The Weakest Link: Investigation and Prosecution of Procurement-Related Corruption Cases in Tanzania and Uganda*

Annika Engelbert[1]

บทคัดย่อ

ประเทศกำลังพัฒนาส่วนใหญ่ ได้จัดตั้งหน่วยงานป้องกันการทุจริตตามสนธิสัญญาระหว่างประเทศเพื่อป้องกันและปราบปรามการทุจริต โดยอาศัยการบังคับใช้กฎหมาย โดยอัตราการลงโทษคดีทุจริตยังคงต่ำมาก ซึ่งทำให้ประสิทธิภาพในการป้องปรามการทุจริตลดลง งานวิจัยที่ผ่านมาเป็นการศึกษาถึงปัจจัยภายนอกที่ทำให้หน่วยงานปราบปรามการทุจริตประสบความสำเร็จ แต่บทความนี้ จะโต้แย้งพิสูจน์ให้เห็นว่ากลไกความร่วมมือที่มีประสิทธิภาพระหว่างหน่วยงานป้องกันและปราบปรามการทุจริตกับหน่วยงานติดตามตรวจสอบในภาคที่มีแนวโน้มสูงในการทุจริต เช่น การจัดซื้อจัดจ้าง และหน่วยงานดำเนินคดีของรัฐ เป็นสิ่งสำคัญในการควบคุมการทุจริต โดยใช้กรณีศึกษาเปรียบเทียบจากแทนซาเนียและยูกันดา เพื่อสำรวจว่าแนวทางความร่วมมือที่เหมาะสมควรเป็นการรวมศูนย์อำนาจหรือกระจายบทบาทหน้าที่ในการป้องกันและปราบปรามการทุจริต การวิเคราะห์เป็นการศึกษาจากกฎหมาย และการสัมภาษณ์ผู้เชี่ยวชาญ รวมทั้งรายงานจากหน่วยงานรัฐในการจัดซื้อจัดจ้างและจากสื่อสารมวลชน

คำสำคัญ: การจัดซื้อจัดจ้างภาครัฐ ความร่วมมือ การตรวจสอบ การสืบสวน การดำเนินคดี

Abstract

In most developing countries, anti-corruption agencies were established in compliance with international treaties to prevent and combat corruption through law enforcement. Yet conviction rates in corruption have remained very low, undermining the deterrent effect arising from a high risk of detection. Whereas previous research

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[1] *Ruhr-Universität Bochum, Germany*

has focused on identifying external success factors for anti-corruption agencies, this paper argues that effective collaboration mechanisms between the agencies, monitoring bodies in corruption-prone sectors such as public procurement, and public prosecution are crucial for curbing corruption. By means of a comparative case study of Tanzania and Uganda, it shall be explored whether a more streamlined or dispersed collaboration approach is more promising in a highly corrupt setting. Besides national laws, the analysis is based on findings from expert interviews and on reports by procurement authorities and the media.

Keywords: public procurement, collaboration, detection, investigation, prosecution

1. Introduction

Corruption remains a serious threat to the main objective of public procurement systems, which is to achieve value for money, i.e. to acquire goods, works or services of highest quality, at best price. Considering the fact that government contract volumes can be high and that complex administrative procedures facilitate the concealment of corrupt practices, it is not surprising that many big corruption scandals in East Africa during the last years were related to government contracts; what is striking, though, is the fact that none of these cases have ever led to a conviction of high-ranking officials in a court of law (Human Rights Watch, 2013). Regulatory authorities overseeing procurement processes can detect corruption through internal and external monitoring mechanisms, such as audits and review procedures, but are limited in their investigatory powers and not authorized to prosecute alleged corruption cases. Anti corruption agencies (ACAs), on the other hand, have been established to streamline national anti-corruption efforts, and to investigate and – depending on their mandate – also to prosecute criminal offences in corruption matters. ACAs therefore assume a crucial role in combating corruption in public procurement at the very interface of administrative and criminal law.

Scientific research in the last years has concentrated on identifying factors suitable for alleviating the current widespread ineffectiveness of ACAs (Camerer, 2001; De Jaegere, 2012; Doig, Watt & Williams, 2006; Heilbrunn, 2004; Johnston & Kpundeh, 2002; Meagher, 2004; Pope & Vogl, 2000; Recanatini, 2011; Speville, 2008; Transparency International, 2000; UNDP, 2005; USAID, 2006). Yet it has not been extensively researched how ACAs are interlinked with other law enforcement bodies, which forms of cooperation exist and which chances and challenges arise from different institutional arrangements. This paper aims to fill this gap by emphasizing necessities and conditions

for cooperation between ACAs and other law enforcement bodies in procurement-related corruption. The paper will present two exploratory case studies of Tanzania and Uganda from an institutional-functional comparative perspective, based on respective national legislation and reports of procurement authorities and enriched with findings from expert interviews conducted in May and June 2013 onsite and media reports.

2. The role of anti-corruption agencies in combating corruption in public procurement

The core activities of ACAs depend on their strategic focus, which can be investigation, enforcement, prevention, awareness and education, or a combination of some or of all of these. Each of these general areas involves a long list of responsibilities (USAID, 2006). By the sheer number and the fragmented nature of anti-corruption activities, it seems evident that one single agency cannot operate in isolation from other organizations. It is therefore not expected from the ACAs that these carry out the tasks alone, but that they "provide centralized leadership in […] core areas of anti-corruption activity" (Meagher, 2004: 3; USAID, 2006: 5).

The authorities charged with investigating and prosecuting corruption cases (ACAs, public prosecution, police, courts of law) have an informational disadvantage in relation to those bodies monitoring good governance in public administration (for example audit departments, revenue services, procurement authorities). ACAs have very limited opportunities to detect corruption, as they are not involved in the day-to-day business of corruption-prone sectors. Furthermore, not all ACAs are mandated to prosecute corruption, but investigate corruption matters and refer them to the general prosecutor when evidence is compiled. Based on the specific body of evidence, public prosecution takes the decision whether to bring cases to court where actual jurisdiction takes place (UNDP, 2005). In cases where public prosecution continuously fails to bring charges against allegedly corrupt actors, the reasons can be manifold: It may be a lack of independence of the public prosecutors themselves – a widespread problem in deeply corrupt political systems - or their unwillingness to recognize the professional investigation work of the ACA (Pope & Vogl, 2000; UNDP, 2005). On the other side, there might be a capacity problem within the ACA to prepare cases adequately for litigation. The interface between investigation and prosecution is therefore critical (Chêne, 2012; UNDP, 2005). In brief, the procedural relationship of detection, investigation and prosecution in corruption requires strong cooperation among monitoring and law enforcement bodies.

The function of ACAs in investigation and prosecution of procurement-related corruption cases can take various forms. First, the ACA might be the sole law enforcement body to cooperate with public procurement authorities in corruption or one of several competent authorities. This cooperation can be either stipulated by law or based on more informal agreements. Second, ACAs can be vested with full, subordinated or no prosecutorial powers at all; the interplay with public prosecutions is dependent thereon. By means of two in-depth case studies, the following chapter shall discuss different institutional concepts with regard to their respective capacities for improving the fight against corruption in public procurement.

3. Case studies

Each year, an important percentage of the Tanzanian and Ugandan national budgets are spent through public procurement (Akech, 2006). At the same time, the states are highly affected by corruption,[1] and corruption scandals brought to the attention of the general public via the media originate mostly from distorted procurement procedures. Thus, both states have strong incentives to foster anti-corruption in their public procurement systems. Despite many institutional analogies, different ways of collaboration between public procurement authorities, national ACAs, and prosecution services were established, which shall be discussed below.

1) Collaboration between ACAs and prosecution services

The two Tanzanian ACAs, the Prevention and Combating of Corruption Bureau (PCCB) and the Zanzibar Anti-Corruption and Economic Crimes Authority (ZACECA), dispose of enhanced investigatory powers, yet are not mandated to bring alleged corruption cases to court without the written consent of the Director of Public Prosecutions (DPP); their prosecutorial powers are hence subordinated.[2] The interplay between the PCCB and the DPP has been subject to concern, as several interview partners mentioned that both the PCCB and the DPP are exposed to considerable pressure from the political class and that their successful functioning depends on the political will of the executive. It was reported that in many cases, the PCCB was put under pressure by the government and had to play down allegations in the investigation reports.

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[1] Uganda ranks 142 and Tanzania 119 out of 175 countries on the Corruption Perceptions Index 2014 published by Transparency International.

[2] The PCCB's claims for full prosecutorial powers have yet been refused by Tanzanian judges (The Citizen, June 15, 2013; see also Transparency International Kenya, September 4, 2013).

These corruption cases were only made public because other bodies investigated the case simultaneously and came up with the evidence. It is hence arguable whether in a situation where corruption has become systemic, investigative powers should be channeled through only one ACA or, on the contrary, rather be dispersed amongst as many agencies as reasonable, in order to make political influence-peddling more difficult. A bilateral donor organization confirmed moreover that the DPP has often been held back by the government when trying to bring cases to court. As a result, only corruption cases on a minor scale have been convicted, whereas those perpetrators involved in bigger scandals are usually better connected to influential politicians and not impeached at all (Human Rights Watch, 2013). The low conviction rate in corruption has had a negative impact on the public's perception of the PCCB's ability to bring major corruption scandals to court (Thomson Reuters Foundation, April 12, 2013; Freedom House, 2012): Further research would be needed to shed light on the question whether this is due to the ACA's incapacity to compile sufficient evidence for the corruption case or rather the result of restricted independence, as the analysis above suggests.

Unlike the legal foundations of the Tanzanian ACAs, the Ugandan Inspectorate of Government (IGG) is constitutionally established. Compared to the provisions on the Tanzanian PCCB, the Ugandan legal framework provides for greater independence of its ACA as the IGG is primarily accountable to Parliament, not to the President. Drawing from the legislation, the IGG seems to enjoy more autonomy in investigating and prosecuting corruption, especially in those cases affecting the political sphere, as potential influence-taking from the executive is contained rather effectively.

In order to "foster the elimination of corruption" (Art. 225 (1) (b) Constitution of Uganda), the IGG is vested with enhanced investigatory powers as well as with the mandate not only to recommend, but also to execute prosecution on corruption matters. Contrary to the Tanzanian anti-corruption laws, the Ugandan legislation does not make provisions on collaboration of law enforcement bodies in corruption matters; Part IV of the Anti-Corruption Act of 2009 however grants the exact same investigatory powers to the IGG and to the DPP. Accordingly, the prosecution function for alleged corruption is shared by the two law enforcement bodies. It is not specified in the law in which way the two bodies shall coordinate their operations. Overlapping mandates without a clear definition of responsibilities, however, can be a severe drawback in combating corruption. It has indeed occurred that the IGG and the DPP conducted investigations on the same case, but came to contrary

conclusions which severely hampered prosecution (in more detail: Human Rights Watch, 2013).

2) Collaboration between ACAs and public procurement authorities

The Tanzanian and the Ugandan public procurement authorities dispose of investigatory powers, but only in relation to procurement contracts and not to criminal proceedings. Accordingly, their capacity to sanction corrupt actions in procurement is restricted to contractual matters by means of tender rejection, debarment of bidders or disciplinary sanctions against procurement officers. Interaction with law enforcement bodies is hence necessary for those procurement procedures where the regulatory authorities' investigatory mandate is not sufficient.

The Tanzanian public procurement system uses mainly two mechanisms to detect corruption: First, administrative reviews can be requested by unsatisfied bidders, including those that were aggrieved by corrupt activities during the tender phase. The regulatory authority can take further action whenever there are sufficient grounds (Sec. 99 (4) Public Procurement Act). Secondly, the regulatory authority has established a system of "red flags" to measure the likelihood of corruption in the procurement process during auditing the procuring entities. This audit system has been well institutionalized and is closely interlinked with the PCCB via a Memorandum of Understanding that aims to strengthen collaboration between the regulatory authority and the PCCB.[3] All audit reports of procuring entities and contracts scoring 20% and above on the red flags scale are submitted to the PCCB, together with investigation reports on suspected fraud, for further investigation. Although red flag checklists are included in every audit, the coverage of the system is limited as audits are based on stratified sampling due to practical reasons. It is also important to note that a detected red flag is not in itself evidence of corruption, but can also be an indication for operational deficiencies related to capacity gaps (Public Procurement Regulatory Authority (PPRA), 2013).

In Uganda, the IGG itself is not mentioned in the Public Procurement Act as an agency in charge of handling criminal corruption matters. Interviewees have confirmed that this loophole has created general confusion among all involved parties about the responsible institution to which the regulatory authority should hand over alleged corruption cases. In total, five public bodies have the mandate to investigate

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[3] Signed on February 11, 2010; see PPRA: Annual Procurement Evaluation Report for 2009/10, chapter 4.6.4.3. Details on the red flag checklist are included in Annex 5.5 of the PPRA's Annual Procurement Evaluation Report for 2012/13.

corruption cases: Besides the IGG and the DPP, these are the Criminal Investigations and Intelligence Department (CIID) under the Uganda Police Force, the Office of the Auditor-General and the Public Accounts Committee (PAC) of the Parliament. The regulatory authority itself has stated in interviews that they usually refer suspected corruption cases to the CIID. In addition to cases that are directly sent from the procurement authority to the law enforcement body, the PAC can – based on reports submitted to Parliament by the PPDA, the Auditor-General and IGG respectively – request a second opinion from either the Auditor-General or the IGG on alleged corruption. If the second law enforcement body agrees that the case requires further investigation, it is handed over to the CIID and eventually prosecuted by the DPP.

Contrary to the Tanzanian streamlined approach that involves mainly two authorities, Uganda has opted for the widespread dispersion of prosecutorial and especially investigatory powers in corruption matters. The procedure described above is customarily applied, yet not a prescribed standard. It seems not only extremely time consuming, but also rather unstructured with all of its ill-defined responsibilities. It is therefore not surprising that experts in Uganda consider investigation to be the main problem in combating corruption: First, overlapping mandates often lead to parallel investigations issuing divergent decisions and recommendations. Secondly, the quality of investigation results is not always good enough, so that the preparation of litigation is not adequate and charges are eventually dropped. Last but not least, the IGG and the DPP are still considered to be under extensive control of the government (cf. Human Rights Watch, 2013). Taking all factors together, there was consensus among interview partners that collaboration between the regulatory authority and law enforcement bodies must be better defined.

4. Conclusion

Summing up, the institutional approach to combat corruption in public procurement applied in Tanzania appears to be more centralized as responsibilities among law enforcement bodies are better defined. Although this strategy supports efficiency, it makes the system more vulnerable to control by the political elite. The Ugandan system has chosen the opposite way and distributes investigation and prosecution functions among many authorities. Experience has shown, however, that inefficiencies due to overlapping mandates and unclear jurisdictions are detrimental to anti-corruption efforts as well. The role of anti-corruption agencies in investigating and prosecuting procurement-related corruption cases is certainly stronger in anti-corruption systems following the

streamlined approach, which makes them, at the same time, more exposed to exertion of political influence.

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