sup> A contrasting third view is embodied in the stakeholders' theory, which holds that a corporation's profitability is too narrow a focus and that it needs to include many other stakeholders such as the employees, suppliers, customers and society at large.<sup>35</sup>

According to the First Principle of the Group of Twenty and the Organisation for Economic Co-operation and Development (OECD), corporate governance spells out the rules and procedures for making decisions on corporate affairs.<sup>36</sup> It can therefore be conceptualised as a set of processes, customs, policies, laws and institutions affecting the way a corporation is directed, administered or controlled, and its purpose is to influence directly or indirectly the behaviour of the organisation towards its stakeholders.<sup>37</sup> It should be noted, however, that corporate governance does not stand alone; it is part of the political and economic system where laws, rules and regulations apply.<sup>38</sup> In fact, according to the King Report III, which was used in Namibia until recently, good corporate governance cannot exist separately from the law and it is entirely inappropriate to remove governance from the notion of compliance with the law.<sup>39</sup> The components of typical corporate governance mechanisms are as follows:<sup>40</sup>

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<sup>31</sup> Sullivan, Wilson and Nadgrodkiewicz 2013 [https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/finance/role\\_corporate\\_governance\\_sullivan\\_eng.pdf](https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/finance/role_corporate_governance_sullivan_eng.pdf) 1-2.

<sup>32</sup> Mostovicz, Kakabadse and Kakabadse 2011 *Corporate Governance* 614-615.

<sup>33</sup> Wu 2005 *Governance* 153.

<sup>34</sup> Wu 2005 *Governance* 153.

<sup>35</sup> Mostovicz, Kakabadse and Kakabadse 2011 *Corporate Governance* 615.

<sup>36</sup> Wijayati, Hermes and Holzacker "Corporate Governance and Corruption" 265.

<sup>37</sup> Mostovicz, Kakabadse and Kakabadse 2011 *Corporate Governance* 613.

<sup>38</sup> Wijayati, Hermes and Holzacker "Corporate Governance and Corruption" 265.

<sup>39</sup> NSX and IoDSA *NamCode* 4.

<sup>40</sup> Wijayati, Hermes and Holzacker "Corporate Governance and Corruption" 270-273.

## **2.1 The description of shareholder rights and transparency**

Shareholders should be treated equally and their rights must be well-protected in terms of the shareholder agreements that they have signed with the company.<sup>41</sup>

## **2.2 The roles and responsibilities of the board of directors**

A board of directors should serve as corporate supervisors and monitors of management, without neglecting their advisory roles. The board should prioritise a commitment to conducting effective oversight in such a way that it may lead not only to short-term performance but also to long-term performance. The board should also ensure that the corporation maximises value for all the stakeholders and that all corporate activities comply with the legal requirements.<sup>42</sup>

## **2.3 Rules and regulations**

Rules and regulations are regarded as external devices to discipline firms.<sup>43</sup> Good corporate governance should therefore emphasise compliance with the law.

## **2.4 The roles and responsibilities of management**

Appropriate accounting and auditing standards including standards of transparency are well recognised as a means to account for the company's activities. Accounting standards guide companies on how to report their economic transactions in figures while auditing standards assure that the company's financial reporting has complied with the accounting standards.<sup>44</sup> Transparency standards require the availability and publicity of truthful and relevant information, making it accessible to the public.<sup>45</sup> If all these components in the corporate control mechanism work effectively, then the quality of corporate governance is sound.

Relevantly, corporate governance is centred on principles of integrity, accountability and responsibility and it provides mechanisms of checks and balances which may deter companies from becoming involved in corrupt activities.<sup>46</sup> Weak corporate governance frameworks are cited around the

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<sup>41</sup> Wijayati, Hermes and Holz hacker "Corporate Governance and Corruption" 270.

<sup>42</sup> Wijayati, Hermes and Holz hacker "Corporate Governance and Corruption" 270-271.

<sup>43</sup> Wijayati, Hermes and Holz hacker "Corporate Governance and Corruption" 271.

<sup>44</sup> Wijayati, Hermes and Holz hacker "Corporate Governance and Corruption" 271.

<sup>45</sup> Wijayati, Hermes and Holz hacker "Corporate Governance and Corruption" 272.

<sup>46</sup> Wijayati, Hermes and Holz hacker "Corporate Governance and Corruption" 269; Sullivan, Wilson and Nadgrodkiewicz 2013 <https://www2.deloitte.com/>

world to be among the factors that deepen the financial and economic difficulties of a country.<sup>47</sup> The link between corporate governance and corporate corruption is therefore simple: good corporate governance prevents corruption or at the very least limits its negative effects and poor corporate governance breeds opportunities for corruption.<sup>48</sup> This link is especially relevant in the context of developing countries as they embark on various forms of market-oriented reforms to modernise their economies. Further, in an era of globalisation, bad corporate governance may facilitate the exporting of corrupt practices across borders and may therefore undermine the effectiveness of the global anti-corruption campaign.<sup>49</sup>

Wu<sup>50</sup> asserts that the quality of corporate governance has a significant impact on lowering the country's level of corruption. The link as explained above assumes firstly that good corporate governance can lead to the reduction of corruption, secondly, that sound corporate governance is important in protecting a country's vulnerability to financial crises, and thirdly that good corporate governance can stimulate economic growth because it provides a control mechanism to ensure that economic resources are efficiently allocated.<sup>51</sup> Corruption is therefore a symptom of poor governance.<sup>52</sup> Acknowledging that institutions play a crucial role in determining how economic resources are efficiently allocated, improved corporate governance frameworks are therefore required to provide clear guidance in managing businesses based on transparency, accountability, integrity and professionalism. Sullivan aptly puts it as follows:

Corporate governance is perhaps the single most effective tool to limit the ability of the private sector companies to participate in corruption. Good corporate governance establishes a system where companies are unable to provide bribes covertly and are easily held accountable for wrongdoing. Corporate governance ensures that managers act in the interest of a company, board members exercise good judgment, investors receive timely and relevant information, and decision-making is not done behind closed doors. By making companies transparent and by holding decision-makers accountable for their actions, corporate governance makes it hard for companies to provide bribes or other company resources to Government officials in exchange for services.<sup>53</sup>

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content/dam/Deloitte/ru/Documents/finance/role\_corporate\_governance\_sullivan\_eng.pdf 6.

<sup>47</sup> Wijayati, Hermes and Holzhacker "Corporate Governance and Corruption" 269.

<sup>48</sup> Wu 2005 *Governance* 158.

<sup>49</sup> Wu 2005 *Governance* 152.

<sup>50</sup> Wu 2005 *Governance* 168.

<sup>51</sup> Maher and Andersson *Corporate Governance* 44.

<sup>52</sup> Forgues-Puccio 2013 [https://assets.publishing.service.gov.uk/media/57a08a0440f0b652dd00050a/Corruption\\_and\\_the\\_Private\\_Sector.pdf](https://assets.publishing.service.gov.uk/media/57a08a0440f0b652dd00050a/Corruption_and_the_Private_Sector.pdf) 11; Rose-Ackerman 2008 *International Peacekeeping* 339.

<sup>53</sup> Sullivan *Corruption, Economic Development, and Governance* 8.

In the light of the above, it is accepted that principles of good corporate governance such as accountability and transparency can reduce the level of corruption by imposing more constraints on both corrupt public officials and the corruptors from the private sector in the following ways.<sup>54</sup> Firstly, the accountability of corporate boards to shareholders reduces bribery, as an independent and competent board that truly represents the interests of the shareholders can help prevent the opportunistic behaviours of managers who might be tempted by the immediate gains arising from bribery, making it more likely that managers will commit to a "no-bribe" policy, thereby boosting their bargaining power in dealing with corrupt officials. Secondly, the transparency in the provision of accounting information could help reduce the level of corruption by increasing the probability of detecting acts of bribery. Higher accounting standards and the strength of rules on disclosure could help fortify the internal control and monitoring system within the corporation. This deters corruption. Higher accounting and auditing standards impose a responsibility on management to be more transparent with respect to the use of the corporation's assets, making corrupt practices difficult to undertake and conceal. Transparency in the provision of accounting information helps in eliminating the information asymmetry between the owners of the companies and those running it.

In the measure of the mechanisms of corporate governance, it is important to watch out for red flags, among which are that firms that commit fraud tend to have a lower percentage of non-executive directors and a fewer number of audit committee meetings.<sup>55</sup> It is also a concern if the board is controlled by management because a strong corporate board is supposed to enable the detection of any opportunistic behaviour by the management. Further, if a company has a higher percentage of transactions that are not reported in its accounting books, this implies that it is relatively easy to hide the expenses of corruption.<sup>56</sup>

### **3 The Namibian corporate governance regime**

Since 1990, when Namibia attained her independence from the South African mandate, the corporate governance codes for South Africa, namely King I, King II and King III were made applicable to Namibia. However, with the advance of the new *Companies Act*,<sup>57</sup> the King III Code became

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<sup>54</sup> Wijayati, Hermes and Holzhaecker "Corporate Governance and Corruption" 265.

<sup>55</sup> Wijayati, Hermes and Holzhaecker "Corporate Governance and Corruption" 265.

<sup>56</sup> Wijayati, Hermes and Holzhaecker "Corporate Governance and Corruption" 265.

<sup>57</sup> *Companies Act* 28 of 2004.

unsuitable for the economic outlook of Namibia.<sup>58</sup> In 2014 the efforts of the Namibian Stock Exchange with the assistance of FNB Holdings Namibia Ltd resulted in the birth of the Corporate Governance Code for Namibia (the NamCode).<sup>59</sup> The NamCode is based on international best practices and the 2009 King III Code on Governance in South Africa.<sup>60</sup>

The NamCode applies to all entities incorporated by any statute, under or in terms of the *Companies Act* or any other legislation applicable in Namibia.<sup>61</sup> It provides for at least nine principles of corporate governance, namely ethical leadership and corporate citizenship, boards and directors, audit committees, the governance of risk, the governance of information technology, compliance with laws, codes and standards, internal audit, governing stakeholder relationships as well as integrated reporting and disclosure. The board of directors is primarily responsible for the design, implementation and monitoring of the risk management plan.<sup>62</sup> It is also tasked with the responsibility of ensuring that the corporation complies with applicable laws and considers adherence to non-binding rules, codes and standards.<sup>63</sup> There is, however, no statutory obligation on corporations to comply with the NamCode, as it operates on a non-legislated basis.<sup>64</sup> The underlying intention of the NamCode is not to force companies to comply with recommended practice, but rather for companies to "apply or explain".<sup>65</sup> Since the board of directors is accountable to shareholders and other stakeholders, where directors opt not to implement the recommended practices as set out in the NamCode they should be able to explain their reasoning and motivation to the shareholders.<sup>66</sup> On the other hand, the application of the NamCode is mandatory for all the companies listed on the Namibian Stock Exchange.<sup>67</sup>

In support of the principles of corporate governance contained in the NamCode referred to above, the *Companies Act* provides for financial reporting and accountability and requires companies to keep accounting records fairly representing *inter alia* the financial position of the company

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<sup>58</sup> NSX and IoDSA *NamCode* 1.

<sup>59</sup> NSX and IoDSA *NamCode* 4. Also see Van den Berg and Van Zyl "Namibia" 230.

<sup>60</sup> NSX and IoDSA *NamCode* 4; Deloitte *Corporate Governance Survey* 1.

<sup>61</sup> See the long title.

<sup>62</sup> NSX and IoDSA *NamCode* Principle C4-3; Van den Berg and Van Zyl "Namibia" 240.

<sup>63</sup> NSX and IoDSA *NamCode* Principle C6-1; Van den Berg and Van Zyl "Namibia" 240.

<sup>64</sup> NSX and IoDSA *NamCode* 3.

<sup>65</sup> NSX and IoDSA *NamCode* 3; Deloitte *Corporate Governance Survey* 3.

<sup>66</sup> NSX and IoDSA *NamCode* 3; Deloitte *Corporate Governance Survey* 3.

<sup>67</sup> NSX and IoDSA *NamCode* 3; Deloitte *Corporate Governance Survey* 3-5.

and its transactions.<sup>68</sup> The directors have the duty of ensuring that annual financial statements comply with the generally accepted standards and provide the details set out in schedule 4 to the *Companies Act*.<sup>69</sup> Stringent sanctions may be imposed for non-compliance.<sup>70</sup> A challenge that the directors need to overcome is how to ensure a more holistic and systemic approach to tackling corporate corruption that includes but goes beyond mere compliance with the law to building a corporate culture of ethics and integrity.

## **4 Overview of the legislative framework aimed at combating corruption**

### **4.1 The Anti-Corruption Act 8 of 2003**

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>71</sup> One such legislative measure was the promulgation of the *Anti-Corruption Act*,<sup>72</sup> which provides for the prevention and punishment of corruption. Under this Act, the Anti-Corruption Commission of Namibia was established as an impartial and independent body.<sup>73</sup> It consists of a Director-General, a Deputy Director-General and other staff members of the Commission.<sup>74</sup> The Director-General is appointed by the National Assembly upon nomination by the President,<sup>75</sup> for five years.<sup>76</sup>

Amongst others, the Anti-Corruption Commission has the function to receive or initiate and investigate allegations of corrupt practices, to investigate any conduct of a person employed by a public body or private body which in the opinion of the Commission may be connected with or conducive to corrupt practices, to report thereon to an appropriate authority in the public body or private body, to take measures for the prevention of corruption in public bodies and private bodies, including measures for examining the practices, systems and procedures to facilitate the discovery of corrupt practices, to

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<sup>68</sup> Section 297 of the *Companies Act* 28 of 2004.

<sup>69</sup> Sections 294, 302, 303, 304, 307 of the *Companies Act* 28 of 2004.

<sup>70</sup> Section 316 of the *Companies Act* 28 of 2004.

<sup>71</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>72</sup> *Anti-Corruption Act* 8 of 2003.

<sup>73</sup> Section 2 of the *Anti-Corruption Act* 8 of 2003 read art 94A(2)-(3) of the Namibian Constitution.

<sup>74</sup> Article 94A(4) of the Namibian Constitution.

<sup>75</sup> Article 94A(5) of the Namibian Constitution.

<sup>76</sup> Article 94A(6) of the Namibian Constitution.

secure the revision of practices, systems or procedures which may be prone to or conducive to corrupt practices, and to advise public bodies and private bodies on ways of preventing corrupt practices and on changes of practices, systems and procedures compatible with the effective performance of their duties and which are necessary to reduce the likelihood of the occurrence of corrupt practices.<sup>77</sup>

The Act specifies the following types of offences:<sup>78</sup> corruptly accepting gratification, giving gratification, accepting gratification by or giving gratification to an agent, corruptly acquiring private interest by a public officer, corruption concerning tenders, the bribery of a public officer, the corruption of witnesses, bribery of foreign public officials, bribery concerning auctions, bribery for giving assistance concerning contracts, corruptly using office or position for gratification, corruption concerning sporting events, dealing with, using, holding, receiving or concealing gratification concerning any offence and attempting and conspiring to commit any offence referred to in the Act, the fraudulent concealment of an offence and the failure to report corrupt transactions. It must be noted that the focus of the Act largely criminalises corruption involving public officials and not so much corporate corruption.

Notwithstanding the above provisions proscribing various forms of corrupt conduct, the HLPNE has reported that serious corruption and mismanagement across all sectors continues unabated and that the Anti-Corruption Commission established has not prevented the spread of corruption and has resulted in a few court cases only.<sup>79</sup> Amupanda argues that Sections 21 and 31 of the *Anti-Corruption Act* are the foundation of current problems at the Anti-Corruption Commission and that they need to be amended and democratised.<sup>80</sup> These sections grant discretionary powers to the Director-General in deciding whether or not to investigate alleged corrupt conduct as well as whether or not to refer the outcome of such investigations to the Prosecutor-General for prosecution, without providing room for appeal against the Director-General's decision.<sup>81</sup> He

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<sup>77</sup> Section 3 of the *Anti-Corruption Act* 8 of 2003.

<sup>78</sup> Sections 32-48 of the *Anti-Corruption Act* 8 of 2003.

<sup>79</sup> HLPNE *Final Report* 30; see also para 1 above.

<sup>80</sup> Amupanda 2019 *NLJ* 198-199.

<sup>81</sup> Specifically, s 21(2) of the *Anti-Corruption Act* 8 of 2003 provides that "[u]pon initiating or receiving a complaint which in the opinion of the Director General warrants investigation on reasonable grounds, the Director-General must cause the complaint to be investigated as quickly as practicable". S 31(1) on the other hand provides that "[i]f, upon completion of an investigation by the Commission, it appears to the Director-General that a person has committed an offence of corrupt practice under Chapter 4 or any other offence discovered during the investigation, the

posits that an effective strategy of ensuring meaningful participation of the civil society in the fight against corruption is the creation of a buffer zone to serve as a safe place between whistle-blowers and corruption-fighting body/bodies.<sup>82</sup>

It is worth noting that the *Anti-Corruption Act* also protects in that it stipulates that no action or proceedings of a disciplinary, civil or criminal nature may be instituted by any person or authority against any person who has assisted the Commission in an investigation into an alleged or suspected offence in terms of the Act or other law in respect of any information disclosed by him or her to the Commission to assist the Commission in the performance of its functions under this Act.<sup>83</sup> In addition, thereto, it is submitted that the "safe place" has been established with the coming into force of the *Whistleblower Protection Act*<sup>84</sup> and the *Witness Protection Act*.<sup>85</sup> These statutes aim to protect persons who may make disclosures of improper conduct in terms of the Act, including corrupt conduct, and to protect those whose safety or well-being may be at risk because of their being witnesses or their involvement in proceedings respectively. However, they have not yet been brought into force and only time will tell whether such measures are effective. Further, there is the recommendation of the HLPNE that the enforcement of the rule of law is supported by strengthening existing institutions and moving to a "zero tolerance" approach across all sectors and institutions, including but not limited to lifestyle audits.<sup>86</sup> It is submitted that the corporate sector should take the lead by reforming its governance mechanisms as a way of contributing to the zero-tolerance approach towards corporate corruption.

#### **4.2 The Prevention of Organised Crime Act 29 of 2004**

The *Prevention of Organised Crime Act* provides for measures to combat organised crime by providing for an obligation to report certain information, to provide for the recovery of the proceeds of unlawful activities and the forfeiture of assets that have been used to commit an offence or assets that

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Director-General must refer the matter and all relevant information and evidence assembled by the Commission in connection with the matter to the Prosecutor-General".

<sup>82</sup> Amupanda 2019 *NLJ* 198-199.

<sup>83</sup> Section 52(4) of the *Anti-Corruption Act* 8 of 2003.

<sup>84</sup> *Whistleblower Protection Act* 10 of 2017.

<sup>85</sup> *Witness Protection Act* 11 of 2017.

<sup>86</sup> HLPNE *Final Report* 30; also see para 1 above.

are the proceeds of unlawful activities.<sup>87</sup> The Act defines "unlawful activity" to mean:

any conduct which constitutes an offence or which contravenes any law whether that conduct occurred before or after the commencement of this Act and whether that conduct occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia.<sup>88</sup>

Whereas "proceeds of unlawful activities" are defined to mean:

any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity.<sup>89</sup>

The above definitions imply that offences in terms of the *Anti-Corruption Act* fall within the ambit of the wording "unlawful activities" in the *Prevention of Organised Crime Act*.<sup>90</sup>

### **4.3 The Financial Intelligence Act 13 of 2012**

The *Financial Intelligence Act* establishes the Financial Intelligence Centre in the Bank of Namibia.<sup>91</sup> The Centre'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>92</sup> It receives and collects information including suspicious transaction and activity reports from such corporations, analyses this information, and where there is a reasonable suspicion that a crime has been committed, disseminates the analysed information to the Anti-Corruption Commission and Namibian Police, because it does not itself have investigatory powers.<sup>93</sup> Although the *Financial Intelligence Act* does not define the prevention of corruption as a direct object, the collaboration with the Anti-Corruption Commission and the

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<sup>87</sup> See the long title of the *Prevention of Organised Crime Act* 29 of 2004.

<sup>88</sup> Section 1(1) of the *Prevention of Organised Crime Act* 29 of 2004.

<sup>89</sup> Section 1(1) of the *Prevention of Organised Crime Act* 29 of 2004.

<sup>90</sup> Also see *Lameck v President of the Republic of Namibia* 2012 1 NR 255 (HC).

<sup>91</sup> Section 7(1) of the *Financial Intelligence Act* 13 of 2012.

<sup>92</sup> Section 8 read with s 9(1)(h) of the *Financial Intelligence Act* 13 of 2012.

<sup>93</sup> Section 9 of the *Financial Intelligence Act* 13 of 2012.

Namibian Police Force strengthens the country's legislative framework in the fight against corruption.

Since the success of the Financial Intelligence Centre is dependent on the disclosure of information by persons or corporations, a commendable feature of the *Financial Intelligence Act* is that it protects persons making reports by not disclosing their identity, rendering evidence relating to their identity not admissible, and providing that such persons though competent witnesses are not compellable to give evidence in criminal proceedings.<sup>94</sup> This promotes transparency and accountability without fear. Further, any person who "tips off" another person about an investigation or proposed investigation thereby causing likely prejudice to the investigation or proposed investigation commits an offence and is liable to a fine not exceeding N\$100 million or to imprisonment for a term not exceeding 30 years or to both such fine and imprisonment.<sup>95</sup>

#### **4.4 The Public Procurement Act 15 of 2015**

Public procurement in Namibia is regulated by the *Public Procurement Act*. This Act came into operation on 1 April 2017 and it represents a complete reform and overhaul of the Namibian public procurement system, which was previously clouded with a loss of public trust, corruption and mismanagement of state resources under the auspices of the *Tender Board Act 16 of 1996*.<sup>96</sup> Section 2 of the Act outlines the objects of the *Public Procurement Act*. Relevantly, one of the objects of the Act is:

- (a) 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 including, among others, to
  - (i) harmonise procurement policies, systems and practices that apply to public entities and maximise economy and efficiency in public procurement to obtain best value for public expenditures;
  - (ii) set and review standards and practices for the public procurement system in Namibia;
  - (iii) monitor compliance by public entities; and
  - (iv) build procurement capacity in Namibia.

Section 6(1) of the Act establishes the Procurement Policy Unit in the Ministry of Finance.

The public procurement system posed by the *Public Procurement Act* was designed to be in line with both the recommendations of the *UNCITRAL Model Law on Procurement of*

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<sup>94</sup> Section 45(1)-(3) of the *Financial Intelligence Act 13 of 2012*.

<sup>95</sup> Section 46 of the *Financial Intelligence Act 13 of 2012*.

<sup>96</sup> Links *Promoting Integrity 2*.

*Goods, Construction and Services*,<sup>97</sup> whose aim is to provide a template to countries to craft their procurement legislation to be in line with international best practices, as well as the principles of the *United Nations Convention Against Corruption*, which informed the 2011 revisions of the UNCITRAL Model Law.<sup>98</sup> Although the fight against corruption was not a direct objective of the *Public Procurement Act*, it is implied by "the objective of improving good governance" and compliance with the UNCAC requirements.<sup>99</sup>

The *Public Procurement Act* provides the following measures for the prevention of corruption. Firstly, the Procurement Policy Unit is established in the Ministry of Finance.<sup>100</sup> This Unit is responsible for advising the Minister of Finance on any procurement policy directive which *inter alia* includes the promotion of fundamental principles of procurement governing the administration of procurement.<sup>101</sup> The fundamental principles, as reflected on above, include at a minimum the principles of transparency, integrity, competitive supply, effectiveness, efficiency, fair dealing, responsiveness, informed decision-making, consistency, legality, integration and accountability etc.<sup>102</sup> Transparency, a very important value in public procurement, makes it difficult to conceal improper and corrupt practices. It has been defined as:

a means of achieving the various goals of the procurement process such as competition and non-discrimination, and has been interpreted as requiring publicized contracts; disclosure of the rules governing procurement in general and governing specific procurements; and rule-based decision making and opportunities for verification and enforcement.<sup>103</sup>

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<sup>97</sup> The *UNCITRAL Model Law on Procurement of Goods and Construction* was adopted in 1993 and the *Model Law on Procurement of Goods, Construction and Services* in 1994. This Model Law was revised in 2011 to be in line with the requirements of the *United Nations Convention Against Corruption* (2003) (UNCAC). Links *Public Procurement Bill 2*.

<sup>98</sup> Links *Public Procurement Bill 2*.

<sup>99</sup> Links *Public Procurement Bill 5*. UNCAC came into force in 14 December 2005 and its main objectives is to facilitate the prevention of corruption by involving both the public and the private sector, to assist countries in criminalising corrupt acts, to provide a framework for international cooperation in the fight against corruption and to facilitate the recovery of assets. In essence, it provides the legal framework for the United Nations Global Compact Principle 10, which provides that "[b]usinesses should work against corruption in all its forms, including extortion and bribery"; Forgues-Puccio 2013 [https://assets.publishing.service.gov.uk/media/57a08a0440f0b652dd00050a/Corruption\\_and\\_the\\_Private\\_Sector.pdf](https://assets.publishing.service.gov.uk/media/57a08a0440f0b652dd00050a/Corruption_and_the_Private_Sector.pdf) 11.

<sup>100</sup> Section 6(1) of the *Public Procurement Act* 15 of 2015.

<sup>101</sup> Section 6(1)(d) of the *Public Procurement Act* 15 of 2015.

<sup>102</sup> See Bolton 2014 *SALJ* 619.

<sup>103</sup> Williams 2007 *J Afr L* 4; Arrowsmith *Law of Public and Utility Procurement* ch 7.12; Lennerfors 2007 *Journal of Business Ethics* 381-390.

The operations of the Procurement Policy Unit *inter alia* include advising the Minister on policy for the introduction of e-procurement as a means of simplified and transparent procurement as well as advising public entities on all public policies, principles and practices.<sup>104</sup> If in the discharge of its functions the Procurement Policy Unit determines that there has been non-compliance with the provisions of the Act, the Minister may refer such non-compliance to the Namibian Police, Anti-Corruption Commission or any other competent authority for investigation, when it deems appropriate, and must inform the public entity concerned.<sup>105</sup> It is indisputable that the *Anti-Corruption Act* 8 of 2003 finds application to public procurement procedures, as it criminalises corrupt activities relating to contracts and to the procurement and withdrawal of procurement contracts.<sup>106</sup>

Secondly, section 8 establishes the Central Procurement Board of Namibia with the object of conducting the bidding process on behalf of public entities for the award of procurement contracts that exceed the prescribed threshold for public entities, entering into contracts for procurement on its own behalf or on behalf of public entities awarded by the Board, and to direct and supervise accounting officers in managing the implementation of procurement contracts awarded by the Board.<sup>107</sup> A member of the Board is prohibited from making improper use of information acquired by virtue of his or her position as a member to gain, directly or indirectly, an advantage for himself or herself or for any other person, or to cause detriment to the Board.<sup>108</sup> Further s/he may not use his or her position as a member to gain, directly or indirectly, an advantage for himself or herself or for any other person, or to cause detriment to the Board or to divulge confidential information entrusted to the member or obtained by the member during the exercise of his or her powers or functions in terms of the Act.<sup>109</sup> Although these confidentiality and secrecy provisions along with the decision-making processes may improve competitiveness on the part of bidders, they may also undermine the notion of transparency in public procurement by deterring disclosures of improper conducts, thereby breeding opportunities for corruption.

Thirdly, the *Public Procurement Act* provides that an accounting officer is accountable for full compliance with the provisions of the Act and further

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<sup>104</sup> Section 7 of the *Public Procurement Act* 15 of 2015.

<sup>105</sup> Section 7(4)(b) of the *Public Procurement Act* 15 of 2015.

<sup>106</sup> Section 37 of the *Anti-Corruption Act* 8 of 2003.

<sup>107</sup> Section 8 read with s 9 of the *Public Procurement Act* 15 of 2015.

<sup>108</sup> Section 10(2)(a)-(b) of the *Public Procurement Act* 15 of 2015.

<sup>109</sup> Section 10(2)(c) of the *Public Procurement Act* 15 of 2015.

mandates that the accounting officer set up in the prescribed manner an internal organisational structure which includes a procurement committee and procurement management unit for the conduct and management of procurement at the public entity.<sup>110</sup> An accounting officer is also required to engage in procurement planning, plan each step of the procurement process and prepare an annual procurement plan, certify the availability of funds before the commencement of each procurement process, and ensure that the proceedings of the internal structures are properly recorded and kept in a safe and secure place in the prescribed manner.<sup>111</sup> Notwithstanding the above, the HLPNE report revealed that the role of the Accounting Officer and Chairperson of the Board vests in one individual, raising inherent conflict and contradicting best practices and governance principles.<sup>112</sup>

Fourthly, for the evaluation of pre-qualifications or bids for procurements, the Board or accounting officer is required to establish an *ad hoc* bid evaluation committee for the evaluation of bids.<sup>113</sup> A bid evaluation committee is responsible for the evaluation of pre-qualifications, bids, proposals or quotations and the preparation of evaluation reports for submission to the procurement committee.<sup>114</sup> The procurement process generally follows a three-stage cycle comprising of the pre-bid stage, the bidding stage and the post-bid stage. These stages are captured in the Act under Part 6, which is entitled "Bidding Process". Part 6 of the Act prescribes the procedures to be followed in the invitation for bids, the pre-qualification proceedings, the contents of bidding documents, the circumstances in which two-staged bidding may be held, the requirements for bid security or bid securing declarations, the submission of bids, the bid validity period, the opening of bids, the examination and evaluation of bids, post-qualifications, the cancellation of the bidding process, the award of procurement contracts and the briefing of unsuccessful bidders.<sup>115</sup>

Fifthly, the *Public Procurement Act* has also introduced mandatory methods to be used in the procurement process. It grants procurement entities different methods from which to choose after having decided to engage in a procurement process, namely open advertised bidding, restricted bidding, a request for sealed quotations, direct procurement, execution by public entities, emergency procurement, small value procurement, a request for

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<sup>110</sup> Section 25(1) of the *Public Procurement Act* 15 of 2015.

<sup>111</sup> Section 25(4) of the *Public Procurement Act* 15 of 2015.

<sup>112</sup> HLPNE *Final Report* 32.

<sup>113</sup> Section 26(1)(a) of the *Public Procurement Act* 15 of 2015.

<sup>114</sup> Section 26(4) of the *Public Procurement Act* 15 of 2015.

<sup>115</sup> See ss 40-57 of the *Public Procurement Act* 15 of 2015.

proposals, and electronic reverse auction.<sup>116</sup> A deviation from the open advertising bid is permissible only if the procuring entity has reason to believe that opting for open advertised bidding would not support empowerment and other policies of the government contemplated in section 2 of the Act, if it is not efficient or practical for the procurement in question, or if it is too costly to apply, given the value of the procurement.<sup>117</sup> Furthermore, section 54 provides that the bidding process can be cancelled if:

- (d) it has been established that there has been collusion among the bidders. In this context, collusion refers to an instance where two or more bidders enter into an agreement whereby a bidder agrees not to submit a bid in response to an invitation for bids or agrees upon the price, terms or conditions of a bid to be submitted in response to an invitation to bid.<sup>118</sup>

While all these provisions are commendable, the *Public Procurement Act* does not substantially deal with corruption on the part of the private sector. To improve this state of affairs, the Institute for Public Policy Research's proposals that the measures of blacklisting corrupt contractors and excluding contractors that have been implicated in bribery or fraudulent activities and those that carry negative reputations due to poor internal controls be introduced as an anti-corruption tool in the *Public Procurement Act* are reiterated.<sup>119</sup> In this regard, it is recommended that the existing blacklist be made more descriptive and comprehensive in its composition and be made publicly available and that a copy be kept by the Anti-Corruption Commission as a means of discouraging non-performance and potential corrupt activity.<sup>120</sup>

#### **4.5 The Public Private Partnership Act 4 of 2017**

The *Public Private Partnership Act* provides a legal framework for public-private partnership projects through the stages of initiation, preparation, procurement, the conclusion of the public-private partnership agreement and the implementation.<sup>121</sup> It is aimed *inter alia* at ensuring oversight and governance on projects selected for development through the public-private

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<sup>116</sup> See se 27(1)(a)(i)-(ix) of the *Public Procurement Act* 15 of 2015.

<sup>117</sup> Section 27(4)(a)-(c) of the *Public Procurement Act* 15 of 2015. For a detailed exposition of when the various methods of procurement may be used, see ss 28-38 of the Act.

<sup>118</sup> Section 54(5) of the *Public Procurement Act* 15 of 2015. Section 23(1)(c) of the *Competition Act* 2 of 2003 also prohibits collusive tendering or bid rigging.

<sup>119</sup> Links and Daniels *Tender Board* 2.

<sup>120</sup> Links and Daniels *Tender Board* 2.

<sup>121</sup> See the long title of the *Public Private Partnership Act* 4 of 2017.

partnership model, as well as at ensuring fairness, transparency, equity and competition in the process of awarding public-private partnership projects.<sup>122</sup> Its section 4 is entitled "Principles of probity and transparency" and it requires every public entity to adhere to them, by:

1. carrying out its responsibilities relating to the initiation, preparation, procurement, management and implementation of public-private partnership projects with complete probity and fairly and transparently;
2. not including in the procurement documents any condition or specification which favours or is likely to favour any individual bidder or a group of bidders unduly;
3. ensuring that the project officer, transaction advisor, procurement committee members and members of the management team, may not have a direct or indirect interest in public-private partnership projects that the public entity is intending to implement and must disclose such interest to the accounting officer before any decision is taken by the public entity concerning a public-private partnership project;
4. tasking the accounting officer with the responsibility of evaluating the conflict of interest contemplated above and to take the necessary action to prevent such continued conflict of interest, and to keep a record or cause a record to be kept of disclosures of conflicts of interests and actions and decisions taken by the public entity in respect of a public-private partnership project, including tender proceedings.

While the *Public Private Partnership Act* does not define what constitutes "Principles of probity and transparency", in the ordinary sense of the word, probity depends on transparency and it implies the evidence of ethical conduct associated with the practice of adopting and following formal procedures and processes to ensure that procurement decisions are fair, transparent and can withstand both internal and external scrutiny.<sup>123</sup> The Act also does not explicitly provide what the repercussions for non-compliance with the above principles of probity and transparency are. Although the provisions of the *Anti-Corruption Act* referred to above would generally apply,<sup>124</sup> it is submitted that the principles of probity and transparency are not well catered for in the *Public Private Partnership Act*. In this regard, it is worth noting that the *Public Private Partnership Act* does

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<sup>122</sup> Section 2(c) and (e) of the *Public Private Partnership Act* 4 of 2017.

<sup>123</sup> Commonwealth of Australia Fairness and Transparency in Purchasing Decisions 1.

<sup>124</sup> Paragraph 4.1 above.

not refer to the conduct of the private sector as far as the principles of probity and transparency are concerned. It also does not make provision for any other measure that can be used to prevent or reduce opportunities for corruption. The Act also does not prescribe timelines in the public-private partnership project processes; neither does it contain penalties for non-compliance with the provisions of the *Public Private Partnership Act*, leaving room for corruption opportunities.<sup>125</sup>

## 5 Technological advancements in combating corruption

The 4<sup>th</sup> Industrial Revolution focusses on information centralisation and intellectualisation, the core technology of which is the internet of things, the cloud, big data, and mobile-based information communication technology.<sup>126</sup> It is a form that collects information in a central cloud, analyses the big data using artificial intelligence (AI), and transmits the information to the user's mobile device regardless of time and place.<sup>127</sup> Centralisation can also be termed as "information monopoly", and is thus most likely to cause prevalent corruption because when the central cloud distorts information, it is difficult for the user to detect.<sup>128</sup> Further, as the amount of information in the central cloud increases, concerns related to the distortion and corruption of information have been raised.

Blockchain technology has been referred to as a possible solution to the concerns of information monopoly by enabling a peer-to-peer network that connects individuals to others without requiring a conventional central server or managers.<sup>129</sup> The blocks containing transactions between the individuals are connected in a long chain where participants exchange transaction information that is to be verified by all of the participants after distributed transmission. Once verified, the block is registered in the existing blockchain, of which the transaction information is verified only with the consensus of the majority, making it nearly impossible for an individual user to tamper with it.<sup>130</sup> The essence of blockchain technology is therefore to allow every participant to share information with credibility through information distribution, and it functions beneficially to avoid the problem of the monopoly and centralisation of information while preventing

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<sup>125</sup> lifo-Walenga 2019 *NLJ* 268.

<sup>126</sup> Lee, Yoon and Seo 2019 *J Korea Inst Electron Commun Sci* 12-13.

<sup>127</sup> Lee, Yoon and Seo 2019 *J Korea Inst Electron Commun Sci* 13. Manda and Dhaou "Responding to the Challenges and Opportunities" 244.

<sup>128</sup> Lee, Yoon and Seo 2019 *J Korea Inst Electron Commun Sci* 13.

<sup>129</sup> Lee, Yoon and Seo 2019 *J Korea Inst Electron Commun Sci* 14.

<sup>130</sup> Lee, Yoon and Seo 2019 *J Korea Inst Electron Commun Sci* 14.

corruption.<sup>131</sup> The shared information can be seen and checked by anyone at any time because the algorithm of blockchain technology shares all information and constantly checks if the information has been forged.<sup>132</sup> Blockchain technologies may therefore improve the transparency of operations, online access to transaction data, and the safety and reliability of real-time transaction recording.

In the context of the 4<sup>th</sup> Industrial Revolution, adopting and materialising blockchains to establish e-governments is no longer a distant prospect but a reality. Perhaps the time has come to embrace the opportunities it represents to address challenges that may breed opportunities for corruption, such as threats to transparency and accountability in the form of information monopoly. However, it must be acknowledged that the key to the successful adaptation of the new technological conditions is the ability of governments to adopt the right policies to limit the unintended consequences that innovations in the 4<sup>th</sup> Industrial Revolution may bring, such as trade restrictions, the insecurity of enterprise data, liability issues and violations of personal data privacy.<sup>133</sup> All of these demand strict regulation through legislative standards and policies.<sup>134</sup> To realise this, a multifaceted approach towards making a real impact is needed, which would involve working with the private sector to recognise and promote the strategic importance of emerging technologies and of driving change.

Developing countries such as Namibia are confronted not only by societal challenges such as poverty and corruption but also by technological and infrastructure challenges. In 2016 China, a country with advanced infrastructure was stated to be experiencing challenges surrounding the introduction of new technologies such as analytics, the development of networks and smart devices.<sup>135</sup> Without a doubt, Namibia would face major challenges in implementing the 4<sup>th</sup> Industrial Revolution, let alone in using it as an anti-corruption tool, due to its poor ICT infrastructure, broadband penetration and general network coverage, its insufficient digital connectivity, its poor e-learning services and its consequent poor technological skills and knowledge. Innovative policy and legislative reforms are therefore essential to support digital transformation by introducing

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<sup>131</sup> Lee, Yoon and Seo 2019 *J Korea Inst Electron Commun Sci* 14.

<sup>132</sup> Lee, Yoon and Seo 2019 *J Korea Inst Electron Commun Sci* 14.

<sup>133</sup> Manda and Dhaou "Responding to the Challenges and Opportunities" 246.

<sup>134</sup> Manda and Dhaou "Responding to the Challenges and Opportunities" 247.

<sup>135</sup> Manda and Dhaou "Responding to the Challenges and Opportunities" 244; Zhou, Liu and Zhou "Industry 4.0" 2147-2152.

robust measures in response to the challenges and opportunities brought by the digital era.<sup>136</sup>

Without a doubt, the advent of new technology and the 4<sup>th</sup> Industrial Revolution has also contributed to opportunities for corruption and regulatory challenges.<sup>137</sup> It is self-evident that the success of technological advances in the fight against corruption is dependent on "their suitability for local contexts and needs, cultural backgrounds and technology experience".<sup>138</sup> While the application of AI technologies may be promising, its current state of development remains unknown and there is a lack of scientific evidence on its impact on corruption,<sup>139</sup> especially for developing countries such as Namibia. Emerging trends in the form of blockchain technologies may have great potential for enhancing downward transparency and accountability, especially in the public sector. However, they also raise concerns about data security, and regulation could present opportunities to transfer corrupt money.<sup>140</sup>

## 6 Concluding remarks

It is common cause that there are no simple answers to dealing with corporate corruption, as in some instances corporations can be a source of corruption and in others victims.<sup>141</sup> However, the private sector could develop solutions to threats of corporate corruption through the establishment of strong corporate governance mechanisms. Wijayati, Hermes and Holz hacker affirm that a strong legal framework does not necessarily imply a commitment to fully applying and enforcing it by state actors and regulatory bodies.<sup>142</sup> Notwithstanding the above, it appears that robust enforcement measures are needed to close the gap between the

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<sup>136</sup> Manda and Dhaou "Responding to the Challenges and Opportunities" 246-247; Zhou, Liu and Zhou "Industry 4.0" 2147-2152.

<sup>137</sup> Adam and Fazekas 2018 [https://pathwayscommission.bsg.ox.ac.uk/sites/default/files/2019-09/are\\_emerging\\_technologies\\_helping\\_win\\_the\\_fight\\_against\\_corruption\\_in\\_developing\\_countries.pdf](https://pathwayscommission.bsg.ox.ac.uk/sites/default/files/2019-09/are_emerging_technologies_helping_win_the_fight_against_corruption_in_developing_countries.pdf) 7.

<sup>138</sup> Helbig, Gil-García and Ferro 2009 *Government Information Quarterly* 89-97.

<sup>139</sup> Adam and Fazekas 2018 [https://pathwayscommission.bsg.ox.ac.uk/sites/default/files/2019-09/are\\_emerging\\_technologies\\_helping\\_win\\_the\\_fight\\_against\\_corruption\\_in\\_developing\\_countries.pdf](https://pathwayscommission.bsg.ox.ac.uk/sites/default/files/2019-09/are_emerging_technologies_helping_win_the_fight_against_corruption_in_developing_countries.pdf) 3.

<sup>140</sup> Adam and Fazekas 2018 [https://pathwayscommission.bsg.ox.ac.uk/sites/default/files/2019-09/are\\_emerging\\_technologies\\_helping\\_win\\_the\\_fight\\_against\\_corruption\\_in\\_developing\\_countries.pdf](https://pathwayscommission.bsg.ox.ac.uk/sites/default/files/2019-09/are_emerging_technologies_helping_win_the_fight_against_corruption_in_developing_countries.pdf) 3.

<sup>141</sup> Sullivan, Wilson and Nadgrodkiewicz 2013 [https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/finance/role\\_corporate\\_governance\\_sullivan\\_eng.pdf](https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/finance/role_corporate_governance_sullivan_eng.pdf) 1; Ndikumana *Private Sector as a Culprit and Victim of Corruption* 6.

<sup>142</sup> Wijayati, Hermes and Holz hacker "Corporate Governance and Corruption" 288.

existing laws and regulations and their actual implementation by corporations in the private sector.

An analysis of the legislative framework above indicates that efforts have been made to improve transparency and accountability in Namibia, especially in the public sector.<sup>143</sup> However, these statutes combined with the good principles enunciated in the NamCode<sup>144</sup> have not had a significant impact on reducing corporate corruption in Namibia. There is no law or policy at the moment that makes provision for the use or introduction of technological advancements in the fight against corruption. This is worrisome for Namibia as a developing country that still has a long way to go not only in the fight against corruption but also in overcoming the technological and infrastructural challenges attendant on the introduction of new technologies such as broadband, general network coverage, insufficient digital connectivity, poor e-learning services and the consequent poor technological skills and knowledge. It follows, therefore, that the standards, practices, principles and legislative measures discussed above are not adequate to promote an effective corporate governance regime, thereby breeding opportunities for corporate corruption.

To remedy this, it is submitted that there is a need for a national strategy for harnessing the full potential of the 4<sup>th</sup> Industrial Revolution in the fight against corruption, especially in the private sector. For Namibia to realise the financial market objectives set out in its policy documents, the introduction of robust strategic approaches in corporate governance directed at curbing and/or reducing corporate corruption responsive to the challenges of the 4<sup>th</sup> Industrial Revolution, amongst others, is long overdue. This would include policy and legislative reforms that create circumstances conducive to the use of AI and the introduction of blockchain technologies in combating corruption. It should be affirmed, however, that the current state of development of AI technologies and their impact on corruption remain largely unknown. It would be beneficial to have further research dedicated to examining jurisdictions that have, amongst others, implemented blockchain measures in fighting corruption, and to be able to deduce lessons therefrom for Namibia. For instance, it is not clear how the human factor or greed can be addressed, as the ethics of innovation may be beyond the level of humanity.

At a corporate level, corporations should be responsive to the opportunities and challenges that the 4<sup>th</sup> Industrial Revolution presents. It is further

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<sup>143</sup> Paragraph 4 above.

<sup>144</sup> Paragraph 3 above.

affirmed that the private sector should take the lead in the zero-tolerance approach towards corruption by making necessary changes to their corporate governance mechanisms and ensuring that their corporations comply with the law and are disclosing accurate and sufficient information for the relevant institutions to hold them accountable.<sup>145</sup> Corporate governance mechanisms can be streamlined by incorporating the following:

1. Increase the quality of corporate boards through the development of systematic controls to identify and mitigate corruption risks.
2. Limit the tenure of board members to a period of 5 years non-renewable because the independence of board members tends to be impaired over time as they become more co-operative with other board members and management, which leads to less effective control.
3. Limit multiple directorships for the directors to efficiently and effectively exercise their monitoring role.
4. Require mandatory training and educational programmes on corruption for board members at the beginning of every board tenure as well as for employees periodically. Offer educational initiatives promoting a clear understanding of the risks of corruption and the appropriate responses to offers to engage in corrupt conduct.<sup>146</sup>
5. Develop internal anti-corruption policies and procedures making provision for transparency and accountability, risk management and governance processes, a series of internal controls designed to monitor and manage risks, and appropriate disciplinary measures for corrupt conduct.

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<sup>145</sup> Hess 2009 *JBE* 787.

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## List of Abbreviations

|       |   |
|-------|---|
| AI    | Artificial Intelligence                   |
| HLPNE | High-Level Panel on the Namibian Economy  |
| ICT   | information and communication technology  |
| IoDSA | Institute of Directors in Southern Africa |

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|----------------------------------|---|
| IPPR                             | Institute for Public Policy Research                                |
| J Afr L                          | Journal of African Law  |
| J Korea Inst Electron Commun Sci | Journal of the Korea Institute of Electronic Communication Sciences |
| JBE                              | Journal of Business Ethics  |
| JEL                              | Journal of Economic Literature                                      |
| NLJ                              | Namibia Law Journal   |
| NSX                              | Namibian Stock Exchange   |
| OECD                             | Organisation for Economic Co-operation and Development              |
| Osgoode Hall LJ                  | Osgoode Hall Law Journal  |
| SALJ                             | South African Law Journal   |
| UNCAC                            | United Nations Convention Against Corruption                        |
| UNICTRAL                         | United Nations Commission on International Trade Law                |